INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL,** the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON,** the Courts of the Judicial Commissioners of **CENTRAL PROVINCES, OUDH** and **SIND**

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INDIAN CASES

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VOLUME 88.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 148 OF 1925.
April 9, 1925.
Present:—Mr. Justice Banerji.
DHUM SINGH—APPLICANT
versus
EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 227, 237—Penal Code (Act XLV of 1860), s. 279—Police Act (V of 1861), s. 34—Charge under s. 34, Police Act—Conviction under s. 279, Penal Code, legality of—Charge—Information to accused as to contents of charge, whether necessary.

A summons was issued to the accused to answer a charge under s. 34 of the Police Act for driving a bicycle rashly. The accused was tried on this charge but the Magistrate held that the facts proved did not constitute an offence under s. 34 of the Police Act. The accused was, however, convicted under s. 279 of the Penal Code:

Held, (1) that the finding that the accused was not guilty of an offence under s. 34 of the Police Act necessarily and logically meant that the accused could not be convicted of an offence under s. 279 of the Penal Code;

(2) that the accused was entitled to know of the charge he had to answer and that not having been informed of any charge under s. 279 of the Penal Code he could not be convicted of an offence under that section.

Sections 227 and 237 of the Cr. P. C. necessarily go together and it is not the intention of the Legislature to empower a Court to convict an accused person of an offence of which he has not been told anything.

Criminal revision from an order of the Sessions Judge, Kumaun, dated the 9th February 1925.

Messrs. *C. Ross Alston, Baleshwari Prasad* and *Surendra Nath Verma*, for the Applicant.

The Assistant Government Advocate for the Crown.

JUDGMENT.—A report was made at the Police Station Srinagar Garhwal by constable Sadanand that one Dhum Singh came into the bazar carelessly and fast on a bicycle. Two girls were pushed down by it, and in spite of the Policeman asking him to stop, he did not. The girls wept loudly but were not hurt. Upon that the Sub-Inspector submitted the report to the Town Magistrate suggesting that the man should be tried for driving the bicycle rashly without blowing the horn. Thereupon summons was issued to Dhum Singh to answer a charge under s. 34 of the Police Act. The accused was tried by a Magistrate of the First Class. The Magistrate says that the facts proved do not constitute an offence under s. 34, but the Magistrate convicted him under s. 279 of the Indian Penal Code and ordered him to pay a fine of Rs. 15. The accused went up in revision before the Sessions Judge, and one of the points taken by him was that he could not be convicted under s. 279 of the Indian Penal Code when the charge was under s. 34 of the Police Act, and the next point taken was that the Magistrate in his judgment does not definitely state in what way the accused was driving rashly. Mr. Alston on behalf of the accused has come up here in revision, and he states that his client was the first man to ride a bicycle in the bazar at Srinagar, and further that if the accused is held not to have committed an offence under s. 34, you could not convict him of an offence under s. 279 of the Indian Penal Code and further that under s. 227 of the Cr. P. C. the accused should have been told what was the offence that the Magistrate was going to try him for, and that he could not under s. 237 convict him of a different offence. It seems to me that the finding of the Magistrate that the accused was not guilty of an offence under s. 34 necessarily and logically means that the accused could not be convicted of an offence under s. 279 of the Indian Penal Code. Moreover, an accused is certainly entitled to know what offence he has to answer and ss. 237 and 227, Cr. P. C., necessarily go together, and it is not the intention of the Legislature to empower a Court to convict an accused person of an offence of which he has not been told anything. I, therefore, set aside the conviction and direct that the fine, if paid by the accused, be refunded to him.

Z. K. *Conviction set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 122 OF 1924.
(CRIMINAL REVISION PETITION No. 105 OF 1924.)
November 27, 1924.
Present:—Mr. Justice Krishnan.
SINNASWAMI CHETTI AND OTHERS—PETITIONERS
versus
PANNADI PALANI GOUNDAN AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 147—Right to worship in temple, dispute as to—Section applicable—Procedure.

When a dispute arises with reference to the right to worship in a temple, the proper section under which action should be taken by a Magistrate to prevent a breach of the peace is s. 147 and not s. 145, Cr. P. C.

Where the dispute is really as regards the possession of the temple, s. 145, Cr. P. C., would be the proper section.

Chidambara Gurukkal v. *Sengoda Gounden*, 25 Ind. Cas. 999; 27 M. L. J. 587; 16 M. L. T. 427; 15 Cr. L. J. 671, *Kader Batcha* v. *Kader Batcha Rowthan*, 29 M. 237; 4 Cr. L. J. 58, and *Muhammad Musaliar* v. *Kunji Chek Musaliar*, 11 M. 323 at p. 326; 2 Weir 117; 4 Ind. Dec. (N. S.) 225, relied on.

Palaniyandi Pandaram v. *Palaniappa Thevan*, 34 Ind. Cas. 651; 17 Cr. L. J. 235, distinguished.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order, dated the 18th January 1924, of the Court of the Sub-Divisional Magistrate, Erode, in Miscellaneous Case No. 34 of 1923.

Mr. *T. M. Krsihnaswami Iyer*, for the Petitioners.

Mr. *K. S. Venkatarama Iyer*, for the Respondents.

The Public Prosecutor, for the Crown.

ORDER.—This case arose in connection with the probability of a breach of the peace occurring between the Chetties and Goundans in Chennakalvalasu, hamlet of Kolathupalayam in Dharapuram, Taluq Coimbatore District, regarding the right of worship in a temple in that hamlet. The Chetties who are the petitioners before me claim it to be a temple common to themselves and to the Goundans. On the other hand, the Goundans claim that the Chetties were not entitled to the temple at all. They, of course, also denied the right of the Chetties to perform worship in this temple. The Magistrate in order to prevent a breach of the peace has taken action under s. 145 of the Cr. P. C. and he has found, as regards the possession of the temple itself, that it is in the exclusive possession of one Palani Goundan one of the members of the Goundan's party.

It has been argued before me that this is not a case which should have been dealt with under s. 145 but that it should have been dealt with under s. 147 of the Cr. P. C. because the Chetties did not really claim possession of the temple but only the right to perform worship in that temple. The right to worship will, no doubt, require the right of entering into the temple; except in so far as that right was concerned there was no other dispute. The real dispute between the parties was as to the right to worship in the temple. When a dispute arises with reference to such a right as that, the proper section under which action should be taken by the Magistrate to prevent a breach of the peace is s. 147 and not s. 145. The cases in *Chidambara Gurukkal* v. *Sengoda Gounden* (1), *Muhammad Musaliar* v. *Kunji Chek Musaliar* (2) and *Kader Batcha* v. *Kader Batcha Rowthan* (3) lay down that the proper section is 147. The case cited by the other side, namely, *Palaniyandi Pandaram* v. *Palaniappa Thevan* (4), is distinguishable from the present case. There the main dispute between the parties was as to the right of possession of the temple in question. In that case the learned Judge was able to come to the conclusion that the dispute was in effect for possession of the temple and the right to perform *puja* therein was only a portion of the larger relief claimed; it was an ancillary relief and, therefore, it was held by Ayling, J., that s. 145 was the proper section applicable. Where the dispute is really as regards the possession of the temple, no doubt s. 145 would be the proper section. But in this case the dispute is not so much about the right to possession of the temple as to the right to perform worship in the temple. In such a case as that I am of opinion that s. 147 is the proper section to be used by the Magistrate. The finding that the possession of the temple is with Palani Goundan is, therefore, inadequate to prevent a breach of the peace between the parties; for that finding does not prevent the Chetties from entering the temple for the purposes of worship. If the dispute still exists as regards their right to worship

(1) 25 Ind. Cas. 999; 27 M. L. J. 587; 16 M. L. T. 427; 15 Cr. L. J. 671.

(2) 11 M. 323 at p. 326; 2 Weir 117; 4 Ind. Dec. (N. S.) 225.

(3) 29 M. 237; 4 Cr. L. J. 58.

(4) 34 Ind. Cas. 651; 17 Cr. L. J. 235.

and it is likely to lead to a breach of the peace, it ought to be put an end to by proper proceedings being taken under s. 147. I, therefore, allow the Criminal Revision Petition, set aside the order of the Magistrate and direct him to take action under s. 147, Cr. P. C., after giving due notice to the parties. Of course, if the likelihood of a breach of the peace has ceased, no action need be taken. But if it still continues, then the Magistrate will take action under s. 147. The petition is allowed and the case remanded accordingly to the Magistrate.

V. N. V. *Petition allowed.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

February 25, 1925.

Present:—Viscount Haldane, Lord Dunedin and Sir John Edge.

BEGU AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 236, 237, 309—Penal Code (Act XLV of 1860), ss. 201, 302—Charge under s. 302—Conviction under s. 201, legality of—Sessions trial—Assessors, opinions of, delivered in writing—Irregularity—Privy Council, whether Court of Criminal Appeal—Interference in criminal matters.

Under s. 237 of the Cr. P. C. a man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made under the provisions of s. 236 of the Code. [p. 4, col. 2.]

The accused were charged with an offence under s. 302 of the Penal Code but were on the evidence convicted of an offence under s. 201 of the Penal Code, that is to say, of making away with the evidence of the crime by assisting in removing the body of the deceased after the murder was committed:

Held, that having regard to the provisions of ss. 236 and 237 of the Cr. P. C. the conviction was perfectly legal. [*ibid.*]

Where in a Sessions trial held with the aid of assessors the assessors deliver their opinions in writing instead of orally to the Judge, this contravention of the provisions of s. 309 of the Cr. P. C. does not affect the legality of the trial in the absence of a finding that it led to a miscarriage of justice. [*ibid.*]

The Privy Council is not a Court of Criminal Appeal. When there has been evidence before the Court of Appeal and the Court of Appeal has come to a conclusion upon that evidence their Lordships will not disturb that conclusion. They will only interfere in cases where there has been a gross miscarriage of justice and gross abuse of the forms of legal process. [*ibid.*]

Appeal from the judgment of the High Court of Judicature at Lahore (Mr. Justice Broadway and Mr. Justice Campbell), dated the 8th April 1924.

Mr. *W. Wallach*, for the Appellant.

Messrs. *A. M. Dunne, K. C.*, and *K. Brown*, for the Respondent.

JUDGMENT.

Viscount Haldane.—This is an appeal against a judgment of the High Court of Judicature at Lahore in a case which came before it on appeal from the Sessions Judge of Montgomery. By their judgment the High Court affirmed the sentence of death which had been pronounced by the Sessions Judge on two of the appellants and the sentence of seven years' rigorous imprisonment pronounced on the three other appellants.

Shortly stated the case made out by the prosecution was this. On the night of the 15th June 1923, one Baksha, the murdered man, was riding home accompained by a man called Turez, who was the chief witness for the prosecution. The latter parted from him about 9 P. M. to go to a well in one of his fields, and Baksha continued on his way. Very shortly after they had parted Turez heard a cry from the direction in which Baksha had gone; he ran forward and saw Baksha being assaulted by the five accused, and another man who has since absconded. It was said in the evidence that friction had existed between the families of Baksha and the accused. Turez came sufficiently close to them to see what was happening. Two of the accused, seeing him, threatened him and went towards him; but he ran away to the neighbouring village of Tibbi Hamid Sahu where he raised an alarm and stated what he had seen. A party from the village at once went to the place where the assault had taken place, but they found no trace of Baksha, only signs of a struggle and blood on the ground. There was a certain amount of conflict of evidence. Turez said all the accused fell upon Baksha and inflicted on him many wounds with weapons which included a hatchet and other sharp weapons. It was afterwards found that when they had killed him they wrapped up his corpse in a cloth and placed it on a horse and went away with it. That is important in view of what took place at the trial. The horse was identified and trackers were able to trace the footprints of the accused, and the Court was satisfied that each of the appellants was identified.

The appellants were committed for trial at the Sessions Court on a charge of murder under s. 302 of the Indian Penal Code. The case was tried by the learned Judge at the Sessions Court with the aid of three assessors, and at the end of the case the

assessors gave their opinions, which were recorded that they were unanimously of opinion that Bakhu and Walia, the accused, had attacked Baksha with intent to kill him; that they murdered him; that two of the others who were present took part in the assault, as stated by Turez, the eye-witness; that there might be some doubt as to whether Hamid, one of the accused was also present and took part in the assault or not; and, finally, that the prosecution case and evidence appeared generally reliable throughout. That is what the learned Judge regarded as being the opinion of the assessors. The learned Judge having the evidence and the views of the assessors before him and having considered them, on the 22nd December delivered his judgment. With regard to Bakhu and Walia he decided that they intended to kill Baksha and were guilty of murder and he sentenced them to death. With regard to the other three he was of opinion that the evidence did not sufficiently or definitely prove, that they were present at and had taken part in the murder, but, on the other hand, he convicted each of them of having removed the body, and he sentenced them each to seven years' rigorous imprisonment.

From this judgment the appellants appealed to the High Court, and the appeal was heard by Mr. Justice Broadway and Mr. Justice Campbell who dismissed the appeal.

A petition for special leave to appeal from this judgment was presented to their Lordships. Leave was given and the appeal now comes before the Board for determination.

The substantial question upon the appeal arises upon s. 237 of the Cr. P. C. that follows s. 236, which provides that :

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

That is followed by s. 237, which is the vital one in this case :—

"If, in the case mentioned in s. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally but they were tried on evidence which brings the case under s. 237.

Their Lordships entertain no doubt that the procedure was a proper procedure and one warranted by the Criminal Procedure Code.

The only other point remaining is this. The Code prescribes that the assessors shall give their opinions orally to the Judge. It is said that here they gave them in writing and the Judge dealt with them on that footing. The learned Judge says that is not so, and it is only faintly that this point is persisted in now. No such point was taken at the trial and no such point was raised until the end of the proceedings in the High Court, when the Vakil for the prisoners raised it. Not only is it not shown that that aberration from the precise directions of the Code took place but, if it did take place, it has not been shown that it led to any miscarriage of justice at all.

This Tribunal is not a Court of Criminal Appeal. When there has been evidence before the Court below and the Court below has come to a conclusion upon that evidence their Lordships will not disturb that conclusion; they will only interfere in such circumstances as are referred to in the well-known case of *In re Dillet* (1), where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process. Here there has been no abuse of that kind and there is a large amount of evidence on which the Court could come to the conclusion at which they arrived. It is, therefore, outside the constitutional powers of their Lordships' Board, conforming to the principles which it has laid down, to interfere with the decision of the Court below.

In these circumstances their Lordships are unable to advise His Majesty to take

(1) (1887) 12 A. C. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241.

any other course than to dismiss the appeal.

Z. K. *Appeal dismissed.*

Solicitors for the Apellants:—Messrs. *Ranken Ford* and *Chester.*

Solicitor for the Respondent:—Solicitor, India Office.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 136 OF 1925.

March 25, 1925.

Present:—Mr. Justice Stuart.

KASHI NATH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 3, 4—Extension of Act to certain area—Persons found gambling beyond that area, whether guilty.

Where the Public Gambling Act has been extended by Government Notification to a certain area, one of the boundaries of which is the bank of a certain river, persons found gambling in a boat away from the bank which has been described as the boundary of the area notified cannot be held to have been guilty of any offence under the Act.

Criminal revision from an order of the Sessions Judge, Benares, dated the 24th of February 1925.

Mr. *Kumuda Prasad*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The only point which has been argued on this application is the point of jurisdiction. The applicant's Counsel maintains that the gambling did not take place within the area to which the Act had been extended by the Government Notification of the 14th June 1910.

The gamblers were gambling in a boat which was on the Benares side of the mid-stream of the Ganges. After examining the Notification, I am of opinion that the Southern boundary of the area to which the Act extends is the North bank of the Ganges. Where the Notification says "the Ganges," I understand it to mean the North bank of the Ganges and not the mid-stream. It follows from this finding that no offence was committed, because the gambling took place outside the area to which the Act applies.

I, therefore, allow this application and set aside the convictions and sentences. The fines, if paid, will be refunded. Those applicants, who are in Jail, will be released at once from custody. As I find that there was no case, I set aside the convictions and sentences even of those persons who have not applied in revision.

Application allowed;

Z. K. *Conviction set aside.*

CALCUTTA HIGH COURT.

CRIMINAL REVISIONS NOS. 648 AND 649 OF 1924.

November 3, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

PRAMATHA NATH SANYAL—PETITIONER

versus

KALI KUMAR DUTT—OPPOSITE PARTY.

Companies Act (VII of 1913), ss. 2 (14), 92, 93—Advertisement offering shares of Company for sale, whether "prospectus"—Failure to file copy before Registrar—Offence.

An advertisement offering to the public shares in a Company for sale comes within the definition of "prospectus" as contained in cl. (14) of s. 2 of the Companies Act. [p. 6, col. 1.]

Under the provisions of s. 92 of the Companies Act an advertisement of this nature must be placed before the Registrar by filing a copy of it before it is issued, and in order to be so filed it must contain the essential particulars which are mentioned in s. 93 of the Act. If the advertisement does not comply with the requirements of s. 93 it cannot be accepted by the Registrar and consequently it cannot be published. [p. 7, col. 1.]

Failure to file a copy of such an advertisement with the Registrar before it is issued is punishable under s. 92 (5) of the Companies Act. [*ibid.*]

Rules against an order of the Additional Chief Presidency Magistrate, Calcutta, dated the 7th July 1924.

Babu *Narendra Kumar Bose*, for the Petitioner.

Mr. *Khundkar*, for the Crown.

JUDGMENT.

Mukerji, J.—These two Rules relate to convictions under s. 92 (5) of the Indian Companies Act (VII of 1913).

In No. 648 the petitioner as representing the Bengal Miscellany, Ld., a Company registered under the Act, and in No. 649 the petitioner as Secretary thereof, has been so convicted for issuing an advertisement in a daily newspaper named *Forward* on the 24th June 1924 without filing a copy thereof with the Registrar of Joint Stock Companies for registration on or before the date of its publication, as required by the Act.

The ground upon which the convictions are challenged, put shortly, is that the advertisement in question is not a prospectus within the meaning of the Act but specifically refers to a prospectus, copy whereof had admittedly been already filed with the Registrar of Joint Stock Companies. It is urged that if the prospectus of the Company has already been filed with the Registrar as it has been on the 2nd Septem-

ber 1921, and the advertisement already refers to the prospectus and states the fact that it has been so filed, it is not necessary under the law to file a copy of the advertisement with the Registrar for there would be no object in doing so; and it is further urged that if a copy of this advertisement had been attempted to be filed it would not have been accepted as it does not contain the particulars necessary under s. 93 of the Act.

The offending matter in this case is an advertisement offering to the public some shares of the Company for sale. It, therefore, clearly comes within the definition of "prospectus" as contained in s. 2, cl. (14) of the Act. The definition runs thus: "'Prospectus' means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a Company." Then under s. 92 the filing of a prospectus is obligatory and the particulars to be set out therein are given in detail in the said section as also in s. 93. A reference to the different sections of the Act makes it abundantly clear that the provisions relating to a prospectus are most stringent and the duty of preparing it and filing it in accordance with law is extremely onerous. Upon the plain words of the Statute I can see nothing which relieves the Company from filing a copy of an advertisement of this nature with the Registrar before issuing it.

At first sight, however, the petitioner's contentions seem plausible and it seems superfluous and unnecessary that a copy of the advertisement should be filed when the prospectus itself has already been filed. It strikes me as meaningless that a Company should be required to file a copy of every advertisement that it issues in the newspapers inviting the purchase of its shares when the advertisement specifically refers to a prospectus, copy of which, it says, is available to an intending purchaser of shares on application, and copy of which, it says, has been duly filed; and furthermore if the Company had filed a copy of the advertisement in the shape in which it was issued, it could not have been accepted by the Registrar. The policy of the law, however, is entirely different, and on a careful study of it I am satisfied that it is neither unreasonable nor unjust.

The obligation of persons who cause a prospectus to be issued was laid down by Kindersley, V. C., in the case of *New Brunswick & Canada Ry. & Land Co.* v. *Muggeridge* (1) in these words: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree, affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." In the case of *Henderson* v. *Lacon*, (2) Page Wood, V. C., observed thus with reference to the *dictum* above quoted: "I must say I think the result of all the cases which have occurred shows the great value of that golden legacy, if I may so term it, which has been left to us by Sir Richard Kindersley, who has condensed in few words the whole doctrine as to the rule of conduct between share-holders and their directors, in the case of *New Brunswick & Canada Ry. & Land Co.* v. *Muggeridge* (1), a case cited with approbation in the case of *Central Ry. of Venezuelu* v. *Kisch* (3) in the House of Lords."

Where there is deviation from this rule complications arise and give rise to actions of deceipt or actions to obtain rescission on the ground of misrepresentation, instances of which the books abound in. To avoid these complications and to safeguard the interest of the Company as also of those who choose to deal with it, the Legislature has made provisions for the full disclosure of all material facts and laid down certain statutory particulars which have got to be disclosed.

It is obvious that the preparation of a prospectus necessitates the greatest care; while an attractive statement of the advantages offered is justly permissible, every statement made should be an honest one,

(1) (1860) 1 Dr. & Sm. 363; 30 L. J. Ch. 242; 7 Jur. (N. S) 132; 3 L. T. 651; 9 W. R. 193; 62 E. R. 418; 127 R. R. 142.

(2) (1868) 5 Eq. 249; 18 L. T. 527; 16 W. R. 328.

(3) (1867) 2 H. L. 99 at p. 113; 36 L. J. Ch. 849; 16 L. T. 500; 15 W. R. 821.

no ambiguous phraseology, unfair reservation or half truths should be allowed to be used or to creep in. On a reference to the sections mentioned above, together with some of the other sections of the Act. *e. g.* ss. 84 and 100, it is clear that one of the chief aims of the Legislature has been to secure the fullest disclosure of all material and essential particulars as to the state of affairs of a Company and lay the same in full view of all intending purchasers of its shares or participation in its profits. With that object the Legislature has provided that any invitation to the public for that purpose should be subject to the scrutiny of the authorities. It has, therefore, been enacted in s. 92 of the Act that an advertisement of the nature which forms the subject-matter of the present cases should be placed before the Registrar by filing a copy of it before it is issued—and it has also provided that in order to be so filed it must contain essential particulars such as are mentioned in s. 93. That this is so also appears from sub-s. (2) of s. 93 which makes some exemptions in case of newspaper advertisements, and sub-s. (3) of that section which makes the section inapplicable to a circular or notice inviting existing members or debenture-holders of a Company to subscribe either for shares or for debentures. It is clear that an advertisement in the shape in which it has been published would not have been accepted by the Registrar as satisfying the requirements of s. 93: but that only means that it should not have been issued.

Our attention has been drawn to a passage in Stiebel's Company Law and Precedents, Second Edition, Vol. I, page 258, foot-note, which is in these words:—"Sometimes one sees in newspapers advertisements issued by Companies which propose to issue shares, which do not contain the statutory requirements and state that the publication is for information only and that applicants must apply to the Company for the full prospectus: such advertisements should never contain an application form, but they do not appear to be contrary to the Act." No authority is cited in favour of this proposition; and in any case the present prospectus does not fall within that category, for it does not state that the publication is for information only, nor does it say that the applicants must apply to the Company for the full prospectus, but only that the prospectus may be obtained on application.

I am accordingly of opinion that the convictions are correct and the Rules should be discharged.

Suhrawardy, J.—I agree.

Z. K. *Rules discharged.*

SIND JUDICIAL COMMISSIONER'S COURT.

CONFIRMATION CASE No. 2 OF 1924.
CRIMINAL APPEAL No. 10 OF 1924.
March 26, 1924.
Present :—Mr. Kincaid, J. C., and Mr. Aston, A. J. C.

BAHADUR *walad* RANO KHASKHELI —APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), as amended by Act XVIII of 1923, ss. 162 (1), 164 (2), 288—Statement made to Police Officer, whether admissible—Statement recorded by Magistrate—Absence of solemn affirmation, effect of—Evidence before Committing Magistrate, when can be used at trial—Accused, whether bound to give explanation—Practice.

A statement recorded by a Police Officer under s. 162 cl. (1) of the Cr. P. C. is inadmissible in evidence at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. [p 9, col. 2.]

A statement recorded by a Magistrate under s. 164 cl. (2) of the Cr. P. C. is admissible in evidence, whether taken on solemn affirmation or not. [p. 10, col. 1.]

Evidence of a witness taken before a Committing Magistrate may under s. 288 of the Cr. P. C., be used as substantive evidence in the case at trial in the Sessions Court where for the purposes of justice, the adoption of such a course is found necessary by the Judge. [p. 10, cols. 1 & 2.]

Maruti Joti Shinde v. *Emperor*, 63 Ind. Cas. 332; 46 B. 97; 23 Bom. L. R. 820; 22 Cr. L. J. 636; (1922) A. I. R. (B.) 108, *Queen-Empress* v. *Jadub Das*, 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194, and *Queen-Empress* v. *Dorasami Ayyar*, 24 M. 414; 2 Weir 377, followed.

The words "subject to the provisions of the Indian Evidence Act, 1872" in s. 288 of the Cr. P. C. are intended to prevent the admission of irrelevant evidence in the Sessions Court merely on the ground that it had been recorded by the Committing Magistrate. [p. 10, col. 2; p. 11, col. 1.]

If no *prima facie* case is made out against the accused, it is open to the accused to rely safely on the presumption of innocence or of the infirmity of the evidence for the prosecution. But when a *prima facie* case has been made out and the presumption of innocence is displaced, the force of suspicious circumstances is augmented if the accused attempts no

explanation of facts which he may reasonably be presumed to be able and interested to explain. [p. 12, col. 2.]

Isarsing Sawansingh v. *Emperor*, 24 Ind. Cas. 585; 7 S. L. R. 109; 15 Cr. L. J. 497 referred to.

Appeal against the conviction and sentence of the Sessions Judge, Hyderabad, (Sindh), dated the 21st December 1923.

Mr. *Motiram Idanmal*, for the Appellant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—The accused in this case Bahadur *walad* Rano Khaskheli was convicted on the 21st of December 1923 by Mr. Shannon, the learned Sessions Judge of Hyderabad, under s. 302 of the Indian Penal Code and was sentenced to be hanged by the neck until he was dead. He has appealed against that decision and as the sentence imposed was a capital sentence, the papers, have come up to this Court, in the usual course for confirmation.

The facts of the case as deposed to by the Crown witnesses are fairly simple. But they involve a number of extremely interesting law points. Before going further into the judgment I wish to express on behalf of my learned brother and myself our thanks to the learned Counsel and the learned Pleader engaged in this case for the assistance rendered by them to us in the consideration of the legal questions that have arisen.

The facts are shortly as follows:—

On the 8th May a certain Ahmed Lashari was going to his work which consisted in looking after his master's *babul* plantation. As he went he first saw a woman's shoe lying in the jungle and then a woman's body fully dressed. He did not examine the body closely, but he told his *zemindar* Pinio, who advised him to report the matter to the Police. That evening he went to the Police Station Saindad and Mahomed Sharif the Sub-Inspector recorded his statements. Mahomed Sharif went to the scene of the offence, which he reached at 10 o'clock that night. He conducted no investigation, as it was too late, but put a guard round the body. Next morning on the 9th of May he held a *mashirnama* sent for the Doctor from Hala and tried to find tracks leading from or to the body; he also tried to discover who the woman was. But although the spot was quite close to the village of Agro Rahu, no one there could tell him any thing about the woman nor could they identify her. The *paggis* in the meantime had found the tracks of a man and a woman which went as far as the village of Phul Kako some three miles away. The Sub-Inspector had with him a mounted constable called Mahomed Usman who happened to be a Phul Kako man, so he sent him to inquire at the village. In the mean time, the messenger who had gone to Hala to fetch the Hala Doctor had come back with the news that he was away on leave. The Sub-Inspector at once sent for the Shahdadpur Doctor who arrived on the morning of the 10th and made a *post mortem* examination of the body. He found on the deceased's body four incised wounds. In his opinion they had been caused by a sharp cutting instrument such as a hatchet. Death in his belief was due to compound fracture of the cervical vertebrae.

After the *post mortem* examination had been completed, the Inspector arrived and about noon on the 11th the District Superintendent of Police Mr. Smith came, while Mr. Smith was examining the tracks which led to and from the scene of the offence, Mahomed Usman cam up with five persons of whom three are witnesses in this case. To these three alone I shall refer, namely, Miri, Sahul and Chandu. Their statements were taken as the result of those statements a search was made for Bahadur *walad* Rano. That night Umar and Karimdad Khaskheli were sleeping at the well of Maluk Khaskheli. About 2-20 A. M. they were awakended by Bahadur and his father and they took Rano to the mosque in Bhaledino Kako whence he was taken to the Police. On the monring of the 12th he was placed before the District Superintendent of Police and promised to show the axe with which the murder had been committed. He took Mr. Smith and another Policeman first to the scene of the offence and then proceeded to look for the axe but did not find it, Mr. Smith lost patience and went away. After he had gone about a mile he was overtaken by a mounted Policeman who said that the accused was now willing to point out the axe. Mr. Smith, however, refused to return and told the mounted Policeman to tell the Inspector to get the axe. Half an hour later the accused produced an axe head from a disused hay stack. Later on in the day he produced a pair of trousers from the roof of a perch in a field. Both axe head and trousers were sent to the Chemical Analyser who report-

ed that there were stains of human blood on both of them.

On the 13th of May Sahul, who is a sister of Bahadur, made a statement to the Resident Magistrate, Hala. She therein said that her father, Rano, her sister, Hamiran, her brother, Bahadur, and his mistress, Sabhai, and others had gone from their village of Khadro in the Sinjhoro *taluks* on a visit of condolence and also because of the domestic quarrel between their father Rano and his uncle Sujawal. At Phul Kako they stayed with a relative Maluk. Some nine days later Sujawal came and made it up with Rano and fetched him and others home. Hamiran and Shahul remained at Phul Kako 8 or 10 days after that another death occurred in the family, namely, the daughter of Yousif Khaskheli with the result that Bahadur and Sabhai and others came to pay another visit of condolence at Phul Kako. This time the party remained for 7 or 8 days. During that period Miri, who was a sister-in-law of Maluk, told Bahadur that she had seen his mistress Sabhai deceiving him with a cousin called Piru. On receiving this information Bahadur began to beat Sabhai, to extort from her a confession of her misconduct. As she would not confess, he continued beating her for three days. On the 4th day he announced that he would take Sabhai to see a certain Pir Saleh Shah at Ranipur because her knee was swollen. Sabhai at first refused to go with Bahadur but eventually consented. Before going Bahadur bought five *biris* gave one to Sabhai who smoked it and the remainder she tied in her shirt. She borrowed a pair of shoes from Sahul and Bahadur took a hatchet with him which he had bought a few days previously.

On the 15th of May the accused was *challaned.* On the 16th of May Sahul in the course of the inquiry before the Committing Magistrate adhered to her former statement and on the same day Miri also deposed that she had seen the misbehaviour of Sabhai with Piru and had told Bahadur. Both she and Sahul identified the clothes worn by the deceased woman as Sabhai's and the shoes which had been borrowed by her from Sahul when she was leaving Phul Kako to go with Bahadur to consult Pir Saleh Shah.

The accused pleaded not guilty. He denied the production of the axe head and also the trousers. He also denied his intimate relations with Sabhai whom he said he did not even know.

Three legal points have been taken by the learned Pleader for the defence. First, the statements made by Sahul and Miri to the District Superintendent of Police are as the s. 162 now runs, inadmissible in evidence. Secondly, the statement made by Sahul and recorded by the Resident Magistrate of Hala not having been made on solemn affirmation is inadmissible in evidence under s. 164. Lastly, under s. 288 of the Cr. P. C. statements made by Sahul and Miri to the Committing Magistrate are not admissible as substantive evidence but can only be used either to contradict or to confirm the statement of the deponents. As Sahul and Miri both resiled from those statements in the Court of the Sessions Judge, the prosecution are unable to made use of them.

Now, if the objections of the learned Pleader be allowed the only evidence against the accused would be the production of a blood stained axe head and the production of a blood stained pair of trousers. It would, in our opinion, be impossible to convict an accused person of murder on the production of these two articles, although it might create a serious suspicion against him. It is, therefore, necessary for us to examine very closely the objections taken by the learned Pleader.

Section 162 part 1 runs as follows :—

"No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; not shall any such statement or any record thereof whether in a Police diary or otherwise, or any part of such statement or record be used for any purpose (save as herein after provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

After giving the words of this section our careful consideration, we have come to the opinion that the learned Sessions Judge was in error in admitting the statements made to Mr. Smith by Sahul and by Miri. In this view the learned Public Prosecutor has very fairly expressed his acquiescence.

The next point is whether the statement of Sahul to the Resident Magistrate, Hala, on the 13th of May 1923, should be excluded. The reason for its exclusion as advanced

by the learned Pleader is that it should have been made on solemn affirmation and there is nothing on the record to show that it was a statement on solem affirmation.

The question, therefore, arises whether the absence of a solem affirmation renders inadmissible the statement itself. There is nothing in s. 164 which, in our opinion, justifies this plea. Section 164 (2) runs as follows:—

"Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in the Magistrate's opinion, best fitted for the circumstances of the case."

Chapter XXV lays down the procedure to be adopted in recording evidence but it contains nothing about the solemn affirmation required by the witnesses. That procedure finds origin in s. 5 of the Indian Oaths Act X of 1873. But the same Act in s. 13 lays down that no proceeding and evidence shall be invalidated by the omission to take an oath or to make an affirmation. We, therefore, are of the opinion that the statement of Sahul recorded by the learned Resident Magistrate Hala on the 13th of May 1923, is admissible in evidence under s. 164 of the Cr. P. C. whether taken on solemn affirmation or not.

The last and the most important point is whether under s. 288 of the amended Cr. P. C. the statements made by Sahul and Miri in the Court of the learned Committing Magistrate are admissible as substantive evidence or merely to corroborate or to contradict. In the case of *Maruti Joti Shinde* v. *Emperor* (1) two Judges of the Bombay High Court of great eminence adopted the view expressed by the Madras and Calcutta High Courts which was contained in the following passage:—

"There can be no doubt the provision (namely s. 288 of the Cr. P. C.) was intended to enable the Court to read the previous evidence as substantive evidence in the case at the trial where, for the purposes of justice, the adoption of such a course is found necessary by the Judge." The learned Judges of the Bombay High Court added "Before such evidence is substituted under s. 288, Cr. P. C. it is necessary as pointed out in *Queen Empress* v. *Jadub Das* (2) that there should be some reason why it should be preferred. That is a matter of prudence and not of law".

The learned Pleader for the defence, admitted the correctness of two decisions under the old Code but has pressed strongly on us the view that it is no longer good law in view of the amendment of s. 288. That section now runs as follows:—

"The evidence of a witness duly recorded in the presence of the accused under Ch. XVIII may, in the discretion of the Presiding Judge, if such witness is produced, and examined be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872." The learned Pleader has contended that the statement made by the deponents before the Committing Magistrate's Court can now only be used not as substantive evidence but only in the way that previous statements by the same witness can be used under the Indian Evidence Act. We have given this question our most earnest consideration for the learned Pleader has been able to advance in favour of his contention the remarks of a very learned commentator. Mr. B. P. Mitra, who had recently published a commentary on the amended Criminal Procedure Code. The Commentator's remark is as follows:—

"These cases, namely, *Maruti Joti Shinde* v. *Emperor* (1) and *Queen Empress* v. *Dorasami Ayyar* (3) are no longer good law for under the present section as amended the statements made before the Committing Magistrate can be used only subject to the provision of the Evidence Act." With all deference to the learned Commentator we do not think that his interpretation of the section is a correct one. He had not the advantage that we have had of hearing the matter argued by Counsel and we do not think that he fully grasped the meaning of the alteration. To us, at any rate, it seems impossible that the Legislature who had before them the clear and unambiguous expression of opinion by eminent Judges that s. 288 empowers a Sessions Court to use statements made by the deponents in the Committing Magistrate's Court as substantive evidence would have used the words "for all purposes" unless they thereby intended to endorse the views of those Judges. It may then be asked what was intended by the words "subject to the provisions of the Indian Evi-

(1) 63 Ind. Cas. 332; 46 B. 97; 23 Bom. L. R. 820; 22 Cr. L. J. 636; (1922) A. I. R. (B.) 108.
(2) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194.
(3) 24 M. 414; 2 Weir 377.

dence Act, 1872." We think that the intention of the Legislature was to prevent the admission of irrelevant evidence in the Sessions Court merely on the ground that it had been recorded by the Committing Magistrate. The Committing Magistrate might well record through inadvertence hearsay evidence or statements made by the accused persons to the Police in the absence of a Magistrate.

After disposing of the three main legal points raised by the learned Pleader, I shall return to the discussion of the facts of the case.

Sahul and Miri, both of whom are related to Bahadur, have given to the Committing Magistrate a striking and, as it seems to us, a trustworthy account of the actions of Bahadur and Sabhai previous to the discovery of the dead body. The learned Pleader for the defence has pressed on us repeatedly that these witnesses were tutored by the Police. But when one examines the detailed and life like story told by Sahul on the 13th of May to the Resident Magistrate, it is impossible not to believe that it is a genuine and spontaneous account given by a young girl of what really happened. Her account of the quarrel between Rano and Sujawal which led to the journey of the party from Khadro to Phul Kako, the visit of Sujawal to obtain a reconcilation, the subsequent death of Yousif Khaskheli's daughter which led to a further condolence visit and finally the story told by Sahul on the 16th May, that *Musammat* Sabhai had a swollen knee not because she had a disease but because she had been prosecuted by devils. All these bear the stamp of truth. We are perfectly convinced that no Police Officer would tutor a girl aged 12 to say that the deceased woman was suffering from a swollen knee because she was prosecuted by devils.

We have next to consider why we should prefer the statements of Sahul and Miri in the Magistrate's Court to the statements in the Sessions Court. As the learned Judges of the Bombay High Court have pointed out, this is a matter not of law but of prudence. It is obvious that a girl aged 12 will, if she is given an opportunity do her utmost to save her brother tried on a capital charge and the same argument applies though no doubt in a lesser degree to Miri, who is also connected with Bahadur. We, therefore, think that the statements made by Sahul and Miri to the Committing Magistrate can be and are to be preferred to their subsequent statements made to the Sessions Judge. We, therefore, accept them under s. 288 of the Cr. P. C. as substantive evidence.

We have next to see how far these statements are corroborated. I have already mentioned that under s. 164 of the Cr. P. C. the statements made by Sahul to the Resident Magistrate is admissible in evidence. It is, however, not admissible as substantive evidence but can be used and should be used to corroborate Sahul's subsequent statement during the committal proceedings.

Further there are the clothes of the deceased woman. It has been argued that they were just common clothes such as ordinarily Sindhi women wear and that it is impossible to identify them. But Sindhi women do not wear a standardised pattern of clothes. It must be remembered that Sabhai had visited the village on two occasions and a number of residents of the village must have seen Sabhai and to Sahul in particular Sabhai, as the mistress of Bahadur must have been particularly well-known. There are also two other circumstances. Before going to visit the Pir Saleh Shah, Sabhai had borrowed from Sahul a pair of shoes. The learned Pleader did not argue that it was impossible for Sahul to identify her own shoes. But he contended that the grown up woman Sabhai could not have worn the shoes of a child like Sahul. But the shoes worn by Sindhi women are what we call slippers; they have no heels and it is perfectly possible for any woman to wear another woman's Sindhi shoes. Again we have no means of knowing whether Sabhai was much taller than Sahul or that her feet were so much bigger that she could not get into Sahul's shoes. On the other hand we have the sworn statement of Sahul which we consider reliable that Sabhai borrowed Sahul's shoes before going out with Bahadur. And when the deceased's body was found two or three days afterwards in the jungle, near it was one of Sahul's shoes. Lastly, there is the circumstance that before starting with Bahadur. Sabhai tied up 4 *bidis* in her skirt. The learned Pleader has contended that these *bidis* were unidentifiable. That is no doubt the case. But it adds enormously to the probability of the dead body being Sabhai's, if Sabhai before starting out had tied 4 *bidis* in her skirt and that

in the skirt of the deceased woman were tied up 4 *bidis*. It is also important to remember that the witness Chandu who is a hostile witness, has admitted that just about this time a man whom Chandu identified as the accused came to his shop and bought 5 *bidis*.

The next matter of corroboration is furnished by the accused himself. He informed Mr. Smith that he was ready to point out the axe with which the murder had been committed. The learned Pleader has argued that we should eliminate from our consideration the words "with which the murder had been committed". The learned Pleader has based his reasoning on the circumstance that the axe was not produced in Mr. Smith's presence and that the subsequent production of the axe was a separate proceeding altogether, the words, therefore, used by the accused were not admissible in evidence. In our opinion that view is incorrect. Even though Mr. Smith had left before the axe was produced, the offer to produce it and the production of the axe by the accused were all part of one transaction. The accused delayed for a few minutes by pretending not to know where it was but he subsequently of his own accord took from its hiding place the axe with which he had killed the deceased. The statements made by the accused to Mr. Smith is thus perfectly admissible. The axe head was produced by the accused in the presence of the Inspector and the Sub-Inspector from a hay-stack. It is impossible that the accused could have known where the axe head was hidden unless he himself had put it there. Now, on this axe head were found stains of human blood by the Chemical Analyser. This, in our opinion, is a circumstance which very strongly corroborates the evidence given by Sahul and Miri.

There is also the circumstance that the accused led the way, while Mr. Smith and other Policemen followed, to the spot where the murder must have been committed.

Lastly there is the production by the accused of a pair of trousers. On these trousers there were found stains of human blood detected by the Chemical Analyser. It has been argued that no body has proved that the trousers were the very trousers of the accused. But after all, it is unlikely that the accused would produce any body else's trousers. And it is yet less likely that he would be able to point out the trousers which were found in the roof of a perch in a distant field, if he were not the person who had hidden them there.

The learned Pleader for the defence has argued that there is no direct evidence and that in the absence of direct evidence the Court should not convict an accused person on a capital charge. But this question has already been definitely decided in this very Court in the case of *Isarsing Sawansingh* v. *Crown* (1). The learned Judges there observed "It is urged on behalf of the accused that he owes no duty to the prosecution and is under no liability to give any explanation. If no *prima facie* case had been made against the accused it is open to the accused to rely safely on the presumption of innocence or on the infirmity of the evidence for the prosecution. But when a *prima facie* case is made out and the presumption of innocence is displaced, then as said by Wills Judge in his work on Circumstantial Evidence at page 97, 'the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain".

Now the circumstantial evidence in this Court could hardly be stronger. The accused was a lover of the deceased woman. They had a quarrel on the ground of her infidelity. In the course of that quarrel the accused beat Sabhai for three days. They then set out together and at a distance of three miles from the point of their departure Sabhai was found dead. Subsequently when the accused was in the presence of the Police he did not deny the suspicious circumstances against him. He pointed out the place where the murder had been committed. He pointed out the axe with which the murder had been committed. He produced from concealment a pair of his own trousers and both the trousers and the axe had on them human blood. When he was asked to explain all this in the Sessions Court what was his explanation? He denied that he had ever known Sabhai. He denied that he had pointed out the axe head and he denied that he had produced the trousers and last of all he denied that they were his. In these circumstances, we have no doubt, whatever, but that the conviction

(1) 24 Ind. Cas. 585; 7 S. L. R. 109; 15 Cr. L. J. 497.

of the learned Sessions Judge was perfectly right and proper.

An appeal has been made to us by the learned Pleader that we should even although we confirm the conviction reduce the sentence. We have given this matter also our very careful consideration and we think that in the peculiar circumstance of the case we ought not to confirm the death sentence passed by the learned Sessions Judge but to reduce it to the lesser one of transportation for life.

K. S. D. *Conviction confirmed; Sentence reduced.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 197 OF 1924.
November 6, 1924.
Present:—Mr. Baker, J. C.
RAJMAL—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 97, 109, 114—Right of private defence, when can be availed of—Abetment, what amounts to.

The right of private defence cannot be availed of where there is time to have recourse to the public authorities to prevent the commission of an offence against the person or property of the person concerned. [p. 14, col. 2.]

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent but it is absolutely necessary to connect him in some way or other with those steps of the transaction which are criminal. [*ibid.*]

Criminal revision against an order of the District Magistrate, Bhandra, dated the 2nd May 1924, in Criminal Appeal No. 54 of 1924.

FACTS appear from the following order of the District Magistrate, Bhandra:—

A lease for three years of the lac of six villages including Bhasgaon and Kamargaon, on *batai* was given by R. B. Indraraj Singh *zemindar* of Kamtha to Rajmal (appellant). Rajmal entered into agreement with Mardan Khan (P. W. No. 4) by writing Ex. P. 5 which was never executed. That agreement gave, for no apparent consideration, 2-annas share of the 8-annas share of Rajmal in the lac of the six villages to Mardan Khan. That agreement was never registered. On the other hand, for a time, it seems to have been acted on, and Mardan Khan received a payment of Rs. 450 from Rajmal as his 2-annas share of the first crop packed. This did not seem enough to Mardan Khan and the present trouble arose in consequence. Secondly, it would appear that R. B. Indraraj Singh later sold his 8-annas share of the *batai* to Rajmal giving Rajmal, therefore, a full 16-annas lease in the lac for the three years. At the same time when, as I will show, Mardan began to steal Rajmal's lac, the *zemindar* appears to have aided and abetted him (though this is not expressly stated in the evidence, but can only be reasonably inferred from the evidence, *e. g.*, from the fact of the *zemindar's* presence in the village, from the statements of Rajmal, from the fact of Mardan and Dadu receiving assistance from Dhivru, the *zemindar's* servant, and from the fact that the *zemindar*, according to Mardan's evidence, received a share of the spoil of Mardan and Dadu).

Mardan being dissatisfied with his treatment by Rajmal, determined to take the law into his own hands and take what he thought was his 2-annas share of the lac. Now it is quite clear that if Ex. P. 5 has any meaning it is this that Mardan Khan is to receive 2-annas share, *i. e.* 25 per cent. of Rajmal's profits in consideration of his services in propagating and collecting the lac in the villages received in *batai* by Rajmal. There is no direct evidence on record to tell me this, but it seems to me the only reasonable explanation of the facts as put before me. Why should Rajmal give Mardan 2-annas share gratuitously? Mardan himself states that he assisted Rajmal in planting seed lac and collecting it, and, therefore, I think my explanation is obviously correct. Mardan, however, on the strength of this Ex. P. 5, sold half of his 2-annas share to Dadu, a relative of his, apparently of the *lathyal* type who has a previous conviction for rioting and was a suitable man for introducing into an affair like the present. Dadu, to translate the picturesque vernacular phrase, "bought a quarrel" *i.e.*, he bought 1-anna (without paying any money) share of Mardan's share. (This is quite a common custom. *A* has a field, which *B* wrongfully claims. So *B* leases for an imaginary consideration the field to *C*, as big a ruffian as *B* can find. *B* now has as an assistant against *A* a man who has everything to gain and nothing to lose). Now it is clear that even supposing Rajmal had gifted 2-annas share to Mardan Khan, Mardan cannot sell half of that share without Rajmal's permission. Secondly, if

Mardan has a 2-annas share of six villages it is to be presumed that the allocation of that 2-annas should be made by Rajmal.

What actually happened was that Mardan decided that his 2-annas share consisted in two villages (Bhasagaon and Kamargaon) out of the six (which is *prima facie* a generous estimte in favour of Mardan), and he told Rajmal that he was going to collect the lac from there with Dadu. Rajmal instead of going to the Police decided to meet force with force. His brother Ishwardas (accused) with Keshrimal (accused) and the other accused and servants (four of whom were wanted for this case but absconded) were sent to collect lac and oppose Mardan and Dadu in their operations.

Between 9th May 1923 and 12th May 1923 rival lac picking went on. Ishwardass' party saw Mardan and Dadu's party picking lac, (the latter being abetted, as I have shown, by the *zemindar*). Mardan admits that he prevented Rajmal's men (pages 22 and 23 of record). Then, according to Mardan's evidence, the lac collected by Ishwardas was taken by Dadu and Dhivru (the *zemindar's* servant) and divided. Ishwardas left to consult Rajmal in Gondia. What exactly was decided between them is not known but I agree with the lower Court in finding that Rajmal decided to decide the matter by force. P. W. No. 10, Mahadeo, deposes that Radhesingh accused, Rajmal's brother, offered him money to go with him to Bhasgaon to help the quarrel. Radhesingh asked one Bansi to come to Rajmal to settle the amount to be paid. It is clear that on 12th Radhesingh with the three appellants Keshrimal, Indrapalsingh and Ishwardas, and the four absconders, Hindustani *lathyals*, met Mardan Khan and Dadu returning from the jungle of Kamargaon with a great number of coolies and a fight ensued. In that fight Mardan Khan and Dadu, as they deserved, got the worst of it, and Dadu sustained a broken arm.

It was for this attack on Mardan and Dadu that the accused were convicted under s. 147, Indian Penal Code, Rajmal being challaned under ss. 147, 109, Indian Penal Code, also.

Mr. *Erach Shah*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The facts are fully set out in the judgment of the District Magistrate. The applicant has been convicted of abetment of rioting and it is contended that there is absolutely no evidence against him. I am of opinion that this is so.

The lac in connection with which the riot occurred is the property of the applicant and the persons engaged in the riot were his servants. The applicant admittedly was not himself present and there is no evidence that he instigated his servants to to use force. The evidence of P. Ws. Nos. 6 and 10 is hearsay. P. W. No. 6 says that Rajmal's brother and servants said Rajmal had given them orders to prevent his opponents from taking away lac. P. W. No. 10 says that one of Rajmal's servants tried to engage him to join them and told him to settle the amount with Rajmal. The witness did not go to Rajmal and did not join his servants. There is absolutely no direct evidence of any statement by Rajmal or any orders given by him to his servants, and the case against him rests on mere suspicion. The District Magistrate admits that it is not known what exactly was decid ed between Ishwardas and Rajmal. Ishwardas, who is Rajmal's brother, was present at the riot.

I do not think there is any evidence against Rajmal which is sufficient for his conviction. I agree with the District Magistrate that the right of private defence cannot be availed of as there was time to have recourse to the public authorities. This point however does not arise as I am of opinion that the conviction cannot stand. No doubt there is suspicion against Rajmal for whose benefit it was that the other party should be prevented from removing the lac, but to convict him of abetment it is necessary to prove that he gave orders to his servants to prevent the removal by force. It was long ago laid down in the case of *Queen* v. *Nim Chand Mookerjee* (1) that in order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.

The latter link is lacking here. The conviction will accordingly be set aside and the fine, if paid, refunded.

G. R. D. *Conviction set aside.*

(1) 20 W. R. 41 Cr.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 12 OF 1924.
April 3, 1924.
Present:—Mr. Kincaid, J. C., and Mr. Aston, A. J. C.
KHAIRO AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Bombay District Police Act (Bom. Act IV of 1890), ss. 11, 51 (e), *53, Sch. B—Jurisdiction of Police Officer, scope of—Police Officer aiding another officer, outside area of jurisdiction, whether on duty—Police Officer—Penal Code (Act XLV of 1860), s. 333.*

For the purposes of the Bombay District Police Act of 1890, Police Officers of every grade are appointed to an entire District in which they have to serve and are to be deemed to be on duty in all parts of that District. Although a Police Officer may be outside the area of his jurisdiction, he is bound within the limits of the said District to aid another Police Officer when called on by him to do so or to keep order in streets, etc., as required under ss. 51 (*e*) and 53 of the said Act. [p. 17, cols. 1 & 2.]

Therefore, any person assaulting a Police Officer while he is engaged in discharging the duty laid on him as a member of the Police force is guilty of an offence under s. 333, Penal Code. [p. 17, col. 2.]

Emperor v. *Madho*, 42 Ind. Cas. 917; 40 A. 28; 15 A. L. J. 813; 19 Cr. L. J. 5, distinguished.

Appeal against the sentence and conviction of the Additional Sessions Judge, Hyderabad (Sind).

Mr. *W. Lobo*, for the Appellants.
Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—The facts of this case are quite simple but involve one or two interesting points of law. In April 1923 Rewachand was Head Constable of Mahrabpur. He had a warrant sent him to enable him to secure some fugitives from Justice. A certain Bhagat Kanwar a singer of some repute was going to give a performance at Kumba Lima, a place some miles away from Mahrabpur and it occurred to Rewachand that he might possibly find the men whom he sought among the crowd, assembled to listen to Bhagat Kanwar's music. Now Kumba Lima was in the jurisdiction of the Head Constable of Khadar, Natho Khan. He was somewhat alarmed about possible dangers that might arise from the presence of a large crowd that was to assemble there and he attended the performance with four subordinate constables Moundal Khan, Ghazi Khan, Sumar Khan and Rasulbux. When Natho Khan saw Rewachand at Kumba Lima he called on him also for help and put him on duty from 8 P. M., on April 23rd to 1 A. M., of the 24th. While he was on duty at the outskirts of the crowd he heard a *Bania* called Pariomal complaining that one Khairo now accused No. 1 was trying to pick his pocket. Rewachand went to Pariomal's assistance. Khairo resisted but Rewachand pulled him out of the crowd. Khairo then called out for help and one Sajan Khaskheli incited a band of some 15 men to rescue Khairo. They were armed with *lathis* and they beat Rewachand senseless. While he lay senseless, he was robbed of his money and his watch. Ghazi Khan who was then on duty with Rewachand left him on the ground and went direct to Natho Khan to whom he made a report that very evening. Natho Khan took down the statement and sent by Rasulbux to the Sub-Inspector Sakrand. He then went to the scene himself, found Rewachand lying there unconscious and took him to his lodging. Next morning he recorded his statement and learnt from him nine names. Then he sent Rewachand to the Sakrand Hospital. He was treated there by Mr. Udharam the Medical Officer who found no less than 24 contusions on his head and body and stated that Rewachand was in bodily pain up to the 5th of May 1923. He was not able to discharge his ordinary duties up to the 16th of May and that he was only discharged cured on the 17th of May 1923.

In the meantime Natho Khan on the 24th tried to secure the nine persons whose names Rewachand had given to him. But he could not do so on the 24th and did not secure them until the 25th. Natho Khan held an identification test on the 25th and Ghazi Khan in addition to those whose names had already been given picked out Valu, Khudabux and Rasulbux. Moundal Khan then was able to pick out Valu, Muradali and Rasulbux. There were some doubts in the Sub-Inspector's mind, however, as to what offences the accused persons had committed. He referred the matter to the District Superintendent of Police who ordered the prosecution of the accused under s. 333 of the Indian Penal Code. Eventually they were committed for trial by Mr. Hussienbux, the First Class Magistrate of Nawabshah, to take their trial before the Additional Sessions Judge of Hyderabad on charges framed under ss. 333 and 147 of the Indian Penal Code. The learned Sessions Judge found the accused guilty

of riot under s. 147, and grievous hurt under s. 333 of the Indian Penal Code. He sentenced all the accused to six months' rigorous imprisonment under s. 147, sentenced accused Nos. 1 and 2 to three years' rigorous imprisonment under s. 333 and the remaining accused to 18 months' rigorous imprisonment under s. 333. He further directed that the sentences awarded should run concurrently.

Against these convictions and sentences the accused have appealed and the case has been argued before us in great detail by Mr. Lobo.

The learned Pleader for the defence has relied upon an alleged enmity between a certain Chandumal, a *Bania*, villager and the accused and the origin of the enmity is somewhat complicated. Dayal who is a cousin of Chandumal prosecuted accused No. 5 and in this case accused No. 2 was a defence witness. Then Nebhumal who is a cousin of Chandumal prosecuted Pamal Khan who is a relative of Khairo accused No. 1. Kessumal the brother of Chandumal gave evidence for the prosecution. Then a Jawali woman named Duri had a criminal case against Mangomal and Dayaram, the uncle of Mangomal is a partner of Dayal who is a cousin of Chandumal and Mangomal is connected with Rachumal because Rachumal's brother Bulomal was a partner with Mangomal.

The accused can be divided in three groups, all of whom are in some way or the other at enmity with Chandumal. The learned Pleader's allegation is that owing to the enmity Chandumal has organized this case against all the accused. In our opinion that is mere surmise. In none of the incidents has Chandumal himself taken any active part and it seems unlikely that because cousins of his have quarrelled with some of the villagers that he should organize a gigantic conspiracy to have all the groups at one time sent to Jail.' But whatever we may think of the learned Pleader's suggestion it seems to us to be directly negatived by the evidence given by the Police. The learned Pleader for the defence is unable to assign any motive for the action of the Police beyond the fact that they were Policemen and as members of that body the Court should assume that they gave evidence against the accused just in order to do evil for evil's sake. I would formally protest against allegations of this character. It is unfortunately the case that in every trial over which I have presided nearly 30 years, charges of this character have been made against the Police. I will now take the opportunity to state publicly that it is only in the rarest instances that I have found any basis for these allegations and that in my view the Police are a hard-working loyal and thoroughly trustworthy body of men who are entitled to all the support which Judges and Magistrates can give them. We, therefore, are of the opinion that the insinuations made against Rewachand and the other Police witnesses in this case are utterly baseless and that they are entitled to the same measure of belief which a Court would give ordinarily to witnesses of a similar standing.

Now, I think it may be taken as a general principle that when a man is attacked and very severely beaten his desire is not to get persons other than his assailants convicted. It is against those that he naturally has a grudge and it is those whom he wishes to be punished. Rewachand could, therefore, naturally be anxious to get his real assailants punished and not persons against whom Chandumal might or might not have a quarrel. Directly he came to his sense on the morning of the assault he mentioned the names of all the nine accused every one of whom he knew before. Nor was his acquaintance with them unlikely because he had been for some two years a Head Constable in the neighbourhood. We, therefore, start with the fact that Rewachand identified at the very earliest possible moment all the nine accused persons as his assailants. The very night of the commission of the offence Ghazi Khan went to Natho Khan and mentioned the names of Khairo accused No. 1, Saleh accused No. 4, Sajan accused No. 2 whom he also knew before. At the identification test Ghazi Khan further picked out three persons Valu accused No. 5, Khudabux accused No. 6 and Rasulbux accused No. 8. At the same identification test Moundal Khan picked out Valu accused No. 5, Rasulubux accused No. 8 and Muradali accused No. 3. Sometime was expended by the learned Pleader in trying to discredit the identification test. But on this point we can do no better than justify our opinion of the genuine character of the identification by referring to the words of the learned Sessions Judge. He has stated that the identification test was according to the positive evidence of the Mashir Khan

Mahomed, carried out with due attention. Khan Mahomed was a respectable *zemindar* a stranger to Khuma Lima and to the rivalries and animosities of the place. His evidence was, therefore, in the opinion of the learned Sessions Judge and in our opinion independent and credible. We thus have the evidence of Rewachand as to the identity of the accused corroborated by two other entirely independent persons Ghazi Khan and Moundal Khan. Only one of these accused, namely No. 7 Moulabux, has not been identified by Ghazi Khan and Moundal Khan. But as Rewachand's evidence as regards the other accused has been corroborated by the other two Policemen on duty we think it a fair inference that he is correct as regards accused No. 7 as specially as accused No. 7's identity has been sworn to by the two *Bania* witnesses, Rochumal and Chandumal.

We thus are of the opinion that accused Nos. 1, 2 and 9 were among the assailants of Rewachand.

The learned Pleader has put forward some legal pleas on his client's behalf. They have received due and careful consideration from the learned Sessions Judge. Now, the first question which arises from the learned Pleader's arguments is whether the Head Constable Rewachand was at the time of assault in Police uniform. On that point we have Rewachand's own statement that he was wearing Police coat and Rewachand's statement has been confirmed by Natho Khan.

Another and more important contention is whether he was at the time of the assault on duty. Rewachand is, as I have already said, Head Constable of Mahrabpur and Mahrabpur is some little distance from Khadar which is outside Rewachand's jurisdiction. Mr. Lobo has contended that as Rewachand was outside his jurisdiction he could not be said on duty. Now under s. 32 of the District Police Act (IV of 1890) every Police Officer shall for all purposes of this Act be deemed to be always on duty in the area for which he is appointed or to which he is lawfully transferred and under Sch. B of s. 11 it is clear that the Police Officers of every grade are appointed to the entire district in which they have to serve. Thus for the purposes of the District Police Act under ss. 11 and 32 Rewachand was, in our opinion, on duty in all parts of the Nawabshah District. Now Rewachand was in Nawabshah District when he was attacked and beaten and although he was outside his own jurisdiction he was bound under s. 51 (*e*) to aid another Police Officer when called on by him or in case of need in the discharge of his duty, in such ways as would be lawful and reasonable on the part of the officer aided. It was also his duty under s. 53 to help him to keep order in the streets and at and within fairs and temples or any other place on public roads. He had been called upon by Natho Khan to assist him in the lawful purpose of keeping order at the fair in progress in Kumba Lima and had he refused to answer the call in such a case he would have been guilty of gross dereliction of duty. Our attention has been drawn to the case of *Emperor* v. *Madho* (1), where a Police Constable was assaulted while endeavouring to enforce an order passed by the District Magistrate which order had become obsolete. That case, however, is widely to be distinguished from the present one because the District Magistrate's order had ceased to be in force and it was no longer a lawful order and it was not the duty of the Constable to obey it. Therefore when the Police Officer was carrying out that order as their Lordships very properly remarked, he could not be said to be discharging his duty as a public servant. Here, however, Rewachand was discharging the duty laid upon him as a member of the Police force and any person who assaulted him in the manner in which he was assaulted was guilty of an offence under s. 333.

The last point which arises from the learned Pleader's arguments is whether there was a common intention so as to make the offence one under s. 147. On this point I think there can be no doubt that the evidence of the witnesses has established that when Rewachand was assaulted the accused Sajan called on a band of 14 or 15 persons to release Khairo and to beat the *jamadar*. The fact that subsequently the persons appealed to by Sajan beat Rewachand and rescued Khairo is conclusive to our minds that they were all acting with the common intention. They were all thus guilty of riot and also guilty of offence under s. 333.

The learned Pleader finally has made an appeal that the sentences are excessive. We regret that we are unable to agree

(1) 42 Ind. Cas. 917; 40 A. 28; 15 A. L. J. 813; 19 Cr. L. J. 5.

with him. In our opinion the offence committed by the accused in beating most violently and cruelly, a perfectly unoffending Head Constable was a crime of a grave character. If the learned Additional Sessions Judge's sentence errs at all it errs, in our opinion, on the side of leniency.

We confirm the convictions and sentences of the lower Court and dismiss their appeals.

K. S. D. *Appeals dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 702 OF 1924.
November 18, 1924.
Present:—Justice Sir Henry Scott-Smith, Kt., and Mr Justice Fforde.
KHEMAN—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 164, 533—Evidence Act (I of 1872), s. 80—Confession, recording of—Procedure—Memorandum, contents of—Certificate, defective—Statement of Magistrate recording confession, whether can cure defect.

A confession was recorded by a Magistrate and at the foot of the confession the Magistrate made the following note:—"The statement was written in my presence and hearing. It was read over to the accused and he admitted it to be correct. It contains a true and full account of the statement made by him." There was a note at the head of the confession that the accused was fully made to understand that he was not subject to any compulsion or coercion and that he was at liberty to make whatever statement he liked. The Magistrate who had recorded the confession was examined as a witness at the trial and stated that he had warned the accused that any statement made by him would be used as evidence against him. He also stated that he had put a definite question to the accused whether he was making the confession voluntarily and that the accused replied that he was making the confession of his own free will:

Held, that the certificate appended to the record of the confession did not comply with the provisions of s. 164 (3) of the Cr. P. C., but that the defect was cured by the statement made by the Magistrate who had recorded the confession and that the confession was consequently admissible in evidence. [p. 20, col. 1.]

Per *Scott-Smith, J.*—Though s. 164 of the Cr. P. C. lays down that no Magistrate shall record any such confession unless, upon questioning the person making it he has reason to believe that it was made voluntarily, yet it is nowhere laid down that the Magistrate shall record any note showing what question he has put to the person and how he has satisfied himself that the confession is being made voluntarily. At the same time it is advisable that a Magistrate recording a confession should record a memorandum showing that he has, by questioning the person making it, satisfied himself that the confession is being made voluntarily. [p. 21, col. 1.]

Per *Fforde, J.*—Section 164 of the Cr. P. C. is one of the exceptions to the main principle of evidence that a document recording a confession may not be given in evidence when the witness to the statement can be produced and can prove it by oral testimony. The section being an exception to the well-established rule of law and being applicable to criminal proceedings its provisions must also be complied with in the strictest possible manner. The essential requirements of the section are that the Magistrate who records the confession shall before doing so explain to the person making it that he is not bound to make any confession at all and that if he does so it may be used as evidence against him. And no Magistrate shall record any such confession unless upon questioning the person making it, he has reason to believe that he will make it voluntarily. The statement when duly reduced to writing, in compliance with these provisions, must contain at the foot of it a memorandum to the fact that the Magistrate has explained to the person making the confession that if he does so it may be used as evidence against him, that the Magistrate believes that the confession has been voluntarily made, that it was taken in his presence and hearing, was read over to the person making it and admitted by such person to be correct and that it contains a full and true account of the statement made by him. If the memorandum contains the proper note at the foot of it it shall be presumed that all necessary formalities purporting in the foot-note to have been performed have in fact been performed. Where, however, the memorandum is defective the defect may be cured by recording the statement of the Magistrate who recorded the confession and if such statement shows that the requirements of s. 164 of the Cr. P. C. were complied with the confession will be admissible in evidence. [p. 21, col. 2.]

Criminal appeal from an order of the Sessions Judge, Amritsar, dated the 1st August 1924.

Mr. *Nanwan Mal*, for the Appellant.

The Government Advocate, for the Opposite Party.

JUDGMENT.

Scott-Smith, J.—Kheman has been convicted by the Sessions Judge of Amritsar of the murder of Ram Sarup, a resident of the Reformatory Settlement, Amritsar, by cutting his throat with a razor on the 20th April 1924, and has been sentenced to death. He has appealed to this Court and has been represented at the hearing by a Vakil, and the case is also before us for confirmation of the sentence of death under s. 374 of the Cr. P. C.

On the 19th April 1924, that is, one day before the murder Ram Sarup was admitted into the hospital attached to the Reformatory sufferring from fever. On the afternoon of the 20th April Bhole (P. W. No. 22) and Natha (P. W. No. 23) visited him there, and his wife *Musammat* Bhagwati (P. W. No. 3) and the appellant Kheman were also there. After the departure of

Bhole and Natha the appellant sent *Musammat* Bhagwati away to return a dish (*parat*) which had been borrowed from the house of one Rup Ram. The appellant remained alone with the deceased and, according to the theory for the prosecution, murdered him by cutting his throat with a razor, after which he threw the razor over the outer wall in front of the hospital and washed his hands at a tap where he was seen by Jalal (P. W. No. 4). After this, according to the statement of *Musammat* Bhagwati, he met the latter returning to the hospital and told her that her husband had a pain in his chest and that she should fetch him some turmeric as a remedy. *Musammat* Bhagwati says she returned to her quarters, got some turmeric and pounded it. She then heard Misri (P. W. No. 6) shouting to her that her husband had been murdered.

The motive for the murder is said to have been (1) that the appellant wanted to start an intrigue with *Musammat* Bhagwati and in order to achieve his object committed the crime; and (2) that the deceased owed some money to the appellant which the latter had repeatedly demanded but the deceased had not paid. It is clearly proved by evidence on the record, and the appellant also admits this, that he used to live in the same house as Ram Sarup, but some months before the murder he left his house and resided in another, also in the Reformatory Settlement. *Musammat* Bhagwati has given evidence that the appellant gave her a powder by way of a love charm which she was to eat, that she told her husband of this and that the latter then turned the appellant out of his house. She has also stated, and there does not appear to be any reason to disbelieve her, that on the night of 19th April, when her husband was in the hospital, the appellant came and knocked at the door of her quarters, but she would not let him in. Her story about the powder is corroborated by Bhole (P. W. No. 22) who states that two months before the death of Ram Sarup his wife showed him a powder saying that it had been given to her by Kheman in order that she might eat it, and that she told this story to her husband and the members of the brotherhood and on this account Ram Sarup turned Kheman out of his house. The appellant has admitted even in the Sessions Court that when he and *Musammat* Bhagwati were sitting with Kheman on the evening of the day of the murder he sent her away to return the *parat* to Rup Ram, but he states that he followed her at a few paces distance. The statement of *Musammat* Bhagwati that after returning ths *parat* she powdered up turmeric for her husband is borne out by the statement of Umrao (P. W. No. 20) recorded by the Committing Magistrate. He stated that *Musammat* Bhagwati came and asked him to give her some tumeric, that he gave her some which she began to grind and that she was still grinding it when Misri came running, saying that Ram Sarup was lying senseless and bleeding. He and others then ran to the dispensary and discovered that Ram Sarup was dead.

On the 22nd April Sardar Hari Singh, Deputy Commissioner, Criminal Tribes, came to the Reformatory and ordered that a search should be made for the lethal weapon A search was accordingly made and a razor (Ex. P. No. 4) was found on the other side of the outer wall, which is near the hospital and some 60 feet from it. This razor was subsequently found by the Imperial Serologist to be stained with human blood and was identified as the property of the appellant. The evidence of P. W. No. 18, Sub Inspector Zulfiquar Khan, shows that the appellant gave information which led to the discovery of the person from whom he had purchased this razor for Re. 0-5-0. The appellant told the Investigating Police that he had purchased the razor from a barber outside the Ram Bagh Gate of Amritsar City. He took the party there where four or five barbers were sitting, and the appellant said that the barber from whom he had purchased the razor was not one of them. Inquiry showed that there was another barber who used to sit there and whose name was Muhammad Sharif, and when the latter came up the appellant at once identified him as the person from whom he had purchased the razor. Muhammad Sharif has given evidence in support of this, and there is other evidence also, detailed by the learned Sessions Judge of persons who identified the razor as belonging to the appellant. It has a red handle and some moon-shaped marks on the blade, which the Judge says could be easily identified. I do not see any reason at all to disbelieve this evidence, and I consider it to be clearly proved that the razor found within some 70 feet of the scene of the murder belongs to the appellant. The murderer could easily have

thrown it over the wall to the place where it was found two days after the murder.

Finally, we have the accused's confession which was recorded by Bawa Sampuran Singh, Magistrate, First Class, and Superintendent of the Reformatory on the 23rd April. He states that Chaudhri Devi Dial, Assistant Superintendent, told him that the appellant was confessing, and he, therefore, recorded his statement. Chaudhri Devi Dial has also in his evidence stated that the appellant confessed the murder before him, but he was not asked as to the actual words used by the appellant, and his evidence on the point is, therefore, not of much use. Objection has been taken to the confession both in the Court below and before us on the ground that it has not been recorded in accordance with the provisions of s. 164 of the Cr. P. C. The learned Sessions Judge has pointed out certain irregularities which were committed by the Magistrate, but he examined Bawa Sampuran Singh as a witness, and held that any defects in the recorded confession have been cured under the provisions of s. 533 of the Code. Section 164 (3) of the Code lays down that a Magistrate shall, before recording any such confession, (1) explain to the person making it that he is not bound to make a confession; (2) that, if he does so, it may be used as evidence against him; and (3) that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. It is also laid down that after he has recorded any confession he shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession, and that if he does so, any confession he may make may be used as evidence against him, and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate."

Now in the present case the certificate at the foot of the confession is merely as follows:—

"The statement was written in my presence and hearing. It was read over to the accused, and he admitted it to be correct. It contains a true and full account of the statement made by him."

The rest of the certificate as provided for in s. 164 does not appear on the record.

The first question is whether the appellant was given to understand by the Magistrate that he was not bound to make a confession. In regard to this, there is a note at the head of the confession that Kheman, accused, was fully made to understand that he was not subject to any compulsion or coercion, and that he was at liberty to make whatever statement he liked. In his statement also at page 11 of the record the Magistrate states "I explained to the accused that he was not under any compulsion, and that he was at liberty to make whatever statement he liked." In my opinion this undoubtedly means that it was explained to the accused that he was not under any complusion to make any particular statement and that he could make any statement which he liked. I have no doubt that Kheman fully understood that he was not bound to make any confession unless he liked. As to the second point whether he was told that if he made it it might be used as evidence against him, the Magistrate in reply to a question put in cross-examination stated (see page 11, line 25, of the record): "I did warn the accused, however, that the statement recorded by me would be used as evidence against him." I consider that the second provision laid down in s. 164 (3) and referred to above has been fully complied with. The next point is whether, prior to recording the confession, the Magistrate satisfied himself that Kheman was making it voluntarily. In this connection the Magistrate stated (see page 11, line 4): "I did put a definite question to the accused whether he was voluntarily making the confession before me and he did reply that he was making the confession of his own free will. It is an omission that I did not put the question and his answer in my note, or in his statement. I fully believe that the confession was quite voluntary, though my this belief also is not recorded in my note below the statement." In my opinion this is quite sufficient to show that the Magistrate did satisfy himself as is required by s. 164 (3) that the confession was being made voluntarily. I, therefore, agree with the

learned Sessions Judge that the defects in the recorded confession have been cured by the statement made by the Magistrate in Court and would hold accordingly that it is admissible in evidence. I wish to point out here that, though this section lays down that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, still it is nowhere laid down that the Magistrate shall record any note showing what questions he has put to the person and how he has satisfied himself that the confession is made voluntarily. At the same time I am of opinion that it is advisable that the Magistrate should always record a memorandum showing that he has by questioning the person making it satisfied himself that the confession is made voluntarily. As Bawa Sampuran Singh is himself the Superintendent of the Reformatory it was thought advisable that Kheman's confession should be recorded by an independent Magistrate, and he was, therefore, sent to Bawa Jhanda Singh, Magistrate, First Class, Amritsar, who recorded another statement of the appellant on the same day. In this the appellant retracted the confession which he had previously made. Under these circumstances I do not think that it would be safe to convict the appellant of the murder of Ram Sarup if the confession stood alone, but, as the evidence detailed above, shows it has been corroborated in material particulars. The corroborative evidence will be found well-summarised under six heads in the judgment of the learned Sessions Judge on page 34 of the printed record. Even leaving the confession altogether out of consideration the circumstantial evidence seems to me to point very strongly to the fact that the appellant committed the murder but reading it along with the confession I do not think that there can be any doubt whatever that the appellant did commit the murder. The assessors were unanimously of opinion that his guilt was fully proved, and I have no hesitation in agreeing with them.

I would, therefore, dismiss the appeal and confirm the sentence of death.

Fforde, J.—I agree. The question whether or not the document recording the confession may be admitted in evidence is one of supreme importance. The oral evidence is corroborative of the story as recorded in the written confession, but I agree that such evidence would hardly be sufficient in itself to establish a conviction in the present case.

Section 164 of the Cr. P. C. is one of the exceptions to the main principle of evidence that a document recording a confession may not be given in evidence when the witness to the statement can be produced and can prove it by oral testimony. Section 164 being an exception to the well-established rule of law, and applying as it does to criminal proceedings, its provisions must always be complied with in the strictest possible manner. The essential requirements of the section are that the Magistrate who records the confession shall before doing so explain to the person making it—

(1) that he is not bound to make any confession at all; and

(2) that, if he does so, it may be used as evidence against him.

And no Magistrate shall record any such confession, unless upon questioning the person making it, he has reason to believe that he will make it voluntarily. The document when duly reduced to writing in compliance with these provisions must contain at the foot of it a memorandum to the effect that the Magistrate has explained to the person making the confession that if he does so, it may be used as evidence against him, that the Magistrate believes that the confession has been voluntarily made, that it was taken in his presence and hearing, was read over to the person making it and admitted by such person to be correct and that it contains a full and true account of the statement made by him. These provisions, which appear in the section as amended by Act XVIII of 1923, are somewhat fuller than the section as it originally stood. The original section only required that the Magistrate upon questioning the maker of a confession should be satisfied that it was made voluntarily. The memorandum, which was to be appended to the statement, merely required to be to the effect that the confession was voluntarily made, that it was taken in the presence and hearing of the Magistrate, was read over to the person making it and admitted by him to be correct and that it contained a full and true account of the statement made by him.

It will be observed, therefore, that there are two new provisions in the amended

section, *viz.*, that the person making it must be warned that he need not make any confession at all, and that, if he does so, such confession may be used as evidence against him.

If the memorandum contains the proper note at the foot of it, it shall be presumed that all necessary formalities purporting in the foot-note to have been performed have in fact been performed. This presumption of correctness arises under s. 80 of the Indian Evidence Act. Were there no other statutory provision qualifying s. 164 it is clear that a confession recorded under its provisions could not be admissible in law without the foot-note which has been referred to. Section 533, however, provides that where a confession or other statement under s. 164 or 364 has been tendered or received in evidence, and any of the provisions of either of these sections have not been complied with by the Magistrate recording the statement, the Court shall take evidence that the statement was duly recorded, and upon such evidence it shall be admitted if the error has not injured the accused as to his defence on the merits. The words in s. 533 "duly made the statement recorded" must mean that the statement was made in accordance with and subject to the provisions of s. 164, otherwise it could not be held to be "duly made."

In the present case the foot-note to the recorded confession complies with the provisions of s. 164 before it was amended by the Act of 1923. The Magistrate apparently was not aware that this section had been amended and consequently acted in ignorance of the new provisions which had been added. The Magistrate, however, under the provisions of s. 533 was duly called as a witness and examined, and his evidence shows that he did in fact comply with the provisions which are now enacted in the amended section. That being so I have no doubt that the document in which the confession is recorded was properly admitted in evidence.

I am satisfied that the offence for which the appellant has been convicted has been established beyond any possibility of doubt.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1039 OF 1924.

February 24, 1925.

Present:—Mr. Justice Fforde and Justice Sir Henry Scott-Smith, KT.

Bawa SARUP SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Law Amendment Act (XIV of 1908), s. 17 (2)—Managing or taking part in meeting of unlawful association—Evidence Act (I of 1872), ss. 35, 65, 67, 81—Newspapers, contents of, admissibility of—Attendance register of association, proof of—Local Gazette, genuineness of—Presumption.

To substantiate a charge under sub-s. (2) of s. 17 of the Criminal Law Amendment Act it is necessary to prove that the association in question was an unlawful one and that the accused managed or assisted in its management, or promoted or assisted in promoting a meeting of the association, or of any of its members as such members. [p. 23, col. 1.]

The genuineness of a Local Gazette must be presumed under the provisions of s. 81 of the Evidence Act. [p. 23, col. 2.]

A newspaper cannot be admitted in evidence without formal proof of the fact that it is what it alleges to be. [p. 26, col. 1.]

A mere production of a newspaper is no proof of the truth of its contents. A statement contained in a newspaper unless specifically proved as having been made by a particular person can only be treated as an anonymous statement and merely hearsay and consequently inadmissible in evidence. [p. 25, col. 2; p. 26, col. 1.]

Where a register alleged to belong to a particular association is produced in order to prove that certain members of the association took part in a meeting of the association and put their signatures on the register in token of attendance it must be proved by oral testimony that the register was in fact a register of attendance kept for the purpose of recording the names of the persons who were present at a meeting on the date appearing over their names and it must further be shown that the signatures were in fact those of the persons whose names so appeared. This may be done by producing the writers themselves or by producing some person who actually saw the signatures being written or a person who is acquainted with the handwriting of the writers or by comparing the handwriting of the signature with any writing proved to the satisfaction of the Court to be genuine. [p. 26, col. 2.]

Criminal revision from an order of the Sessions Judge, Amritsar.

Messrs. *B. R. Puri* and *H. D. Bhalla*, for the Petitioner.

Mr. *Sleem*, for the Opposite Party.

JUDGMENT.

Fforde, J.—The petitioners, Sarup Singh, Jagat Singh, Raja Singh and Mehtab Singh have been convicted by a Magistrate invested with First Class powers of an offence under s. 17 (2) of the Criminal Law Amendment Act, 1908, and have each been sentenced to two years' rigorous imprisonment together with a fine of Rs. 500.

The petitioners appealed to the Sessions Judge of Amritsar, who dismissed their appeals. They now apply to this Court under s. 439, Cr. P. C., for revision of the decision of the Appellate Court on the ground, mainly, that there was no legal evidence before the Court to warrant a conviction. The charge upon which they were tried runs as follows:—

"That you on the 7th day of January 1924 at Amritsar being members attended a meeting of the General Committee of the Shiromani Gurdawara Parbandhak Committee held at *Akal Takht* and passed resolutions embodied in Ex. P. D. which resolutions amount to an act of management of the said Shiromani Gurdawara Parbandhak Committee which has been duly declared an unlawful association by Punjab Government Notification No. 23772, dated the 12th October 1923, and thereby committed an offence punishable under s. 17 (2) of Act XIV of 1908, Criminal Law Amendment Act.

Section 17 (2) of Criminal Law Amendment Act enacts that:—

"Whoever, manages or assists in the management of an unlawful association, or promotes or assits in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."

To substantiate a charge under this subsection it is necessary to prove, (1) that the association in question was an unlawful one, (2) that the petitioners managed or assisted in its management, or (3) promoted or assisted in promoting a meeting of the association or of any its members as such members.

In the present case the prosecution had to prove (1) that the petitioners attended a meeting of the General Committee of that Shiromani Gurdwara Parbandhak Committee and (2) at that meeting passed certain resolutions which are set out in a document referred to in the charge as Ex P. D. It was also necessary, of course, to prove that the Shiromani Gurdwara Parbandhak Committee had been duly declared to be an unlawful association.

The first point taken by Mr. Puri for the petitioners is that it has not been proved that the association was in fact an unlawful one. This contention is clearly untenable. Section 16 of the Criminal Law Amendment Act, 1908, as amended by the Devolution Act, 1920 provides that if the Local Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Local Government may, by Notification in the Official Gazette, declare such association to be unlawful. The Local Gazette, namely, the *Punjab Gazette* of October 12th, 1923, has been produced before us. Notification No. 23772 of this Gazette declares that the Governor of the Punjab in Council by virtue of the powers conferred upon him by s. 16 of the Criminal Law Amendment Act, 1908, as amended by the Devolution Act, 1920, is pleased to declare the Shiromani Gurdwara Parbandhak Committee to be an unlawful association. Under the provisions of s. 81 of the Indian Evidence Act the genuineness of this Gazette must be presumed. Mr. Puri was driven to arguing that the Gazette is not evidence merely because it was not formally tendered at the trial. It is clear, however, that it was produced before the lower Appellate Court, and even if it is shown that this document was not formally tendered in evidence, it is now before us and we must accept it as proof that the Shiromani Gurdwara Parbandhak Committee is an unlawful association.

Mr. Puri's substantial argument is that there is no legal evidence that any one of the petitioners took any part in managing or assisting in the management of the association or promoted or assisted in promoting its meeting.

The Crown case is that a general meeting of the association was held on the 7th January 1924 at Amritsar in a part of the Golden Temple known as the *Akal Takht*, that the petitioners amongst other persons were present and that they there took part in passing certain resolutions which resolutions amount to acts of management of the association or a promotion of its meetings within the meaning of s. 17 (2) of the Act of 1908. The Crown do not rely upon any act of management of the association or promotion of its meetings, other than is supplied by the incidents alleged to have occurred on the occasion of the meeting of the 7th January. Mr. Puri has argued that there is no evidence that any meeting of the association took

place. If, however, it has not been proved that the petitioners were present at the meeting in question, it is immaterial so far as this petition is concerned, whether or not the assembly in question constituted a meeting of the association, or whether or not the resolution in question was passed at that meeting. I will, therefore, consider whether it has been proved that the petitioners were present at this meeting.

I will state shortly what the prosecution allege took place at the Golden Temple on the occasion in question. This information is supplied by two witnesses, namely, Sh. Ghulam Hussain, Additional District Magistrate of Amritsar, and Khan Karam Khan, Deputy Superintendent of Police, Amritsar. Sh. Gulam Hussain says that in pursuance of instructions he went to the Golden Temple at about 2-15 P. M. on the 7th of January accompanied by certain Police Officials and Magistrates. On attempting to enter the Temple they were resisted by a very large mob of persons who were gathered in the neighbourhood. A certain number of Akalis, whom this witness took to be the leaders of the mob, requested that the Police should be withdrawn from the steps of the Temple. This was done. Some conversation then seems to have taken place between the Akali leaders and the authorities who were present. While this was taking place, S. Jodh Singh, a member of the Legislative Council, appeared on the scene and seems to have offered his assistance as an intermediary. As the result of some conversation between this gentleman and the authorities a typed list of names was given to the former. S. Jodh Singh then retired with this list to an upper storey room in the *Akal Takht*. After a while a note was sent up by the witness asking him how long he would take to which S. Jodh Singh replied "I have just finished calling attendance. They are all coming down. I am simply checking the list." The witness then sent two more notes up to S. Jodh Singh to which, however, he did not reply. The witness then accompanied by other Officials proceeded to the Clock Tower near by. At about 7 P. M. a number of persons alleged to have come out of the Golden Temple arrived at the Clock Tower. As there was a very large crowd of spectators at this place, the Officials moved on to the *kotwali* where a number of persons presently appeared and surrendered themselves to the Police.

The evidence of Khan Karam Khan is to much the same effect. He added, however, that "before the Police Authorities were driven out of the Golden Temple, a *Dewan* was held and some of the accused came down from the meeting and made speeches". But in the next sentence he adds "I cannot identify the accused who made the speech as there was a great rush."

There is nothing in the evidence of either of these two witnesses to show that the petitioners were amongst the persons who were in the *Akal Takht*, or anywhere in its vicinity. All we have is that they together with a number of other persons surrendered themselves to the Police at about 7 or-7-30 on the evening of that day. S. Jodh Singh, who was called as a witness for the prosecution, and who was the only person who had an opportunity of identifying those who were present at the meeting which was alleged to be taking place in the *Akal Takht* was not able to assist the prosecution. He says that on arriving at the scene some time after midday, he saw thousands of people present and a row of Police on the broad steps leading from the *Thara Sahib* side to the *Akal Takht*. On arrival he was taken to see the Superintendent of Police with whom were standing the Deputy Commissioner and an Officer of the C. I. D. After some discussion with these persons this witness was given a list containing a number of names and was told "to communicate it to those sitting in the upper storey of the *Akal Takht*." The witness went to the storey indicated and on arriving there found lots of persons sitting, some looking out on to the scene which was taking place below, while others were standing in groups and some others sitting on the floor The witness then adds "I cannot say if all the accused were in the upper storey. I am positive that S. Nirmal Singh was there because I had a talk with him. As to the others I cannot say whether they were there or not. The list that was handed over to me was tick marked, and the names tick marked by a red pencil by S. Sant Singh, D. S. P. were read out. A list was then handed over to me by one of those present in that storey. I cannot re-call his name to my memory. Probably I might be able to recognise him. I cannot say positively whether Ex.

P. G. is the same list because it is not in my handwriting and it remained with me for two minutes. I handed over that list to one of the Officers present. The list tick marked was also returned. The list given to me was of the persons who the man giving me the list said, would offer themselves for arrest. I was told to communicate this fact to the Police. My sentence in red pencil on Ex. P. F. that "I have just finished calling attendance" means that I had just finished reading out names from the tick marked list handed over to me by the Police. At first a list was prepared in Gurmukhi and the names of that list were compared with the tick marked list given to me by the Police. This is on this account that I said in my reply on P. F. that I am simply checking. This was done on the uppermost roof. The list handed over to me was in Urdu." The witness was then asked if he knew any of the accused personally, upon which he gave the names of 22 persons whom he said he knew personally. He then added "Except S. Nirmal Singh I am not positive at present whether any of the men named above were or were not present at the *Akal Takht*," and he concludes by stating that "without reference to the records of the Shiromani Gurdwara Parbandhak Committee, I cannot say which of the accused named above were or were not members of that association.

There is nothing in the evidence of this witness to show that any one of the four petitioners was present at the *Akal Takht* on the occasion in question. All we have is that their names appeared on a list of suspects which was drawn up by the Police. This list of course, is not evidence against the persons whose names are therein contained and cannot possibly be tendered in evidence. We have a corresponding list made in Urdu. There is no evidence as to who prepared this list, how it came to be prepared, whether it was a mere copy in Urdu of the list supplied by the Police, or what in fact it purported to be. This document, again cannot be given in evidence. The person who wrote it has not been called to prove it and it merely stands as an unidentified scrap of paper.

It is clear from the oral evidence that the learned Sessions Judge is right when he says that no eye-witness has proved that the petitioners were present at the meeting. He, however, considers that their presence at the meeting and their participation in its management has been established by certain documents. Amongst the documents relied upon are the lists I have already referred to. These lists, as have already stated, are not admissible in evidence and if they are admissible, they prove nothing beyond the fact that the Police expected to find the petitioners amongst those persons.

The next piece of documentary evidence which the learned Sessions Judge relies on as furnishing evidence against the petitioners are the documents referred to as Exs. P. N., P. N. 1, P. N. 2, and P. N. 3. Exhibit P. N. is a copy of the newspaper known as *Akali-te-Pardesi*, dated the 22nd of July 1923, published in Gurmukhi. A paragraph in this paper contains the names of some of the persons who were re-elected as members of the Shiromani Gurdawara Parbandhak Committee, but the names of the petitioners do not appear amongst this list. Exhibit P. N. 1 is an issue of the 23rd of July 1923 of the same newspaper and contains the names of those persons not published in the issue of the 22nd of July, who were re-elected as members of the Shiromani Gurdwara Parbandhak Committee. The names of the three petitioners, namely, Raja Singh, Jagat Singh and Mahtab Singh are set out in this list. Exhibit P. N. 2 is an issue of the same paper of the 29th of July 1923. It publishes the names of those persons who were nominated as members of the new Shiromani Gurdwara Parbandhak Committee, and in this list appears the name of one petitioner only, namely, that of Bawa Sarup Singh. It also contains a statement that a meeting of the General Committee will take place on the 5th of August 1923 at the *Akal Takht* and it invites the members to come there. Exhibit P. N. 3, an issue of the 1st of August of this newspaper, publishes an additional list of those persons who were returned as members of the Shiromani Gurdwara Parbandhak Committee. The petitioner's names do not appear in this list.

The first objection to these newspapers is that no person has been produced to formally prove them to be what they are alleged to be. Secondly—I need hardly point out—a mere production of a newspaper is no proof of the truth of its contents. The Sessions Judge, however, has relied upon those documents as establishing the pre-

sence of the petitioners at the meeting of the 7th January 1924. He refers to these newspapers as follows:—"That they (the petitioners and others) are all members of the Shiromani Gurdwara Parbandhak Committee is proved by their names having been published in Exs. P. N., P. N. 1, P. N. 2, and P. N. 3". Apart from the fact that this is not a correct statement inasmuch as the first newspaper does not contain the names of any of the petitioners, the second newspaper contains the names of three only, the third newspaper contains the name of Bawa Sarup Singh alone, and the fourth newspaper makes no mention of the petitioners' names at all it should be obvious that even if the newspapers referred to are admissible in evidence without formal proof the paper itself is not proof of its contents. It would merely amount to an anonymous statement that the petitioners have been elected members of the Shiromani Gurdwara Parbandhak Committee. This type of hearsay evidence is obviously inadmissible in a Court of Law, and it should not have been necessary to point out that such evidence is legally inadmissible.

The document principally relied upon by the learned Sessions Judge for establishing the presence of the petitioners at the meeting is what he describes as "the register kept in course of business by the Shiromani Gurdwara Parbandhak Committee." This appears to be a book in which names of persons are set out under various dates. The page of the book which is relied upon in the present case contains a list of names amongst which the petitioners' names are included. This book was discovered by the Police in the office of the Shiromani Gurdwara Parbandhak Committee, at a search made on the 19th of January. No person has been produced to prove what this book is, still less that it is register kept in the ordinary course of the business of the Shiromani Gurdwara Parbandhak Committee. There is no evidence as to who wrote down the names which appear on the page in question. It is suggested that the names or signatures were written out by the persons themselves under the date which appears at the heading of the paper. But no witness has been produced to identify these signatures The learned Sesssions Judge has considered that the mere fact that a person's name appears on such a document is proof that he signed it. It is obvious that when this register was produced it was necessary to show by oral testimony that it was in fact a register of attendance kept for the purpose of recording the names of the persons who were present at a meeting on the date appearing over their names. The next essential step was to show that the signatures were in fact those of the persons whose names so appeared. This is done in most cases by producing the writer himself, but as in the present case the writers were the accused persons and could not give evidence some persons ought to have been produced who actually saw the signatures being written, or a person who was acquainted with their handwriting to prove those signatures or they could have been proved by comparing the handwriting of the signatures in question with any writing proved to the satisfaction of the Judge to be genuine. As no witness, whatsoever was called to testify to this document in any way whatsoever, it is obvious that these essential requirements were not attempted to be fulfilled. The document accordingly is not admissible in evidence in the absence of oral proof of its nature and authorship, and even if it were admitted it does not prove the presence of the petitioners at the meeting in the absence of proof of the identity of their signatures.

These are the documents which the Sessions Judge has relied upon in the absence of oral testimony to establish not only the fact of the petitioners being members of the Shiromani Gurdwara Parbandhak Committee, but also as proof of their presence at the meeting in question.

As it is obvious that there is no legal proof that the petitioners were in fact present at the meeting in question it is not necessary to discuss at any length the other documentary evidence relied upon by the Sessions Judge as proving the meeting of the 7th January to have been a general meeting of the Shiromani Gurdwara Parbandhak Committee and the matters alleged to have been resolved at that meeting. The documents which the Sessions Judge has mainly relied upon for holding that a general meeting of the Committee did in fact take place on the 7th January are notices and paragraphs which appeared in the vernacular press. No oral evidence has been given as regards these newspapers and their mere production has

been held to be sufficient proof of the accuracy of their contents.

As an example of the frame of mind of the Sessions Judge towards hearsay evidence of a documentary nature, I may refer to the use which he has made of certain documents described as communiques Nos. 588 and 593. These documents were found in the office of the editor of the newspaper known as *Vakil*. Document No. 588 contain a description of the incidents which took place at the Golden Temple on the 7th January and contains a list of names of persons alleged to have been arrested on that occasion. The document No. 593 purports to be a record of certain resolutions passed by the General Committee of Shiromoni Gurdwara Parbandhak Committee, on the 7th of January. Both these documents bear a signature as follows:

"TARA SINGH"

"for General Secretary, Shiromani Gurdwara Parbandhak Committee."

The only oral testimony in respect of these documents is that of the editor of the newspaper *Vakil* who admits that these communiques are put in the letter box of the press in the night and that probably the communiques are taken out in the morning. He does not prove the genuineness of the signature to the documents nor does he in any way prove their authorships. Tara Singh who purports to have signed, has not been called as a witness and no evidence has been produced to prove his handwriting. The documents, therefore, are merely anonymous writings and could not by any conceivable rule of evidence be used in a Court of Law as a proof of the statements contained in them. The learned Sessions Judge says in his judgment: "Even if they are not primary evidence, the secondary evidence of these documents is admissible under ss. 65 A and 66 (6) of the Indian Evidence Act, as the original, if any, is in the possession of the Secretary who purports to have issued them and who is not traceable and so out of reach of the process of the Court. Efforts were made to trace S. Tara Singh who signed these communiques for General Secretary but he was not available and it cannot be disputed that the document itself is the best evidence of the contents of the document. It appears from this that the Sessions Judge assumes that the name of S. Tara Singh which appears at the foot of these communiques has been proved to be the authentic signature of the General Secretary of the Shiromani Gurdwara Parbandhak Committee. No oral evidence has been given to this effect beyond the statement of the Editor of the *Vakil* that Ex. P. D. (which are the communiques Nos. 590 to 593 inclusive) "also has the name of Tara Singh." It is obvious that it "has the name of Tara Singh," but that statement does not prove the identity of the signature. The Sessions Judge has treated these documents as though they were themselves facts in issue. Whereas they are not themselves facts in issue but are merely sought to be used as evidence to prove such facts. Section 65 of the Indian Evidence Act provides that secondary evidence may be given of the existence, condition or contents of a document in certain cases. But that section has no reference to the present case as mere secondary evidence of the documents has not been tendered. It is the document itself which is put in as secondary evidence of facts which have to be proved *aliundi*.

Section 66 of the Evidence Act merely deals with notice in cases where secondary evidence is sought to be given. It will serve no useful purpose to criticise in detail the remarkable views on the Law of Evidence expressed in the judgment of the Appellate Court. It suffices to say that not one scintilla of legal evidence has been produced to prove the presence of any one of the four petitioners at the meeting in question. It is obvious that the prosecution relied and had every reason to rely, upon necessary proof of the presence of the accused persons at the meeting being supplied by S. Jodh Singh. When this gentleman, however, appeared in the witness box he appears to have suffered from a very singular lapse of memory. It is quite clear that the Police authorities in order to avoid bloodshed availed themseves of the services of this gentleman to effect the arrest of persons suspected of taking a a leading part in the meeting at the *Akal Takht*. A certain number of persons did subsequently present themselves for arrest, but there is no evidence to show that the persons who offered themselves for arrest were those who were taking part at the alleged meeting. There is, moreover, no evidence to show what took place at that meeting owing to the failure of S. Jodh Singh to state in the witness-box matters necessary to establish the Crown case and the prosecution have had to fall back

upon documentary evidence. This documentary evidence, as I have pointed out, is not admissible, and even if it were admissible it does not prove the presence of any one of the petitioners at the meeting in question, or of any participation by them in the management of the association, or in the promotion of any of its meetings.

I am accordingly of opinion that the conviction cannot be sustained, and I would, therefore, set aside the conviction and sentence in respect of each of the four petitioners and acquit them. They should be discharged from their bail bonds.

Scott-Smith, J.—I concur in the above. The convictions and sentences are set aside, and the petitioners are discharged from their bail.

Z. K.

Convictions and sentences set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 134-B OF 1924.
December 12, 1924.
Present:—Mr. Kinkhede, A. J. C.
EMPEROR—COMPLAINANT
versus
SHRIBALLABH—ACCUSED.

Berar Municipal Law, ss. 98, 116, 178—Bye-laws requiring permission for building, whether ultra vires *—Test.*

Before a rule framed by a rule-making authority is declared *ultra vires* the Court must be satisfied not only that the authority had no power to act under the power under which it purported to act, but also that it had no power at all under any law to so act. [p. 29, col. 2.]

The bye-laws framed under s. 116 (1) of the Berar Municipal Act, requiring a person to obtain permission of the Municipality before commencing to build or re-build or enlarge any structure, and imposing a penalty for failure to obtain such permission, are not *ultra vires.* [*ibid.*]

Reference made by the Sessions Judge, Amraoti, against an order of the Magistrate, First Class, Amraoti, dated the 21st July 1924, in Criminal Case No. 43 of 1924.

Mr. *V. Bose*, for the Complainant.

Mr. *M. B. Niyogi*, for the Accused.

ORDER.—This is a Reference under s. 438 of the Cr. P. C. made by the Sessions Judge, East Berar, against a conviction made and sentence of fine passed for the commission of an offence against the Municipal Law and certain rules and bye-laws framed by the Amraoti Municipality, under the following circumstances.

One Shri Ballabh Badrinath Marwadi owns a bungalow in the Amraoti Camp Civil Station. Last year he had commenced collecting some building materials in the compound of his bungalow and was in consequence served with a notice dated 18th August 1923 (Ex. P-1) calling upon him not to build. It was a notice in very general terms. After service of such notice he applied for permission to build an *ota* and the permission was granted.

Presumably it is on this *ota* or *chabutra* which is close to the kitchen that the accused commenced to build or re-build or enlarge to some extent his kitchen without notice to the Municipal Committee, in the beginning of May last. The matter was reported to the Secretary, Municipal Committee, on 10th May 1924 by the sanitary *daroga*, and it appears that the work was commenced some time on or about the 4th or 5th of May. The work was, however, discontinued on 15th May 1924 as the accused learnt that even for re erection of a building the sanction of the Committee was necessary. The accused is thus said to have committed an offence under s. 98 of the new Municipal Act, and prosecution was, therefore, started against him on 5th July 1924, for an offence under the aforesaid section read with, bye-laws framed under s. 116 (1) (*j*) of the old Act. The Magistrate found the accused guilty of a technical breach of s. 98 and the bye-laws and fined him Rs 5. The matter went up to the Sessions Judge in revision and hence he has made this Reference.

Before this prosecution was started the accused having learnt that permission was necessary for the re-erection of the kitchen applied for it on 16th May 1924 and restarted it on 4th June 1924 after getting the said permission. The aforesaid breach, therefore, relates to the period intervening between 5th May 1925 and 15th May 1924. It must be stated here that according to the Secretary Municipal Committee's admission before the Magistrate the grant of sanction to re-build or enlarge the kitchen was "without condition". The Sessions Judge suggests that clause (3) of s. 98 does not include any provision on the authority of which the Committee may by bye-laws start any prosecution, or impose any fine for building without permission, and that s. 103 specifically provides for the proper action to be

taken if a building is begun without sanction as required by s. 98 (1) and gives to the Committee an option to call upon the person who has built without sanction to alter or demolish the building or instead of requiring the alteration or demolition to accept by way of composition such sum as it may deem reasonable. He, however, thinks that any bye-law for prosecution or for imposing a fine (in such a case) will not be for carrying out "the purpose of the Act" but would be *ultra vires*, and further that the Committee having given permission, the offence was clearly condoned and compounded for Rs. *nil*, and that the Committee, therefore, has no case for prosecution for building without sanction between 5th May, 1924 and 16th May 1924, even if such prosecution were permissible at all. He also thinks that in the absence of any specific provision for prosecution and fine in such cases, in Ch. XVIII which deals with offences, penalties and procedure, the case could not be brought within the purview of s. 199 as it does not provide for any prosecution for building without sanction, but provides for disobedience to notice or order or direction specifically given. In this case, there was no order or notice for demolition and no refusal to obey it, and consequently no disobedience within the meaning of the said section.

The question, therefore, reduces itself to this: what is the Committee's remedy against a person who does not give notice in writing of his intention to erect or re-erect any building as required by sub-s. (2), and erects or re-erects or commences to erect or re-erect the building without the sanction of the Committee which is necessary under sub-s. (1) of s. 98 of the new Act, and whether the man can be prosecuted for not having given the notice in the manner prescribed by bye-laws framed by the Committee in exercise of the power conferred under sub-s. (3) of the said section. Under s. 178 of the Act general provision is made regarding the making of bye-laws by the Committee and sub-s. (5) of that section clothes the Committee with authority while making any bye-law to direct that a breach thereof shall be punishable with fine which may extend to Rs. 50 and where the breach is a continuing breach with a further fine which may extend to Rs. 5 for every day after the first during which the breach is proved to have been persisted in. Section 179 lays down the matters as to which the bye-laws may be made, and it enables the Committee by clause (*a*) thereof to make bye-laws generally, for carrying out the purposes of the Act.

In this case the breach complained of is two fold :

(1) Breach of the substantive enactment *i. e.*, s. 98 sub-s. (1); and

(2) breach of the procedure contained in sub-s. (2) of the said section coupled with a breach of the bye-law made under sub-s. (3) thereof read with s. 179 (1) (*aa*) of the Act to enforce the procedure prescribed by it and thus to carry out the purpose of the Act.

Bearing this distinction in mind and considering the several provisions general and special in the nature of substantive and adjectival law in the Municipal Act and also in the shape of bye-laws, applicable to Berar, I think there is ample authority which justifies passing of the bye-laws in question.

The powers given under ss. 178 and 179 for making the bye-laws are very wide and general. Under law the Committee may make any bye-laws for carrying out *the purposes of the Act*. In the *Secretary of State for India* v. *Appa Rao* (1). Krishnan, J., has laid down the following test:—

"Before a rule framed by a rule-making authority is declared *ultra vires*, the Court must be satisfied not only that it had no power to act under the power under which it purported to act, but also that it had no power at all under any law to so act."

Applying this test to the bye-laws and to the penalties provided for their breach and for the breach if the substantive as also of the adjectival law, I think that the bye-laws herein made, cannot be called either unreasonable or made without authority or *ultra vires*, as the learned Sessions Judge thinks. Besides the prosecution in question was not for non-compliance with notice to demolish but for starting the building without giving the notice required by law.

It seems to me to be of the essence of s. 103 of the Municipal Act that a *reasonable sum* must be credited to the Municipal Fund, if there is any composition. There could, therefore, be no composition without payment or acceptance of a sum.

My thanks are due to the able Counsel who appeared before me, Sir B. K. Bose, Advocate and Mr. M. B. Niyogi, Pleader,

(1) 76 Ind. Cas. 212; 45 M. L. J. 156; (1924) A. I. R. (M.) 92; (1923) M. W. N. 450; 19 L. W. 536.

both of whom at my request very gladly agreed to argue the case *amicus curiae*.

Under the circumstances the conviction of the accused was not illegal in any way. The sentence of fine is, therefore, maintained. Let the records be sent back with a copy of this order.

G. R. D. *Record sent back.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 762 OF 1924.

January 7, 1925.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

KHEM SINGH AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 33—Deposition before Committing Magistrate—Witness disappearing at time of Sessions Trial—Transfer of deposition—Procedure.

Where a witness who has been examined before a Committing Magistrate has left the District at the time of the trial in the Sessions Court, his statement before the Committing Magistrate cannot be transferred to the Sessions file without taking evidence in proof of facts which would render the statement admissible within the provisions of s. 33 of the Evidence Act. [p. 31, col. 1.]

Criminal appeal from an order of the Sub-Judge, Amritsar, dated the 23rd August 1924.

Messrs. *Nand Lal* and *Edmund*, for Mr. *Saunders*, for the Appellants.

Mr. *Des Raj Swahney*, for the Opposite Party.

JUDGMENT.—Banta Singh, Khem Singh and Jawala Singh have been convicted by the Sessions Judge of Amritsar of the murder of Karam Singh on or about the 24th of December, 1923, and have been sentenced to death. Khem Singh and Banta Singh have filed a joint appeal through an Advocate and Jawala Singh appealed through the Superintendent of the Jail. Khem Singh has died in Jail subsequent to conviction and his appeal abates.

The main evidence in the case is that of Gauhra, P. W. No. 3, who was examined as an approver. The motive for the crime is said to have been that *Musammat* Guro, the married daughter of Khem Singh, whose *muklawa* had not yet taken place, had become pregnant by Karam Singh. In consequence of this, it is said that Khem Singh, Banta Singh, Jwala Singh and Gauhra conspired together to murder Karam Singh. With the exception of the evidence of Gauhra there is no evidence that *Musammat* Guro became pregnant by Karam Singh, Jiwan Singh witness states that she was pregnant but that he never heard that Karam Singh had been suspected of being the cause and *Masammat* Chandi P. W. No. 26, an aunt by marriage of *Musammat* Guro in whose house the girl died after the murder, definitely stated that she was not pregnant and that she died of fever. The learned Sessions Judge in his judgment at page 40 of the printed record states as follows :—" We also have evidence of Lalu and Jind Singh P. W. Nos. 7 and 9, Narain Singh P. W. No. 4, Jiwan Singh P. W. No. 12, and Bhoja P. W. No. 6, that the accused were seen with the deceased on the last day of his life. This is an entire mis statement as regards all of the persons mentioned with the exception of Jiwan Singh, Narain Singh, so far from saying that he saw any of the accused with the deceased on the evening of the 24th of December, stated that he saw Karam Singh for the last time at the *sath* of the village Rattoki at evening time, there were many people sitting there, but neither the approver nor any of the accused was there with the deceased. Karam Singh left the *sath* unaccompanied by any one else, and the witness did not know what happened to him afterwards. All that Lalu and Jind Singh witnesses stated was that Karam Singh came to the *sath* looking for Gauhra, but they did not mention that they saw him in the company of Banta Singh; nor did Bhoja make any such statement. Jiwan Singh, the uncle of the deceased, who has married the deceased's mother, stated that in the month of *Poh*, one evening he was in his house and Karam Singh was giving fodder to his cattle, when Banta Singh came and called him away. Karam Singh did not return to his house after that. This evidence conflicts with that of the approver who states that on the evening preceding the murder both Jiwan Singh and the mother of the deceased were absent from the village. *Musammat* Basant Kaur, the widow of Karam Singh, also stated in the Committing Magistrate's Court that Banta Singh

had come to her house at sunset and taken Karam Singh away with him. This witness was not examined in the Sessions Court and her evidence taken by the Committing Magistrate was improperly admitted at the trial. The Sessions Judge's order in regard to her evidence is :—"The statement of this witness before the Committing Magistrate is read over and transferred to the Sessions' file, as she is absent and has left the District." No evidence was taken by the Sessions Judge in order to render her evidence admissible within the provisions of s. 33 of the Evidence Act.

The only other evidence relied upon by the learned Public Prosecutor in this Court is that of Harnam Singh, P. W. No. 10, who states that at evening time in the month of *Poh* when he was at his field he saw Karam Singh, Banta Singh and Gauhra coming from Rattoki village and going towards Pakhopura. Some 20 or 22 days later Karam Singh's dead body was recovered from a well in the neighbourhood. It does not appear from his evidence at what distance from the *takia*, where the murder is said to have been committed, he met these persons. It appears to us to be doubtful whether his evidence can be considered to be a material corroboration of the approver's statement that Banta Singh took part in the murder. In any case *Wajtakkar* evidence of this sort is very easily procured, and we do not think it would be safe to put very much reliance upon it. As regards Jawala Singh appellant there is absolutely no corroboration of any sort whatever of the statement of the approver connecting him with the murder.

The learned Sessions Judge has relied upon the evidence of Rahmat Ullah, Head Constable, P. W. No. 15, as a corroboration of the approver's evidence of motive. His evidence, however, is entirely hearsay on this point, and the learned Public Prosecutor has not referred to it in his arguments before us. To sum up then, the only corroboration of any sort that we have as against Banta Singh is the evidence of Harnam Singh, and for reasons already stated we do not consider that it is sufficient even if it be held to be reliable.

We, therefore, accept the appeals, and setting aside their convictions and sentences, acquit Banta Singh and Jawala Singh and direct that they be released from Jail forthwith.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 405 OF 1924.
(CRIMINAL REVISION PETITION NO. 339 OF 1924).

November 20, 1924.

Present:—Mr. Justice Krishnan.

In re PALANI GOUNDAN AND ANOTHER—ACCUSED NOS. 1 AND 2—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 403 (4)—Acquittal—Prosecution on same facts—First Court not competent to try subsequent charge, effect of.

Clause (4) of s. 403 of the Cr. P. C. permits a second prosecution for an offence constituted by the same acts if the Court by which the accused was first tried was not competent to try the offence subsequently charged.

In re Venkataranga Josiar, 40 Ind. Cas. 291; 18 Cr. L. J. 613, followed.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Stationary Sub-Magistrate, Dharmapuram, dated the 23rd May 1924, in C. C. No. 68 of 1924, and to issue an order directing stay of all further proceedings in the said C. C. No. 68 of 1924 pending disposal of Criminal Revision Case No. 405 1924 preferred therefrom to the High Court.

Mr. *V. L. Ethiraj*, for the Petitioners.

The Public Prosecutor, for the Crown, instructed by *K. S. Venkatarama Iyer*, for the Complainant.

ORDER.—Section 403, Cr. P. C., cannot be applied here as cl. (4) of that section allows a second prosecution for an offence constituted by the same acts if the Court by which he (the accused) was first tried was not competent to try the offence subsequently charged. In this case the accused were acquitted on the former occasion by a Third Class Magistrate who has no jurisdiction to try the charges now made. The point was considered in the case reported as *In re Venkataranga Josiar* (1) and following that ruling, I hold the lower Court's order is right and dismiss this petition.

Z. K. *Petition dismissed.*

(1) 40 Ind. Cas. 291; 18 Cr. L. J. 613.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 1-B OF 1925.

February 25, 1925.

Present:—Mr. Baker, J. C.

Musammat MECHI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 25—Berar Patels and Patwaris Law, 1900, s. 21, rules framed under, rr. 19, 21—Police Patel, whether Police Officer—Confession made to Police Patel, whether admissible.

A Police Patel in Berar is a Police Officer within the meaning of s. 25 of the Evidence Act, and a confession made by an accused person to a Police Patel is, therefore, inadmissible in evidence by virtue of the provisions of that section.

Appeal against a judgment of the Additional Sessions Judge, Yeotmal, dated the 10th December 1924, in Sessions Case No. 21 of 1924.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The appellant has been convicted by the Additional Sessions Judge, Yeotmal, under s. 302, Indian Penal Code, of the murder of her newly born child and sentenced to transportation for life.

The prosecution case is that the appellant who has been deserted by her husband gave birth to an illegitimate child. She took the child to the river where she threw it into the water. The body was subsequently discovered in the river.

There is no appearance for the appellant but as the case involves a point of law notice was given to the Crown and the Standing Counsel was heard.

The appellant admits that she gave birth to a child. Her case is that she was suddenly delivered of a child while engaged in washing clothes in the river and that she became unconscious and the child must have fallen into the water. When she recovered consciousness she could not find it.

The accused made a confession before the Police Patel, which the learned Additional Sessions Judge has admitted in evidence, holding that a Patel in Berar is not a Police Officer. I am of opinion that this is incorrect. Under the rules framed under s. 21 of the Berar Patels and Patwaris Law, 1900, printed at page 205 of the Berar Land Revenue Manual, Volume II, the duties of Police Patels are given at page 215. Under rr. 19 and 21 the Police Patel is required to detect and bring offenders to justice, to apprehend within the limits of his village all persons whom a Police Officer could arrest without warrant and to send the persons apprehended to the nearest Police Station, also to arrest persons suspected of having committed serious offences who happen to be in the village. He has also power to search houses for stolen property and to pursue suspects into neighbouring villages.

I am, therefore, of opinion that he is a Police Officer, the fact that these powers are conferred upon him by rules made under the Act making no difference.

Consequently the confession made by the accused to the Patel is inadmissible.

Apart from this, however, there is sufficient evidence to support the conviction. The medical evidence shows that the child was born alive and died of asphyxia. The navel string was tied to a rag which has been traced to the accused's house, which disproves her statement that the child was born while she was unconscious. Moreover as pointed out by the Additional Sessions Judge, the accused's *sari* was tucked between her legs and tied, so that it is practically impossible that the child could have fallen into the water. Accused did not report the fact of the birth nor did she make any attempt to find the child and as the water is only a few inches deep at that place the body would not have disappeared.

In these circumstances I have no doubt that the accused threw the child into the river, though it is not clear from the medical evidence whether it was suffocated before it was thrown in, or whether death was due to drowning.

The conviction must, therefore, be confirmed and I have no power to reduce the sentence but in view of the circumstances the case should be reported to the Local Government for reducting of sentence, as is usually done in case of this character.

Z. K. *Conviction confirmed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 417 OF 1924.
January 20, 1925.
Present:—Mr. Dalal, J. C.
MAHARAJ BAKSH—PLAINTIFF—APPELLANT
versus
Hakim Syed RAZA HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Benami purchase by father in name of son—Relinquishment by son in favour of father, whether sale.

Certain property was purchased by a father at an auction in the name of his son. Subsequently the son mortgaged the property to the father and finally executed a deed of relinquishment in favour of the father. Plaintiff brought a suit for pre-emption in respect of the last transaction on the allegation that the deed of relinquishment was executed in reality to mask a sale-deed:

Held, that the transaction was only a device to put the parties in the position which they really held towards the property and that the property having been purchased originally by the father, no right of pre-emption arose.

Ram Suchit v. *Sheo Sewak Singh*, 56 Ind. Cas. 629; 23 O. C. 50, distinguished.

Second appeal against the judgment and decree of the Additional Sub-Judge, Gonda, dated the 21st May 1924, reversing that of the Munsif, Utroula, dated the 12th December 1922.

Mr. *Moti Lal Saksena*, for the Appellant.

JUDGMENT.—The plaintiff sued for pre-emption in pursuance of a transfer made by Mohammad Sadiq in favour of his father Hakim Saiyed Raza Husain. The case for the plaintiff was that the property was purchased at auction by the son, that subsequently the son mortgaged the property to the father and that finally a deed of relinquishment was executed by the son in favour of the father in reality to mask a sale-deed. Both the Subordinate Courts held that the purchase was made *benami* by the father in the name of his son and that the deed of transfer was really either a deed of relinquishment or one of gift to put the parties in the position they really were in. This is a finding of fact and well-supported by the reasoning of the lower Appellate Court. The ruling quoted by the plaintiff-appellant's learned Counsel [*Ram Suchit* v. *Sheo Sewak Singh* (1)] has no application here. The other case quoted by him is a Bench decision of this Court in First Civil Appeal No. 24 or 1922, decided on 16th May 1913 (*Baldeo Singh* v. *Puttu Lalo*). The pronouncement of the Bench really goes against the argument of the learned Counsel. The learned Judges distinguished between a device and a mask and said that a device was permissible, a mask was not. What they said was "A device is something different from a mask. It will be contrary to the public policy to allow a mask to conceal or shroud the real nature of a transaction or to permit a party to hoodwink the public and defraud the Court by putting a false disguise." The present case is not one of a mask but only of a device to put parties in the position which they really hold towards the property. The property really belongs to Hakim Saiyed Raza Husain. It was purchased *benami* in the name of his son and to give effect to the reality of ownership the son executed the deed in dispute in favour of his father.

It was pointed out that when the mortgage was effected by the son in favour of the father statements were made by them in the Mutation Court. Those statements, however, do not in any way act as estoppel because it is not shown that the plaintiff was led to change his position in any way on account of those statements.

I uphold the finding of fact of the lower Appellate Court and dismiss this appeal.

Z. K. *Appeal dismissed.*

(1) 56 Ind. Cas. 629; 23 O. C. 50.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 91, OF 1924.
February 13, 1925.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Rankin.
MONMOTHO NATH MUKERJEE AND OTHERS—PLAINTIFFS—APPELLANTS
versus
PURAN CHAND NAHATTA—DEFENDANT RESPONDENT.

Registration Act (XVI of 1908), ss. 34, 35—Evidence Act (I of 1872), s. 90—Sale-deed executed by vendor

through attorney—Admission of execution through another attorney—Registration, validity of—"Executant", meaning of—Document 30 years old—Presumption as to execution and attestation and authority of attorney—Administration suit—Mortgage during pendency of suit—Mortgagee, position of.

When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the estate of the deceased in due course of administration. The right of a residuary legatee or a heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied. [p. 35, col. 2: p. 36, col. 1.]

In order to provide for the costs of an administration suit the Court made an order in the suit for the sale of such portion of the properties comprised in the estate as might be necessary for the purpose of paying the costs payable under the decree and directed that the property should be conveyed to the purchaser by *U* and *B*, the trustees under the Will of the deceased. The sale-deed was executed by *U* personally and by *B* by his constituted attorney *J*, but the power-of-attorney authorizing *J* to execute the sale-deed on behalf of *B* was not produced. When the deed was presented for registration execution was admitted on behalf of *B* by another attorney of his who had been authorized to admit execution by a duly executed power-of-attorney which was produced. During the pendency of the administration suit one of the beneficiaries under the Will had executed a mortgage of his right, title and interest in the estate. More than 30 years after the execution of the sale-deed the plaintiffs, who were the sons of the vendee under the sale-deed, proposed to sell the property to the defendant. On a dispute arising as to the title of the plaintiffs to the property which their father had purchased from *U* and *B*:

Held, (1) that the Court was entitled to presume under s. 90 of the Evidence Act that every signature and every other particular of the sale-deed which purported to be in the handwriting of any particular person was in that person's handwriting and that the sale-deed was duly executed and attested by the persons by whom it purported to have been executed and attested; [p. 36, col. 2.]

(2) that under the circumstances of this particular case it was only reasonable to presume that *B* obeyed the orders of the Court and carried them out by authorizing his attorney *J* to execute the sale-deed on his behalf and that it should be presumed not only that the deed was executed by *B*'s attorney by whom it purported to have been executed but also that *J* was the duly authorized agent of *B* to execute the deed on his behalf; [*ibid.*]

(3) that if *B* had appeared personally before the Registrar when the document was presented for registration and had admitted the execution of the deed by his duly constituted attorney *J*, that would have been a sufficient compliance with the provisions of s. 35 of the Registration Act; [p. 37, cols. 1 & 2.]

(4) that it was, therefore, competent to *B* to authorize some person to appear on his behalf before the Registrar and to admit the execution of the sale-deed, which having been done by a duly constituted attorney, the registration of the sale-deed was perfectly valid and conveyed a valid title to the purchaser; [p. 37, col. 2.]

(5) that the mortgage executed by one of the beneficiaries under the Will of the deceased having been executed during the pendency of the administration suit, the mortgagee took the mortgage subject to any disposition which might be made in due course of the administration proceedings and that consequently the sale in favour of the plaintiffs' father was free from the mortgage and was not affected by it. [p. 35, col. 2.]

Per *Rankin, J.*—The Registration Act deals with parties and executants of documents on an ordinary common sense footing without contemplating or making particular provisions for the case of a man whose name by his authority is written by some one else. [p. 40, col. 1.]

The ordinary meaning of executing a document is signing a document as a consenting party thereto. [*ibid.*]

In the case of a *bakalam* signature a person whose name is put with his authority in evidence of his assent to a document is the "executant" of the document within the meaning of s. 35 of the Registration Act. [p. 40, col. 2.]

In India the legal estate follows the beneficial interest and it is not necessary that an authority to sign should be in writing. [p. 42, col. 2.]

Case-law reviewed.

Appeal against the judgment of Mr. Justice C. C. Ghose, dated the 12th March 1924.

Mr. *B Chakravarti* (with him Mr. *A. N. Sen*), for the Appellants.

Sir *Benode Mitter* (with him Messrs. *N. N. Sircar* and *A. K. Dube*), for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiffs against the decision of my learned brother Mr. Justice C. C. Ghose which was delivered on the 12th of March 1924. That judgment was given with respect to exceptions which were taken to a report which had been made by the Official Referee with respect to the title of certain premises, namely, No. 13, Marsden Street, Calcutta, which the defendant had agreed to purchase from the plaintiffs by an agreement, dated the 20th of February 1920.

The Official Referee reported that the plaintiffs had failed to make out a good or marketable title to the premises in question.

The plaintiffs filed exceptions to that report; and the learned Judge came to the conclusion that the exceptions should be discharged and in effect he affirmed the report of the Official Referee and declared that the plaintiffs had failed to make a good title to the premises.

The facts which it is necessary for me to state for the purpose of my judgment are as follows: One Hari Mohan Sircar

who was the owner of the property in question and other properties, executed a deed of trust, dated the 2[illegible]th of April 1853. It is not necessary for me to deal in detail with the provisions of the trust.

On the 19th of May 1879 a suit was brought by Srimati Nabin Kishori Dasi, which was No 342 of 1879, against several persons including one Radha Nath Sircar for the construction of the deed of 1853 and for the ascertainment of the rights of all parties thereunder for the execution of the trusts which might be found to be valid and for partition.

The result of that litigation was that a decree was passed by the Court of Appeal on the 31st of August 1885, by which it was declared that the religious trusts created by the indenture were good and valid in law and were a first charge on the income of the trust properties so far as might be necessary for the worship of the idol and for the performing of certain religious ceremonies; and it was declared that Nabin Kishori, the widow, was entitled to half the surplus income of the trust property other than the family dwelling-house and that the defendants Brojo Nath Sircar, Radha Nath Sircar and Gopi Nath Sircar, the sons and heirs of Gopal Chandra Sircar, were each entitled to 1/6th part or share thereof. After certain other provisions it was declared that a partition should be made of the family dwelling-house into six equal parts or shares among the said parties.

On the 10th of March 1887, an order was made in the suit for the sale of such portion of the properties including that now in question, as might be necessary for the purpose of paying the costs payable under the decree and it was ordered that the trustees Upendra Nath Bose and Brojo Nath Sircar should convey to the purchaser the properties to be sold by the Registrar.

On the 18th of August 1887 the final decree in the suit was made and the order for sale was confirmed. On the 13th of September 1888 the sale was held and the father of the plaintiffs brought the premises which are now in question. A conveyance, dated the 2nd of September 1890, was executed in pursuance of the order of the Court, and it was subsequently registered.

On the 20th of February 1920 as I have already stated the plaintiffs agreed to sell the property to the defendant. In June 1920 this suit was instituted and on the 29th of January 1923, a consent decree was made, the material part of which is as follows: "There will be consent decree for specific performance of the agreement, dated 20th day of February annexed to the plaint for sale of the premises No. 13, Marsden Street in the Town of Calcutta measuring 1 *bigha* and 10 *cottahs* less 2 *cottahs* 5 *chittacks* 8 square feet being the portion acquired by the Municipality for the consideration of Rs. 92,000 subject to the title of the plaintiffs being found to be good upon enquiry to be held by the Registrar."

I understand that the reference to the Registrar was transferred to the Official Referee who made the report to which I have already referred. It appears that on the 27th March 1886 Radha Nath Sircar who was one of the parties to the Suit No. 342 of 1879 executed a mortgage of his 1/6th "share of the income of the said hereditaments and premises in the said Sch. 'A' save and except the said family dwelling-house and all the right, title and interest of him the said Radha Nath Sircar in the said moneys and premises." The mortgage was in favour of Jogendra Kumar Bose and his heir.

One of the points upon which the learned Counsel for the defendant relied was that it had not been proved that the mortgage in favour of Jogendra Kumar Bose had been satisfied or paid off.

The learned Judge found in favour of the plaintiffs in respect of this point; and I am of opinion that the learned Judge's decision was correct. The ground of my decision is shortly this that the estate of Hari Mohan Sircar was in the course of being administered by the Court, and the mortgagee's right would be subject to any disposition which had been or might be made of the deceased man's estate in due course of administration.

The principle was stated by the Judicial Committee of the Privy Council in *Chutterput Singh* v. *Maharaj Bahadur* (1). The passage to which I desire to refer is to be found in Lord Davey's judgment at page 16* and is as follows—"When the estate of a deceased person is under administra-

(1) 32 I. A. 2; 32 C. 198; 7 C. L. J. 395; 9 C. W. N. 25; 10 Bom. L. R. 262; 18 M. L. J. 125; 3 M. L. J 4; 2 A. L. J. 190; 8 Sar. P. C. J. 713 (P. C.).

*Page of 32 I. A.—[*Ed.*]

tion by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied."

The sale in this case was ordered by the Court for the purposes of paying the costs in the suit.

In my judgment the learned Judge was correct in his conclusion when he said that the mortgagee took the mortgage subject to any disposition which might be made in due course of the partition proceedings: consequently, even though the mortgagee's right may not be barred by the Act of Limitation, as to which I express no opinion, it is clear that there is no cloud upon the title by reason of the mortgage in question.

The next point upon which the learned Counsel relied was one with regard to the execution of the conveyance of the 2nd of September 1890.

The order of the Court was that the deed should be executed by Upendra Nath Bose and Brojo Nath Sircar who were the trustees under the settlement of Hari Mohan Sircar.

It appears from the conveyance that Upendra Nath Bose himself executed it on the 8th of September 1890, Brojo Nath Sircar executed the deed by his constituted attorney: and there is an endorsement in the deed to this effect. "Signed sealed and delivered at Calcutta this 8th day of September 1890 by Joy Krishna Bose as the duly constituted attorney for and as the act and deed of the within-named Brojonath Sircar under a power dated the 20th day of June 1889 in the presence of Surendra Chandra Ghose, Articled Clerk to Babu Woomesh Chandra Banerjee."

The learned Counsel's argument in the first place was that there was no proof that Joy Krishna Bose was duly authorized to execute the deed on behalf of Brojo Nath Sircar. It was contended that in order to complete the title the power-of-attorney, dated the 20th of June 1889, should have been produced.

It was admitted by reason of s. 90 of the Evidence Act and having regard to the date of the deed and the custody from which the deed was produced that the Court would be entitled to presume that every signature and every other part of such document which purported to be in the handwriting of any particular person was in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the person by whom it purported to be executed and attested. But the learned Counsel argued that the Court ought not to presume that Joy Krishna Bose was duly authorized to execute the deed in the absence of the power-of-attorney.

I am unable to accept that argument. It was pointed out by the learned Counsel who appeared for the plaintiffs that the sale was directed by the Court and that Brojo Nath Sircar being one of the trustees was one of the persons who was directed by the Court to carry out the sale and execute the conveyance. In my judgment it is only reasonable to presume that Brojo Nath Sircar obeyed the orders of the Court and carried them out by authorizing his attorney Joy Krishna Bose to execute the document on his behalf. In the circumstances of this case, in my judgment, it is both legitimate and reasonable to presume not only that the deed was executed by the attorney of Brojo Nath Sircar by whom it purports to have been executed but also that Joy Krishna Bose was the duly authorized agent of Brojo Nath Sircar to execute the deed on his behalf. There is a further reason for making the above-mentioned presumption. On the facts of this case there can be no doubt that by a power-of-attorney, dated the 2nd of May 1891, Brojo Nath Sircar authorized his attorney Bepin Behary Banerjee to appear before the Registrar and admit the execution of the deed by Brojo Nath Sircar and that the attorney did appear before the Registrar on the 6th of May 1891 and duly admitted the execution by Brojo Nath Sircar. The next point has reference to the provisions of the Indian Registration Act, 1908.

The presentation for registration was made by Radha Nath Sircar; and no point arises in connection with the presentation for registration.

The point arises with regard to what happened as to the admission of execution.

The deed bore the following endorsement: "Execution was also admitted this the sixth day of May 1891 at the Calcutta Registry Office by Bepinbihari Banerji, son of Umesh Chunder Banerji of Calcutta, Solicitor, personally known to me as attorney for Brojo Nath Sircar under power authenticated by me on the 2nd day of May 1891 and recorded as No. 373 for 1891.

(Sd.) "Bepinbihari Banerji.

P. Ghosha,
Registrar,
6-5-91."

"Registered
in Book I,
Vol. 40,
Pages 172 to 194.
being No. 1312
for 1891."

(Then there was the seal of the Registrar of Calcutta.)

"P. Ghosha,
Registrar,
Calcutta,
9-5-91."

The argument presented in this Court on behalf of the defendant was in effect this, that inasmuch as the deed was signed by Joy Krishna Bose on behalf of Brojo Nath Sircar, Joy Krishna Bose was the person who should have appeared before the Registrar to admit execution; and as I understand, the learned Counsel's argument went to this extent that the only person who could admit execution was Joy Krishna Bose or some person duly authorized by him, or if he were dead his representative. The argument went to this length of saying that even if Brojo Nath Sircar himself had appeared before the Registrar and had admitted the execution of the deed by him through the pen of his duly constituted attorney Joy Krishna Bose, it would not have been a sufficient compliance with the provisions of the Registration Act.

I am not prepared to accept that argument.

In the first place, I am not prepared to hold that Brojo Nath Sircar was not a person executing the document within the meaning of s. 35 of the Registration Act, as was contended by the learned Counsel for the defendant.

In the second place, I am prepared to hold and do hold that if Brojo Nath Sircar had appeared personally before the Registrar and had admitted the execution of the deed by his duly constituted attorney Joy Krishna Bose, that would have been a sufficient compliance with the provisions of the Act.

If that be so, and if the appearance of Brojo Nath Sircar to admit the execution would have been sufficient it was, in my judgment, competent to Brojo Nath Sircar to authorize some person to appear on his behalf before the Registrar and to admit the execution, as he undoubtedly did.

It appears from the deed itself and from the Registrar's certificate that a power, dated the 2nd of May 1891, duly executed by Brojo Nath Sircar in favour of Bepin Behary Banerjee was produced by Bepin Behary at the Calcutta Registry Office and was authenticated by the Registrar; and that Bepin Behary admitted execution of the deed by Brojo Nath Sircar. It was part of the duty and within the powers of the Registrar to satisfy himself as to the authenticity of the power-of-attorney which was produced to him.

The appearance was 3 or 4 days after the execution of the power, *viz.*, on the 6th of May 1891 and having regard to the facts of this case in my judgment the admission of execution by Bepin Behary Banerjee was as valid and effective as if Brojo Nath Sircar himself had appeared before the Registrar on the 6th of May and had admitted the execution of the deed. The result is, therefore, that, in my judgment, the provisions of s. 35 of the Registration Act of 1908 were complied with.

I have now dealt with all the points which were raised by the learned Counsel on behalf of the defendant with regard to the title; and I am of opinion that the title is a good title and should have been accepted by the defendant. But the learned Counsel argued that the Official Referee had reported against the title and that the learned Judge had accepted that report and that consequently we ought not to force upon the defendant a title which might be said to be a doubtful one.

This Court, in my judgment, has a duty cast upon it to express its opinion whether the title is a good one or not.

I have already intimated that, in my judgment, there is no doubt that the title which the plaintiffs produced should be accepted as a good title; and with respect

to the last point which the learned Counsel raised there is no ground for the suggestion that the Court is forcing upon the defendant a doubtful title. I do not refer to the numerous cases which the learned Counsel for the defendant cited to us, because although many of them are instructive for the purpose of elucidating the meaning of the various sections of the Registration Act when applied to different facts, I do not find that the point which arose for decision in this case has been raised or discussed in any of the cases cited.

For these reasons the appeal is allowed. The exceptions will be upheld and a declaration will be made that the title is a good one.

The defendant must pay the plaintiffs' costs of the proceedings before the learned Judge and the Official Referee and of this appeal.

Rankin, J.—I agree.

The agreement for sale of the premises in the town of Calcutta known as 13, Marsden Street, out of which the present suit arises was dated the 20th of February 1920. By the terms of that agreement the purchase was subject to the approval of the vendor's title by the purchaser's attorney. After certain correspondence had taken place, a suit was instituted on the 30th of June 1920 and certain objections to the title were put forward in the written statement as justifying the defendant's refusal to complete. At the trial, however, before Mr. Justice Page, these objections, which have no connection with any of the objections that are now taken, were thought to be of so little importance that the suit was decreed by consent in terms which have already been referred to. A decree was made for specific performance subject to an investigation of the plaintiff's title in Chambers; and there can be no doubt that the plaintiff has to show a good title which involves at least a marketable title and not merely a good holding title.

Before the learned Official Referee who conducted the enquiry certain objections were taken on behalf of the defendant and of these we are now concerned only with three.

The first objection was sustained by the Official Referee but has been dismissed as unfounded by the learned Judge. That is he objection which arose out of the allegation that the interest conveyed to a mortgagee by one Radha Nath Sircar by the deed of the 27th of March 1886 is still outstanding and forms a cloud upon the plaintiff's title. With reference to that, the facts appear from the documents before us which unfortunately do not include the plaint in Suit No. 342 of 1879 and they are as follows: It appears that by Indenture of Trust, dated the 29th of April 1853, one Hari Mohan Sircar transferred to certain trustees diverse messuages and premises including the property now in suit, and that the trusts were as follows: "It being the intent of these presents and of the parties thereto that all and singular the said messuages thereby granted and conveyed should remain continue and be deemed and considered a permanent endowment settlement and provision made and appointed to and for the maintenance and performance of the *sebah* or worship of the said Idol Sreedhorjee and for the performance of the said several religious ceremonies therein and hereinbefore mentioned proviso that if any of the rents, issues and profits aforesaid should remain after paying and defraying all and every the charges and expenses aforesaid then in such case the said trustees or the survivors of them or other the trustee or trustees for the time being should apply and dispose of such surplus in and towards the maintenance and support of such of the sons of the said Hari Mohan Sircar and of their families respectively as should be living and on further trust when and if it should seem fit to the said trustee or trustees so to do suffer and permit such son or sons of the said Hari Mohan Sircar to reside with their families respectively in such of the said houses, messuages and premises thereby conveyed as to the said trustee or trustees should seem fit." This property and other properties came to the hands of the trustees of Hari Mohan Sircar. Unfortunately after a certain number of years, by which time there had been changes of trustees, a suit was brought on the 19th of May 1879, being Suit No. 342 of 1879, for certain purposes. The plaint is not in the documents but the decree of Mr. Justice Cunningham and the decree of the Court of Appeal show sufficiently what was the scope of that suit. It was a suit brought first of all to declare that certain of the religious trusts were invalid and upon that basis to obtain partition of a certain portion of the trust

property amongst the heirs or representatives of the founder. It asked amongst other things for an account against one of the intermediate trustees Gopal Chunder Sircar, deceased, and it asked for administration of his estate. It asked also for a declaration as to the rights of the parties in the surplus income of the trust and also for partition of the family dwelling-house. Amongst other things which it asked for was the formulation of a scheme for carrying out the religious trusts. The only observation that it is necessary to make here is that whether or not that was a suit for administration of the remaining estate of Hari Mohan Sircar (I think myself that it was not) it was a suit for the administration of the whole of that trust fund being held at that time under the trust which Hari Mohan Sircar had made. That being so, the Court held, first, that the religious trusts were perfectly good and went on afterwards to say not only that certain provision should be made for the residence of the idol in the family dwelling-house but that provision should be made for partition thereof amongst the members of the family and to give directions as to the division into one-sixth shares of the surplus income of that trust.

Before Radha Nath Sircar in 1886 executed his mortgage the decree of the Court of Appeal had directed various costs to be borne out of the trust fund and it had remitted for further direction the question as to how these costs should be provided for in certain particulars. Radha Nath Sircar, so far as the trust property was concerned, never had more than a claim to a share in the surplus income and he had that claim entirely because Hari Mohan Sircar had to that extent made him a beneficiary. When, therefore, he granted the mortgage of the 27th of March 1886 he was purporting to mortgage something that came to him as a beneficiary of that trust and he had no other right in this property save as such beneficiary. Thereupon it appeared very shortly afterwards that the litigation to establish the trust had been so costly that it could not be paid for, the cost of all parties being billeted upon the fund, without selling some of the items of the trust property. That was done under an order of the Court. A conveyance was directed to be settled by the Registrar and the property was sold free from the trust which Hari Mohan Sircar had impressed upon it by his deed in his lifetime. In these circumstances it seems to me plain to demonstration that this mortgage of Radha Nath Sircar is no encumbrance whatsoever upon the property which the present plaintiffs are now purporting to sell.

It is true that in another case between the plaintiffs and somebody else this matter came before Mr. Justice Chaudhuri. It appears that there, as here, the contract which the plaintiffs had made was to show a title to the approval of the purchaser's Solicitor. The purchaser's Solicitor made a requisition as to this mortgage and he got a rather feeble or evasive answer. In fact, the plaintiffs' Solicitor knew nothing about the mortgage and could not give any information. Thereupon the purchaser's Solicitor refused to approve the title, and upon the matter coming before Mr. Justice Chaudhuri, Mr. Justice Chaudhuri said: "There is the mortgage, there is the requisition; the Solicitor has said he does not approve the title because of this, he is quite within his rights" That has no bearing whatsoever upon the position now before this Court.

The question of the purchaser's attorney's approval has gone out of this case by the order of Mr. Justice Page. We have the facts before us and on those facts it is, I think, plain that the matter of this mortgage has nothing whatsoever to do with the title.

The next question which has been raised by way of objection to the title is also a matter that was in no way referred to in the written statement or in previous negotiations, and that is, that the conveyance by the trustees and other parties to the suit of 1879 to the plaintiff's father Shoshee Bhushan Mukerjee in 1890 is bad for want of registration. It has been registered in fact, but it is said that the registration is a nullity and the document cannot be admitted in evidence. The basis of that contention is that if one looks to the Registration Act one finds the word "executant." The contention is that in the case of a *bakalam* signature, as it is called, such as we have here, executant means the agent whose actual pen signs the name of the party and does not mean the party for and on behalf of whom the name is put. It is said that although, as has happened in the present case, an admission was made

by an agent of the party himself the whole process was *ultra vires* because the executant is the only person who can admit or deny, *i. e.*, the person whose pen actually wrote.

This contention has to my mind nothing to support it in the Act and it encounters serious objections upon the face of the Act itself. I doubt whether it would have been seriously entertained, had it not been that in the course of diverse cases in connection with the Registration Act, observations have been made which may be considered as intending what the defendant's Counsel urges upon this appeal.

I take the Act first: In my opinion, the Act deals with parties and executants of documents on an ordinary common sense footing without contemplating or making particular provision for the case of a man whose name by his authority is written by some one else. The ordinary meaning of the word "executant" is fairly clear. It was said by the learned Official Referee that it meant signing. In my opinion the present question cannot be solved by stressing any such attempted definition. The ordinary meaning of executing a document is signing a document as a consenting party thereto.

A man may sign a document as a witness; no one would call him a person executing a document. To treat the fact of signature as a physical fact, apart from the circumstance that the signature is intended as an expression of assent to the document, is, in my judgment, to go out of one's way to be wrong, when dealing with an Act that makes no particular provision for the exact case we are now dealing with. If one looks at the provisions of the Registration Act, important for the purpose, one finds this: As regards presentation, any one interested can have a document presented. When you come to the state after presentation you find that there is to be an enquiry before the Registering Officer. No document shall be registered before a Sub-Registrar unless the persons executing such document or their representatives, assigns or agents appear before the Registering Officer within a certain time. The Registering Officer shall thereupon enquire whether or not such document was executed by the persons by whom it purports to have been executed, satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and so on. If all the persons executing the document appear before the Registering Officer or if he be satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, then the document is to be registered. On the other hand, if any person by whom a document purports to be executed denies its execution or if any such person appears to be a minor, an idiot or a lunatic, the Registering Officer shall refuse to register the document as to the person so denying, appearing or dead. In my judgment, applying the language of the Statute to the particular type of case before us, the correct view is that the man whose name has been put to the document as evidencing his assent thereto, is the executant for the purpose of the section I have quoted from. That seems to me to follow very plainly from s. 35. As I have pointed out in the course of the argument, it is quite possible for a minor to be an agent, but it is not possible under the Indian law for a minor to make a valid contract; and, it seems to me that a person by whom a document purports to be executed cannot mean an agent, who may or may not be a minor. Moreover, "to refuse to register a document," "as to the person so denying, appearing or dead," to my mind, points in the same direction. To register a document as to a mere agent is an idle conception: it must be with reference to a person who has intended to be a party to the document and not merely to an agent. Whether or not there is in this Act scope for saying that either the agent or the principal will satisfy s. 35, of one thing I am clear and that is that in case of *bakalam* signature such as we have here, a person whose name is put with his authoriiy in evidence of his assent to a document is "executant" within the meaning of s. 35.

I consider that this matter becomes even plainer if you look to the later stages of the Act and if you consider what will happen supposing that a Sub-Registrar refuses to register and that an enquiry has to be made by the Registrar himself, or the matter comes exactly on the same footing in a suit before the Court. If one carefully considers the rulings under the later sections of the Act one will find, it is true, that there are difficulties as to where the line is to be drawn as to the scope

of the Registration Act enquiry. But it seems to me impossible to suppose that admission or denial in the Act means anything except admission or denial on behalf of the party who is the principal to the document.

With reference to the case of *Muhammad Ewaz* v. *Birj Lal* (2), certain words were very much pressed before us and I notice that they appear in the judgment of the learned Judge. The words are: "There the persons described are the persons executing the document, not these who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it." The learned Judge has applied these words in the way in which we have been invited to apply them, namely, to the case of a signature *per procurationem*; and as meaning that not the man whose name is put on the deed as a consenting party—but the man who holds the pen, is the person upon whose appearance, whose admission, whose denial the Registration Act lays so much stress. The learned Counsel for the appellants has pointed out to us, and I entirely agree with him, that those words in the judgment quoted, taken in their context turn out to have a different meaning altogether. *A*, *B* and *C* in that case were parties to the document on the face of the deed. The deed purported to contain the signature of all of them. For the purposes of the case it was proved that two had executed it. There was no proof that the third had executed it and there was no contention that it could be made available against her. The question was whether the document was void against every body or whether it could be regarded as duly registered as against *A* and *B*; and the distinctions their Lordships were making in the passage cited had nothing to do with the particular circumstance that *C* in that case had had her name put to the document by the hand of either *A* or *B*. The point was, can you or can you not read certain words in s. 35, so that the section can be treated distributively? For that reason their Lordships were making the observation.

Again a case has been referred to [*Bissendoyal* v. *Ferdinand Schlaepfer* (3)], but the whole basis of the decision of Sir Richard Couch would seem to be utterly inapplicable to such a case as the present. A certain person was in partnership with another. He signed the name of the firm; and Sir Richard Couch proceeded upon this to say that the signature of this partner's name was not to be taken as *bakalam* signature of his partner, that the partner executing it was the only party to the agreement, that he disclosed on the face of the agreement that he was the agent of the partnership which consisted of himself and the other. That being so, there can be no doubt that the only executant was the person who had signed.

Certain other cases have given rise to a certain amount of contention on the same lines. Those cases are somewhat special, because they are cases where a guardian has purported to bind his ward or his ward's property. The case of *Kesho Deo* v. *Hari Das* (4) is a perfectly simple case where on no construction of the signature was the ward a party to the instrument. It was an instrument executed by a guardian, stating in the document that he intended not merely to affect his own property but also to affect the property of which he was a trustee. There an observation was made, simply to this effect, that when an admission of execution is made by a man who executes a document as a trustee it is not necessary that his *cestui que trust* should also executed the document.

An exactly similar case is the older case of *In the matter of Ram Chunder Biswas* (5). The basis of the decision was that the document there did not purport to be executed by the minor, that no person was required to appear before the Registrar as his representative, that the deed purported to have been executed by three persons all of whom appeared before the Registrar. "A man may execute a deed and state in it that he is selling his portion of the property as well as the portion of another individual to whom he stands in a fiduciary relation, but only sign his name." The Registrar has no business to enquire what actually passes by that document or whether the interest of a third person is or is not affected by it.

A very similar case is found in *Raj*

(2) 4 I. A. 166; 1 A. 465; 3 Sar. P. C. J. 735; 3 Suth. P. C. J. 438; 1 Ind. Dec. (N. S.) 320 (P. C.).
(3) 22 W. R. 68.
(4) 21 A. 281; A. W. N. (1899) 59; 9 Ind. Dec. (N. S.) 888.
(5) 16 W. R. 180.

Lakhi Ghose v. *Debendra Chundra Majumdar* (6), where a guardian purported on behalf of the ward's estate to sell certain property contrary to the terms of the order which the District Judge had made. An attempt was made to set up this defect as a reason why the instrument should not be registered and the Court held that this had nothing to do with the question. The guardian as guardian was the only executant whether it affected a third party or not.

There is an interesting case [*Kanhaya Lal* v. *Sardar Singh* (7)], which arose where certain people had had their names put to a document by a *mukhtear*. The *mukhtearnama* was produced and proved. But the principals objected to the act of the *mukhtear* and said that the *mukhtearnama* had never been explained to them; the Court held that if there was a *mukhtearnama* and if the *mukhtear* had purported to execute the deed in terms thereof that was all that was necessary to justify registration.

None of these cases about guardian and ward has any bearing upon the question of *bakalam* signature.

The whole point about infancy is that an infant has no capacity to contract. He may or may not be well able to sign his name. A guardian desiring to make a contract, which will bind the ward or ward's estate, will indeed go out of his way to be wrong in form if he signs the ward's name and treats himself as a mere pen. For these reasons, it appears to me that the contention which has been so ably and carefully advanced before us by Sir Benode Mitter is not sustainable. In my judgment the attack upon the title, which has been made in the present case, if allowed for a moment, would upset registered titles throughout the whole of India. It seems to me that the endeavour to read the *dicta* which have been cited to us into the Registration Act for the purpose of showing that an admission or denial is a matter which has not nothing to do with the party really affected, cannot be sustained.

The only other question in the present case is whether this title is defective by reason of the fact that the authority of Joy Krishna Bose to sign the document on behalf of Brojo Nath has been insufficiently proved. In my judgment it is amply proved. The attorney of Brojo Nath who appeared before the Registrar to admit the execution of Brojo Nath Sircar to the document was authorized by a power, dated the 2nd May 1891. He appeared before the Registrar to carry out his duty on the 6th May 1891. The actual execution by Joy Krishna Bose was on the 8th September 1890 and the power under which he acted was of the 20th June 1890. The position is as follows: We know from the document that Brojo Nath was one of two persons ordered as trustees to convey certain trust property by a conveyance to be settled by the Registrar. We know that he had no option in the matter and that the beneficiaries were ordered to join in the conveyance. We find after the deed had been executed he gave on the 2nd of May to Bepin Behary Banerjee a power, which he exercised on the 6th of May to admit this very execution. That power is available, the plaintiff Promotha Nath offered to get a certified copy if it was wanted. No objection has been taken to it. The plaintiffs are the sons of the man who took under that conveyance. That they are in possession now nobody disputes. They have shown their possession, it is true, only for the last 3 or 4 years, but there is no suggestion anywhere that Brojo Nath claimed on his own behalf or on behalf of the trust some interest as left to him inspite of the conveyance of September 1890. The purchase-money was paid into Court. In this country the legal estate follows the beneficial interest and it is not necessary that an authority to sign should be in writing. Such cases as *In re Airey, Airey* v. *Stapleton* (8) are not in point. That any one claiming as a beneficiary of Hari Mohan Sircar's trust could now put forward any claim upon this property is a baseless apprehension.

I think that a good title has been shown and that this appeal succeeds.

Z. K. *Appeal allowed.*

(6) 24 C. 668; 1 C. W. N. 444; 12 Ind. Dec. (N. S.) 1114.

(7) 29 A. 284; A. W. N. (1907) 46; 4 A. L. J. 171.

(8) (1897) 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 285.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 155 OF 1923.
November 25, 1924.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

SECRETARY OF STATE FOR INDIA —PLAINTIFF—APPELLANT
versus
MANILAL HARIVALLAVDAS BHAGAT —DEFENDANT—RESPONDENT.

Bombay District Municipal Act (III of 1901), ss. 42, 54, 58—Rules framed by Local Government under s. 58, r. 3—Misapplication of Municipal funds, meaning of—"Primary" education, meaning of—Primary schools maintained by Municipality—Refusal to allow inspection by Government Inspector—Money spent on schools, whether misapplied.

The word "misapplication" in s. 42 of the Bombay District Municipal Act means application to a purpose which the Act neither permits nor requires. The functions of a Municipality are either obligatory or discretionary, and Municipal funds must be expended on those functions and on no others. The obligatory functions are those which the Act requires, the discretionary functions are those which the Act permits. [p. 45, col.1.]

To establish and maintain primary schools is one of the obligatory functions of a Municipality which has been laid down by s. 54 of the Bombay District Municipal Act. Therefore, money spent on the establishment and maintenance of primary schools is money applied to a purpose which the Act requires and cannot, therefore, be treated as having been misapplied within the meaning of s. 42 of the Act. [p. 45, col. 2.]

"Primary" education means education in its first stages and nothing more. The expression does not in itself connote anything in the way of Government support or Government control. [*ibid.*]

Rule 3 of the rules framed by the Local Government under the provisions of s. 58 of the Bombay District Municipal Act merely prescribes the ordinary method whereby Government are enabled to satisfy themselves that a Municipality is doing its duty. In other words, the rule is a rule of procedure, and its infringement cannot in any way affect the character of the schools maintained by a Municipality. [p. 44, col. 2.]

Where primary schools are established and maintained by a Municipality, money spent by the Municipality on such schools is spent on a function which has been made obligatory upon the Municipality by s. 54 of the Bombay District Municipal Act, and the mere fact that the Municipality refuses to have its schools inspected in accordance with r. 3 of the rules framed by the Local Government under s. 58 of the Act, will not make the schools any other than primary schools and the money spent on them would not be regarded as having been misapplied within the meaning of s. 42 of the Act. [p. 45, col. 2.]

First appeal from the decision of the District Judge, Ahmedabad, in Suit No. 34 of 1922.

Mr. *Kangi* (with him Mr. *S. S. Patkar*), for the Appellant.

Mr. *Jinnah* (with him Mr. *H. V. Divatia*), for Respondents Nos. 1, 5 to 7 13 to 15 and 18.

Mr. *G. N. Thakor* (with him Mr. *H. V. Divatia*), for Respondent No. 8.

Mr. *A. G. Desai* (with him Mr. *N. P. Desai*), for Respondent No. 18.

JUDGMENT.

Macleod, C. J.—This suit was filed by the plaintiff-appellant in the District Court of Ahmedabad to recover from eighteen persons who were members of the Ahmedabad Municipality from March 1, 1921, to December 17, 1921, and from a nineteenth person who was a member from October 13, 1921, only, the sum of Rs. 1,68,600 being the amount of expenditure incurred by the Municipality on the maintenance of the primary schools during the suit period, on the allegation that it was misapplied, as the schools were maintained during that period contrary to the provisions of the Bombay District Municipal Act, III of 1901, and the rules framed thereunder. The claim was afterwards decreased by amendment to Rs. 1,37,709-5-8, to be recovered against all the defendants jointly and severally, except defendant No. 16 against whom the claim was limited to Rs. 80,825-3-8. Defendants Nos. 2, 3, 4, 9 and 12 put in a joint written statement, the other defendants filed separate written statements.

The Judge dismissed the suit with costs allowing only one set of costs amongst all the defendants as they had substantially one defence to make.

Twenty-one issues were raised, but issue No. 12 was the main issue in the case, and the only one which has been argued before us in appeal.

"Have the Municipality spent any money beyond that sanctioned by the budget?

"If not, is there any misapplication of the Municipal fund?"

The facts stated in the plaint may be taken as admitted by the defendants in their pleadings.

The following are the pertinent sections of the Act:—

"Section 42. Every Councillor shall be personally liable for the misapplication of any fund to which he shall have been a party, or which shall have happened through, or been facilitated by, gross neglect of his duty as a Councillor, and may be sued for recovery of the moneys so misapplied as if such moneys had been the property of Government."

"Section 54. It shall be the duty of every Municipality to make reasonable provision,

(1) for the following matters within the Municipal District under their authority, namely :—

(p) establishing and maintaining primary schools :—

"Section 58. The management, control and administration of every public institution exclusively maintained out of Municipal property and funds shall vest in the Municipality by which it is maintained:

Provided that the extent of the independent authority of any Municipality in respect of public education, and their relations with the Government Educational Department shall from time to time be prescribed by the Governor-in-Council."

Of the rules framed by Government under the provisions of s. 58 the only rule which the appellants have relied upon before us as having been infringed by the respondent is r. 3 which directs that Municipal schools shall, subject to the proviso in r. 2 (which in this case it is unnecessary to consider), be provided for all castes or classes of the community and shall be open to inspection and examination at all times by the Government Inspecting Staff. The Municipality shall in each case make suitable arrangements in communication with the Inspector for the annual examination required by the Educational Department.

Section 52 was also relied upon by the appellant, but that section was framed in order to impose the obligation on Municipalities to apply all their properties and funds subject to the provisions of the Act and for the purposes of the Act *within the limits of the Municipal District*, and is of no assistance towards deciding whether the monies in the suit were misapplied.

Generally speaking it may be admitted that a Municipality would be bound to apply its properties and funds subject to the provisions of the Act.

Owing to the action taken by the Municipality of which the defendants were members, the Educational Department were in effect prevented from examining the primary schools established and maintained by the Municipality during the suit period. The appellant contended that because the examination could not be made the shools ceased to be primary schools and so the Municipal funds expended on them had been misapplied.

The word 'misapplication' in s. 42 must be given its ordinary dictionary meaning. It means the wrong application of funds, the use of funds for purposes outside the scope of the Act.

The appellant then would have to prove that the schools on which the money claimed as having been misapplied were not primary schools as contemplated by the Act.

It is not necessary to consider the exact definition of a primary school, because it has not been contended by the appellant that the instruction given to the children attending them was other than that prescribed by the Educational Department for primary schools.

Most of the arguments adressed to the lower Court were either unnecessary or irrelevant and were rightly discarded by the Advocate-General who relied on the following syllogism.

A primary school to which Municipal funds can be applied is a school established and maintained according to the Act and the rules framed under the Act.

A school established and maintained by a Municipality which cannot be inspected by the Educational Department owing to the action of the Municipality in closing the doors to the Inspector is not such a primary school.

The money, therefore, which has been spent on such a school has been misapplied.

The fallacy in the argument is this, that because the Inspector is not allowed to see what is going on inside the walls of a school it does not follow that the school is not a primary school maintained in accordance with the Act. It would have to be proved that the school was being used for purposes other than that of primary education. That would have to be proved like any other fact. The ordinary method would be by the annual inspection and report by the Educational Department. If that became impossible from one cause or another, some other kind of proof would have to be led. Rule 3 merely prescribes the ordinary method whereby Government are enabled to satisfy themselves that the Municipality are doing their duty. In other words, it is a rule of procedure, and its infringement could in no way affect the character of the schools referred to in the plaint.

The appellant accordingly has faild to prove that Municipal funds have been misapplied by the respondents,

We are much indebted to the District Judge for his painstaking judgment but with due respect it was hardly necessary to set out at length the history of primary education in the Presidency.

In my opinion the appeal should be dismissed with costs.

Crump, J.—There is no dispute about the facts of this appeal and, so far as they are necessary, they are shortly as follows :—

The defendants were in 1921 Councillors of the Ahmedabad Municipality. In February 1921, by certain Resolutions the Municipality decided that no further educational grant should be received from Government and that the annual examination and inspection of Municipal schools should no longer be conducted by the Deputy Educational Inspector or his assistants. In pursuance of this decision the Educational Department was prevented from holding the annual examination and inspection from March 1, 1921, to December 17, 1921.

The only question which has been argued before us is whether the defendants can be held to have misapplied the monies expended on the Municipal schools during this period. The plaintiff relies upon s. 42 of the Bombay District Municipal Act III of 1901). By that section "every Councillor shall be personally liable for the misapplication of any fund to which he shall have been a party."

What is meant by "misapplication" in this section ? The word has no technical meaning and is no doubt used in its popular sense. To 'misapply' means to apply to a wrong purpose, that is, to a purpose which is not that which the circumstances indicate as correct, or a purpose which is for any reason forbidden. Used in the Statute under consideration it is probably an exhaustive definition to say that "To misapply is to apply to a purpose which the Act neither permits nor requires." The functions of a Municipality are either obligatory or discretional, and the Municipal funds must be expended on those functions and no others. The obligatory functions are those which the Act requires, the discretional functions are those which the Act permits. Whether the definition of misapplication which I have suggested is exhaustive or not it is at least sufficient for the disposal of this appeal.

To provide for primary education is one of the obligatory functions of the Municipality. Section 54 runs as follows :—

"54. It shall be the duty of every Municipality to make reasonable provision, (1) for the following matters within the Municipal District under their authority, namely :...

(*p*) establishing and maintaining primary schools."

To establish and maintain primary schools is thus one of the obligatory functions of a Municipality. Money so expended is money applied to a purpose which the Act requires, and is not, therefore, misapplied.

Are then the schools which this Municipality maintained "primary schools"? The words are nowhere defined in the Act. A 'primary' school is a school where 'primary' education is imparted. I am not aware that the word 'primary' has acquired any special meaning. "Primary" education means education in its first stages and nothing more. This much at least is clear that the words do not in themselves connote anything in the way of Government support or Government control.

The evidence in this case shows—indeed the point is not contested—that the education imparted in the schools in question was 'primary education' in the sense which I have indicated. It follows, therefore, that up to the point which we have reached, the expenditure was expenditure on primary schools, and, therefore, there was no misapplication.

But it is sought to extend the meaning of the words 'primary schools.' I do not say that the argument was put that way, but reduced to its simplest terms that is its meaning. In order to understand the point sought to be made it is necessary to turn to other portions of the Act. I pass over s. 52 of the Act which appears to me to have no bearing on the question at issue. Section 58 runs as follows :—

"58. The management, control and administration of every public institution exclusively maintained out of Municipal property and funds shall vest in the Municipality by which it is maintained:

Provided that the extent of the independent authority of any Municipality in respect of public education, and their relations with the Government Educational Department shall from time to time be prescribed by the Governor-in-Council."

The section means as this between Government and the Municipality: "You (the Municipality) have the management, administration and control of public institutions maintained out of your funds except schools. As to schools we (the Government) retain power to prescribe the extent of your independent anthority and your relations with the Government Educational Department."

In exercise of this power Government have published certain rules. The controversy turns mainly round r 3 which runs as follows:—

"3. Municipal schools shall...be open for inspection and examination by the Government Inspecting Staff. The Municipality shall in each case make suitable arrangements in communication with the Inspector for the annual examination required by the Educational Department."

It is not, in my opinion, necessary to consider the effect of the other rules or the breach thereof, if any. The Municipality in this case declined to comply with r. 3.

I have said that it is sought to extend the meaning of the words 'primary schools' and the argument can now be stated. It is as follows: "Primary schools for the purposes of the Act must be taken to mean primary schools maintained in accordance with the rules framed by Government. These schools were not so maintained. Therefore, they are not primary schools, and the money spent on them has been misapplied" The argument so stated is not devoid of plausibility, but there is a fallacy in it. I cannot accede to the proposition that where the Legislature speaks of 'primary schools' it must be held to mean "primary schools maintained in accordance with such rules as Government may from time to time frame, and no other primary schools." The Act says the Municipality shall maintain primary schools. Government by rules says "you shall maintain those primary schools in such and such a manner." It is not, in my opinion, possible to say: "The Municipality have not maintained their primary schools in the manner enjoined by Government: therefore, they have not maintained primary schools." Unless it can be said that these schools are not 'primary schools, there can be no case of misapplication. I would invite attention here to issue No. 10 framed by the lower Court at the instance of plaintiff. It runs thus:—

"10. Whether r. 3 of the rules relating to inspection was obligatory and if so whether objection to the inspection of schools would convert expenditure towards the maintenance of primary schools into a misapplication of the Municipal funds."

That issue contains within itself the same argument in another form. "The schools no doubt were primary schools as required by the Act, but when Municipality refused inspection the schools ceased to be primary schools." It is not permissible to read into the Act words which it does not contain and that plain proposition is decisive of this appeal.

It follows that no misapplication has been proved and that the suit fails.

I may add that, in my opinion, no useful purpose would be served by a consideration of the position of the Municipal Councillors as trustees under s. 50 of the Act. We are not concerned with any property of the description specified in that section. If the Councillors are regarded as trustees for all purposes of the Act the considerations which I have already set out apply equally to their conduct in that capacity.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE No. 214-B OF 1924.
February 14, 1925.
Present:—Mr. Baker, J. C.
VISHWANATH—PLAINTIFF—APPLICANT
versus
VAIJNATH—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—Ex parte *decree, order setting aside—Revision—Grounds for setting aside* ex parte *decree—Power of Court.*

An order setting aside an *ex parte* decree is open to revision by the High Court under s. 115 of the C. P. C. [p. 47, col. 2.]

Mode Narain Singh v. *Bikram Singh*, 84 Ind. Cas. 1028; (1924) A. I. R. (Pat.) 36: 4 P. L. T. 545; *Nand Ram* v. *Bhopal Singh*, 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130, *Bai Rami* v. *Jaga Dullabh*, 57 Ind. Cas. 556; 44 B. 619; 22 Bom. L. R. 801 and *Ajodhya Mahton* v. *Phul Kuer*, 65 Ind. Cas. 341: 1 Pat. 277; (1922) Pat. 61; (1922) A. I. R. (Pat.) 479, followed.

Chintamony Dassi v. *Raghoonath Sahoo*, 22 C. 981; 11 Ind Dec. (N. S.) 651, *Mahomed Hamidulla* v. *Tohurennissa Bibi*, 25 C. 155; 1 C. W. N. 652; 13 Ind. Dec. (N. S.) 105 and *Krishna Chandra Goldar* v. *Mohesh Chandra Saha*, 9 C. W. N. 584, not followed.

An *ex parte* decree can only be set aside if the defendant satisfies the Court that he was not duly served or that he was prevented by some sufficient cause from appearing, and a Court has no power to set aside an *ex parte* decree apart from the provisions of O. IX, r. 13 of the Code. [p. 48, col. 1.]

A defendant who has refused to accept a summons cannot contend that he has not been duly served. [*ibid.*]

Gadi Meelaveni v. *Marappareddigari Narayana Reddi*, 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 606; (1920) M. W. N. 19 (F. B.), relied on.

Application for revision of an order of the Sub-Judge, Yeotmal, dated the 18th of October 1924, in Miscellaneous Case No. 64 of 1924.

Mr. *W. B. Pendharkar*, for the Applicant.

Mr. *Atmaram Bhagwant*, for the Non-Applicant.

ORDER.—This is an application for revision of an order passed by the Second Class Subordinate Judge, Yeotmal, in Miscellaneous Case No. 64 of 1924, setting aside the *ex parte* decree in Civil Suit No. 223 of 1923.

The facts are that the applicant brought a suit against the non-applicant. The non-applicant did not appear and an *ex parte* decree was passed against him on 3rd December 1923. On 12th July 1924 the non-applicant applied to the lower Court for setting aside the *ex parte* decree on the ground that he was not served with the summons and he heard of the decree on 20th June 1924.

The lower Court took evidence and found that the non-applicant was served with the summons which he refused to accept and that his allegations to the contrary were false, but as he would be put to great hardship if he were prevented from defending the suit, it set aside the *ex parte* decree.

The plaintiff-applicant applies in revision on the ground that the lower Court had no jurisdiction to make such an order.

A preliminary objection is taken that no application in revision will lie under s. 115, C. P. C, as the case has not been decided and any irregularity can form the subject of an appeal under s. 105, C. P. C. Reliance is placed on *Nand Ram* v. *Bhopal Singh* (1) in which it was held that inasmuch as an order under O. IX, r. 13, setting aside an *ex parte* decree can be attacked in appeal from the final decree, no application will lie for revision of such an order.

Reference is also made to *Bai Rami* v. *Jaga Dullabh* (2) in which it was held that the High Court has no power under s. 115, C. P. C., to call for the record of any case which is under trial of a Subordinate Court.

It is to be observed that the Allahabad case quoted above expressly dissents from the Calcutta High Court in *Chintamony Dassi* v. *Raghoonath Sahoo* (3), *Mahomed Hamidulla* v. *Tohurennissa Bibi* (4) and *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (5), where it was held that an order setting aside an *ex parte* decree is not attackable in appeal from a final decree.

The Madras High Court in the Full Bench case of *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (6), in which the facts are precisely similar to those of the present case, accepted an application in revision against an order setting aside an *ex parte* decree and it does not seem to have been contended that such an application would not lie. The point referred to the Full Bench was whether a Court had power apart from the provisions of O. IX, r. 13, to set aside an *ex parte* decree passed by itself and it was held it had not. So also in *Ajodhya Mahton* v. *Phul Kuer* (7), the Patna High Court allowed an application in revision against an order refusing to set aside an *ex parte* decree.

Again in *Mode Narain Singh* v. *Bikram Singh* (8), it was held that where there is nothing in the judgment of the lower Court to indicate that it considered at all the point of limitation in setting aside an *ex parte* decree, the High Court will interfere in revision.

In Woodroffe and Amir Ali's C. P. C., 2nd Edition, page 773, it is stated that, though there is some authority to the contrary, the better and more recent

(1) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

(2) 57 Ind. Cas. 556; 44 B. 619; 22 Bom. L. R. 801.

(3) 22 C. 981; 11 Ind. Dec. (N. S.) 651.

(4) 25 C. 155; 1 C. W. N. 652; 13 Ind. Dec. (N. S.) 105.

(5) 9 C. W. N. 584.

(6) 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 606; (1920) M. W. N. 19 (F. B.).

(7) 65 Ind. Cas. 341; 1 Pat. 277; (1922) Pat. 61; (1922) A. I. R. (Pat.) 479.

(8) 84 Ind. Cas. 1028; (1924) A. I. R. (Pat) 36; 4 P. L. T. 545.

opinion is that an order setting aside an *ex parte* decree is not one affecting the decision of the case under s. 99, and cannot be contested on appeal from the final decree. It is subject to attack under s. 115 if the conditions of that section are fulfilled. Reference is made to the Calcutta decisions above quoted.

The authorities are thus conflicting, but the balance of authority is in favour of admitting such applications for revision.

On the merits the order is clearly without jurisdiction as the *ex parte* decree can only be set aside if the defendant satisfies the Court that he was not duly served or that he was prevented by some sufficient cause from appearing. This can have no application where, as here, it is found that the defendant refused the summons. In such a case, as held in *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (6) which overrules *Sommayya* v. *Subbamma* (9), the Court has no power apart from the provisions of O. IX, r. 13, C. P. C., to set aside an *ex parte* decree passed by itself. The facts of *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi* (6) are on all fours with the present case.

Following that decision the order of the lower Court which is clearly without jurisdiction must be set aside and the *ex parte* decree restored.

The application was moreover barred by limitation, as limitation began to run from the date of the summons.

Costs on the non-applicant. Pleader's fee Rs. 15.

Z. K. *Order set aside.*

(9) 26 M. 399.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 35 OF 1924.

December 20, 1924.

Present:—Mr. Baker, J. C.

MAROTI—JUDGMENT-DEBTOR—APPLICANT

versus

NARAYAN AND ANOTHER—DECREE-HOLDERS—NON-APPLICANTS.

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 174—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2 (2)—Execution of decree—Adjustment out of Court—Certification, application for—Limitation—Extension of time, whether can be obtained—Fraud, what amounts to.

In the absence of any fraud, the mere omission on the part of the decree-holder to certify the fact of adjustment of the decree, notwithstanding his promise to do so, does not entitle the judgment-debtor to override the period of limitation provided in Art. 174 of Sch. I to the Limitation Act for an application under O. XXI, r. 2 (2) of the C. P. C., and to secure an investigation of the very same matter and an extension of time by invoking the terms of s. 47 of the C. P. C. [p. 48, col. 2; p. 49, col. 1.]

Section 18 of the Limitation Act has no application to such a case in the absence of an allegation that the right to apply for certifying an adjustment was concealed by the decree-holder from the judgment-debtor. [p. 49, col. 1.]

Application for revision of an order of the Small Cause Court Judge, Nagpur, dated the 14th November 1923, in Execution Case No. 286 of 1922.

Mr. *R. B. Gadgil*, for the Applicant.

Mr. *M. R. Bobde*, for the Non-Applicants.

ORDER.—This is an application for revision of an order of the Small Cause Court, Nagpur, rejecting in execution the plea of satisfaction as time-barred.

The facts are that the non-applicants obtained an *ex parte* decree against the applicant and in execution attached certain cattle belonging to his nephew. The applicant then executed a bond for the decretal amount to the decree-holders. This adjustment was not certified to the Court and the decree-holders again took out execution. They admitted the execution of the bond but pleaded it was for cash consideration. The applicant's plea of satisfaction under O. XXI, r. 2, C. P. C., was dismissed as time-barred.

The applicant applies in revision and it is argued that there is fraud on the part of the decree-holders and on the ruling in *Hansa Godhaji* v. *Bhawa Jogaji* (1), the question of the alleged adjustment should be enquired into. He further relies on s. 18 of the Limitation Act.

For the non-applicants it is contended that the Bombay case is distinguishable as in it there was clear proof of fraud and in any case a contrary view has been taken by the Calcutta High Court in *Mukunda Lal De* v. *Bansidhar Marwari* (2), where on facts very similar to those of the present case it was held that the mere omission on the part of the decree-holder to certify the fact of adjustment of the decree notwithstanding his promise to do so does not entitle the judgment-debtor to override the period of limitation pro-

(1) 33 Ind. Cas. 232; 40 B. 333; 18 Bom. L. R. 22.

(2) 76 Ind. Cas. 311; 50 C. 468; (1923) A. I. R. (C.) 342.

vided in Art. 174 of the First Schedule of the Limitation Act, for an application under O. XXI, r. 2, cl. (2), and to secure an investigation of the very same matter and an extension of time by invoking the terms of s. 47 of the C. P. C.

I do not find in the application any statement that the judgment-debtor was informed by the decree-holders that they would certify the adjustment and that thereby he was led not to do so. On the contrary it appears that he put his affairs into the hands of one Tukaram with the object of getting the *ex parte* decree set aside, and Tukaram deceived him.

In these circumstances there is no clear case of fraud and following the decision of the Calcutta High Court I hold that the application for adjustment is barred by limitation. There is no case under s. 18 of the Limitation Act since it is not alleged that his right to make an application was concealed from him. The application fails and is dismissed with costs.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPEAL No. 85 OF 1924.

June 20, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Hugh Walmsley, KT.

SREELAL MANGTULAL—DEFENDANT—APPELLANT

versus

J. F. MADAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15—Arbitration—Error on face of award, what amounts to—Award, proceeding on false assumption of law, validity of—Award, form of—Sale—Consideration, portion of, left in hands of vendee for payment to prior encumbrancer—Vendee, whether trustee.

An error on the face of an award means that the Court can find in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which is erroneous. [p. 51, col. 2.]

Where a portion of the consideration for a sale of immoveable property is left in the hands of the vendee for payment to previous encumbrancers, the vendee is not a trustee or a *quasi*-trustee in respect of the sum which is so left in his hands, and an award which proceeds on the basis that the vendee is a trustee in respect of such sum is vitiated by reason of the fact that there is an error of law apparent on the face of the award. [p. 52, col. 1.]

When a suit or a dispute is referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions of law and fact. [p. 52, col. 2.]

The award of an arbitrator is intended to be final both in fact and in law, and the Courts will not interfere except on certain well-recognized principles and in certain well-defined circumstances. The award must, therefore, be couched in a form which would lead to finality and must not be put in a form which incites the parties to embark upon further litigation. [*ibid.*]

Appeal from an order of Mr. Justice Ghose in Suit No. 888 of 1923.

Messrs. *S. R. Das*, Advocate-General, *L. P. E. Pugh*, *H. C. Majumdar*, *Langford James* and *B. K. Ghosh*, for the Appellant.

Messrs. *S. N. Banerjee* and *K. P. Khaitan*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the defendants Sreelal Mangtulal from the judgment of my learned brother Mr. Justice C. C. Ghose, whereby he dismissed an application which was made by the learned Counsel Mr. N. N. Sircar on the 23rd of February 1924.

The facts which it is necessary for me to state for the purpose of my judgment are as follows:—On the 16th of March 1921, one G. C. Bose borrowed from one Chaturbhuj Dossa a sum of Rs. 20,000 and he executed a promissory-note and a memorandum and deposited with Chaturbhuj the title-deeds relating to a share in certain collieries. Subsequently Chaturbhuj endorsed the promissory-note to J. F. Madan and handed over the title-deeds with the memorandum of deposit to J. F. Madan for valuable consideration. On the 12th of September 1922, G. C. Bose sold the said share in the collieries to the appellants. The conveyance purported to be free of encumbrances ; the purchase-money was Rs. 70,000 and part of the consideration money was provided for in the following manner:—" Encumbrances on the collieries to be discharged by Sreelal Mangtulal ; (*a*) Due to Mr. J. F. Madan in respect of the equitable mortgage, dated the 16th March 1921, in favour of Chaturbhuj Dossa and assigned over to the said Mr. J. F. Madan on the 8th day of November 1921 (principal and interest) Rs. 23,600." On the 23rd of March 1923, a suit was instituted by J. F. Madan against the appellant defendants for recovery of Rs. 24,670 which represented the sum of Rs. 20,000, which I have mentioned, and interest,

After the suit was instituted, namely, on the 28th of June 1923, J. F. Madan died and on the 18th of August 1923, the plaint was amended by adding J. F. Madan, the plaintiff firm, and certain persons who were the executors and executrix of J. F. Madan as plaintiffs. Amongst other matters the plaint alleged a specific agreement about the 13th of September 1922, that the defendant would pay to the plaintiff the amount due on the promissory-note with interest. In the written statement of the defendant firm it was alleged amongst other things, that there was no valid and binding mortgage created by the promissory note and memorandum; and it was further alleged that the alleged assignment and mortgage to Madan being in fraud of the creditors of Chaturbhuj who was adjudicated insolvent on the 8th of May 1922 was void and inoperative and the defendants submitted that there was no valid and binding mortgage in favour of the plaintiff. The defendant firm then referred to certain negotiations between the plaintiff and the defendant firm which it was alleged ultimately fell through when the defendants came to discover that there was no valid and binding mortgage or assignment in favour of the plaintiff and the defendants finally submitted that the plaintiff was not entitled to maintain the suit against the defendants. On the 18th of January 1924, by consent of the parties, an order was made by my learned brother Mr. Justice Buckland that all matters in dispute in the suit including the costs not disposed of should be referred to the final arbitration of Mr. N. N. Sircar, Bar-at-Law, who was to make his award within the time specified in the order. The time was subsequently extended: and, on the 23rd of February, the learned arbitrator made his award by which he awarded to the plaintiffs the sum of Rs. 23,600 with interest at the rate of 6 per cent. from the 12th of September 1922, until the date of actual realisation.

The learned Advocate-General drew our attention during the course of the argument to the fact that in one passage the learned arbitrator had said that the plaintiffs as legal representatives of Madan were entitled to recover the sum of Rs. 23,600 and in another passage the learned arbitrator said that he decided that the plaintiff firm should get a decree for Rs. 23,600. There is no substance in this point; which appears to me an obvious slip on the part of the learned arbitrator, and in each case he was no doubt referring to the same party.

The learned arbitrator set out the issues and he dealt, in the first place, with the first six, one of which was "Was there any valid or binding mortgage in favour of the plaintiffs?" He answered all these six issues in favour of the plaintiffs. The result of that was that he found that the plaintiffs had a valid and binding mortgage on the collieries. The seventh issue was also decided in favour of the plaintiffs. That issue was "Was the transaction referred to in para. 2 of the plaint in fraud of the creditors of Chaturbhuj Dossa?" Then the learned arbitrator dealt with Issues Nos. 8, 9, 10 and 11. The material ones to which reference was made during the argument of this appeal were Issues Nos. 8 and 9. Issue No. 8 was "Was there any agreement for assignment of mortgage right of the plaintiff?" and Issue No. 9 was "Was there any agreement that the defendant would pay the amount of the promissory-note with interest as laid down in para. 4 of the plaint?" Those two issues refer to the alleged specific agreement on or about the 13th of September. The learned arbitrator came to the conclusion: "There are no merits in the case of the defendant firm, but technically there was no concluded agreement as has been alleged in the plaint."

The learned arbitrator then proceeded as follows: "Defendants purchased the rights of Gobinda Chandra Bose in the collieries by conveyance dated the 12th September 1922. The vendor purported to convey the properties free from all encumbrances for the sum of Rs. 70,000." The conveyance states:—"In consideration of the said sum of rupees seventy thousand to the vendor paid by the purchaser, the receipt whereof the vendor does hereby as well as by the receipt hereunder written admit and acknowledge and of and from every part thereof hereby release and discharge the purchaser." He then referred to the consideration and the passage which I have read, which deals with the incumbrances on the collieries to be discharged by Sreelal Mangtulal. The learned arbitrator then stated as follows: "Mangtulal's case is, as is also clear from his statement to me, that he has bought the properties

for Rs. 70,000, and he has got to pay Rs. 23,600, either to Mr. Madan or to Gobinda Bose (since adjudicated insolvent) and that neither Gobinda Bose nor the Official Assignee has demanded payment of this amount. I refer to the following questions and answers.

Q. Have you any real objection to pay Mr. Madan in preference to Gobinda Bose ?

A. That is not so. I am prepared to pay if I have a proof of good title.

Q. After the decree of Court if you have got to pay to Mr. Madan, you will have no grievance?

A. Yes, if asked to pay by Court, I have no objection to pay.

If the answer of the defendant Mangtulal in which he said "I am prepared to pay if I have a proof of good title" referred to the question, as I assume it did, whether the plaintiff had a valid and binding mortgage in his favour I should have thought that the learned arbitrator would not have had much difficulty in coming to a conclusion upon this matter inasmuch as the learned arbitrator had already decided that the title of the plaintiff in respect of the mortgage was established.

The matter, however, does not rest there, because the learned arbitrator after finding certain facts, which it is not necessary for me to read in detail (amongst them was a finding that the "defendant firm had Rs. 23,600 earmarked in its hands having undertaken to pay off Mr. Madan") proceeded to state : "Counsel for both sides have addressed the arbitrator on the question whether the defendant firm is liable by reason of the undertaking mentioned in para. 5 of the plaint." That I assume was the undertaking referred to or implied in that part of the conveyance to the defendants which dealt with the way in which the sum of Rs. 23,600 due to Mr. Madan was to be discharged. The learned arbitrator then set out certain decisions to which reference had been made and he proceeded as follows:—"Upon the authorities discussed and on facts found by me I hold that the position of the defendant firm is analogous to that of a trustee in respect of the earmarked Rs. 23,600 in its hands."

The learned Counsel on behalf of the defendants argued that in that passage there was an error of law on the face of the award.

The law upon this question has recently been reiterated by the Judicial Committee of the Privy Council in the case of *Champsey Bhara and Cowpany* v. *Jivraj Balloo Spinning and Weaving Company, Limited* (1), in which case Lord Dunedin in delivering the judgment referred to the well-known case of *Hodgkinson* v. *Fernie* (2) and said as follows:—"Now the regret expressed by Williams, J. in *Hodgkinson* v. *Fernie* (2) has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous." The learned Lord then mentioned certain matters which it did not mean, and stated that "the award will stand unless, on the face of it, they (*i. e.*, to say the arbitrators) have tied themselves down to some special legal proposition which then, when examined, appears to be unsound."

This Court has recently had an occasion to draw attention to the law on this point, in more cases than one, as for instance in the case of *U. M. Choudhury & Co.* v. *Jiban Krishna Ghose & Son* (3), the decision in which is to the same effect as the decision of the Judicial Committee to which I have referred.

The learned Counsel for the respondents argued that the passage in the award which I have read, was not the basis of the award, and that it was no more than an incidental opinion expressed by the learned arbitrator whereas, as I have said, the learned Counsel for the appellants argued that it was the basis of the award.

(1) 73 Ind. Cas. 436; (1923) A. I. R. (P. C.) 66; 47 B. 578; 50 I. A. 324; 44 M. L. J. 706; 25 Bom. L. R. 588; (1923) M. W. N. 596; 38 C. L. J. 130; 28 C. W. N. 397; 33 M. L. T. 419; (1923) A. C. 480; 92 L J. P. C. 163; 129 L. T. 166; 39 T. L. R. 253; L. R. 4 A. (P. C.) 99 (P. C.).

(2) (1857) 3 C. B. (N. S.) 189; 27 L. J. C. P. 66; 3 Jur. (N. S.) 818; 6 W. R. 181; 140 E. R. 712; 111 R. R. 614.

(3) 69 Ind. Cas. 995; 49 C. 646; (1922) A. I. R. (C.) 447.

The first question which this Court has to decide is whether the learned arbitrator did regard that as the basis of his award. The learned Counsel for the respondents' argument is not without some force, but having regard to the way in which the award is framed, it is difficult to avoid the conclusion that the learned arbitrator did regard that as the basis of his award. The next question which arises is whether the decision of the learned arbitrator in this respect was erroneous in point of law. It is clear to my mind that the defendants were not trustees of any fund held by the defendants for the benefit of the plaintiff or his representatives. In fact, it appears from the award that the learned arbitrator did not regard them as trustees; for, he said that the position of the defendant firm was analogous to that of a trustee. I have had considerable difficulty in appreciating what the learned arbitrator meant by saying that the position of the defendant firm was analogous to that of a trustee and that there was a sum of money "earmarked" in his hands. Consequently I am of opinion that, assuming this was the basis, upon which the learned Counsel relied for his award it was erroneous in law and that consequently this award cannot stand. The appellants have applied that this matter should be remitted to the learned arbitrator. In my judgment, that is the proper course.

Therefore, the award will be remitted to the learned arbitrator in order that he may deal with the matter. Considerable time has elapsed already: and we, therefore, think that the award should be made on or before July 14th, 1924. It will be necessary that the learned arbitrator should have a copy of the order of this Court and, therefore, we give direction that as soon as the judgment is signed, an office copy should be forthwith prepared which must be obtained by the appellants and served by the appellants upon the learned arbitrator on or before Friday next.

Before leaving this case I think it is necessary to add one or two words about the form of the award.

The form of the award, in my experience, is unusual.

It is more like the judgment of a Judge, which is subject to appeal, than the award of an arbitrator.

The learned arbitrator has gone so far as to include in his award part of the evidence; he has referred to cases which were cited, and he has commented on at least one of them. As pointed out in *Hodgkinson* v. *Fernie* (2): When a suit or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions of law and fact.

The award of the arbitrator is intended to be final both in fact and law, and the Courts will not interfere except on certain well-recognised principles and in certain well defined circumstances An award made in the form of the award now under consideration is calculated to have an effect which is the exact opposite of finality and one might almost say it is an invitation to the parties to embark upon further litigation, as, indeed, the parties have done in this case.

Instead of being final and conclusive, the result has been that the parties are still litigating upon the matters in dispute and they have been put to much unnecessary expense. Further, there is no necessity that an award should be made in the form in which the award was made in this case; if there is any real difficulty in point of law as to which the opinion of the Court should be taken, provision is made in cl. 11 of the Second Schedule of the C. P. C., for making the award in the form of a special case with the leave of the Court.

The result is that the appeal must be allowed and the matter remitted to the learned arbitrator in order that he may make the award within the time which I have indicated; and, we are of opinion that the costs of the proceedings before my learned brother Mr. Justice C. C. Ghose and the costs of this appeal must abide the event of the learned arbitrator's award. By that I mean if the learned arbitrator's award is in favour of the plaintiffs the defendants will pay the costs of those proceedings. On the other hand, if the award is in favour of the defendants the plaintiffs will pay the costs of the proceedings in this appeal, and in the Court of first instance.

Walmsley, J.—I agree.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 151 OF 1923.

December 15, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

GAYA PERSHAD—DEFENDANT—APPELLANT

versus

ALAM SINGH AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Under-proprietary title, acquisition of—Construction of decree of Settlement Court—Adverse possession—Derivative title, whether can be converted into hostile title.

A person who has no under-proprietary title and who has been paying rent in respect of the property in dispute to the landlord, cannot convert his derivative possession into a hostile one and thereby acquire a proprietary title by prescription. [p. 53, col. 2.]

Muhammad Mumtaz Ali Khan v. *Mohan Singh*, 74 Ind. Cas. 476; 50 I. A. 202; (1923) A. I. R. (P.C.) 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321 (P. C.) and *Sultan Khan* v. *Hardwari*, 85 Ind. Cas. 850; 1 O. W. N. 768; 10 O. & A. L. R. 1485; L. R. 6 A. (O.) 33, followed.

On the application of the predecessors-in-title of the defendants for the allotment of a certain area of land to them for maintenance, the Settlement Court passed a decree on the basis of a compromise in favour of the applicants for a certain area of land bearing a certain rental "for *dawam*":

Held, that the decree could not be construed to have conferred an under-proprietary tenure on the predecessors-in-title of the defendants and that entries to that effect made in the papers of the first and the subsequent Settlements as regards the nature of the tenure would not operate to confer such title upon them. [p. 54, col. 1.]

Appeal against a decree of the Subordinate Judge, Hardoi, dated the 10th January 1923, confirming that of the Munsif, Shahabad, dated the 22nd February 1922.

Mr. *H. K. Ghosh*, for the Appellant.

Mr. *Ishwari Prasad*, for Respondents Nos. 1 to 8 and 10 to 13.

JUDGMENT.—This is the defendant No. 1's appeal. On the 7th September 1918, Jurra Singh, Bahadur Singh, Sugar Singh and Narpat Singh, defendants Nos. 5 to 8, transferred by way of mortgage two pieces of land Nos. 614/2 and 614/4, a grove No. 624 and two houses Nos. 18 and 53 situate in *Mouza* Maikpur, *Pargana* Pachhoha, in the District of Hardoi, in favour of Gaya Prasad, Kanta Prasad, Hori Lal and Daya Ram, defendants Nos. 1 to 4, in the suit out of which this appeal arises. The relief for which the plaintiffs prayed was a declaration that the deed of mortgage of the 7th September 1918, was absolutely invalid and ineffectual. The transferees pleaded that the property in suit was a part of the under-proprietary tenure of the transferors and that the plaintiffs were estopped from challenging the alienation in question. On the first plea, the issue which has been tried in the Courts below was as to whether the transferors were under-proprietors or not of the property in suit. The Courts below have decided this issue against the defendants and have granted the declaration asked for by the plaintiffs. The plea of estoppel is not taken in the memorandum of appeal to this Court.

The question as to whether the property in suit held the character of an under-proprietary tenure or not was presented in two forms for decision. First that the decree which the transferors or their predecessors-in-interest obtained from the Settlement Court on the 14th February 1869, (Ex. 6) in respect of the lands and the grove along with other lands conferred under-proprietary right on them and those properties, and (2) that in any event they have acquired that right by prescription.

The second ground may be disposed of in a few words. The defendants have admittedly been paying rent for the property in suit to the plaintiffs and if they have no under-proprietary title to that property they cannot convert their derivative possession into a hostile one and thereby acquire title by prescription. This I take to be the effect of the recent decision of their Lordships of the Privy Council in the case of *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (1). The same view of that decision was taken by my learned brother, Mr. Dalal, J. C., in *Sultan Khan* v. *Hardwari* (2). The second ground, therefore, fails.

On the construction of the decree of the Settlement Court dated the 14th February 1869, after mature consideration I have come to the conclusion that there is no valid reason for disagreeing with the interpretation which the Courts below have placed upon it. The decree was passed on the basis of a compromise and is "for 25 *bighas* 13 *biswas* 13 *biswansis* lands rental Rs. 25 per year in favour of the plaintiffs for *dawam*." The language of the decree is clearly not ex-

(1) 74 Ind. Cas. 476; 50 I. A. 202; (1923) A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321 (P. C.).

(2) 85 Ind. Cas. 850; 1 O. W. N. 768; 10 O. & A. L. R. 1485; L. R. 6 A. (O.) 33.

plicit. The Courts below have, therefore, for interpreting it rightly referred to the circumstances in which it was made. Those circumstances are revealed by Exs. 2, 3, 4 and 5. Exhibits 2 and 3 are judgments which show that the subject-matter of the decree of the Settlement Court dated the 14th February 1869, was a part of the share in the village Maikpur which originally belonged to one Atta Singh, who had died before the Settlement. On his death the share came into the possession of the predecessors-in-interest of the transferors defendants in the present case. Two suits were brought by the collaterals of Atta Singh against the last-mentioned persons. It was proved that the present defendants' predecessors were illegitimate sons of Atta Singh. The collaterals in both the suits obtained a decree as against those sons of Atta Singh. The share was thus lost to them. One of those judgments was pronounced on the 12th November 1868 (Ex. 3) and the other on the 13th January 1869 (Ex. 2). Thereafter on the 24th January 1869, Hemanchal and Kanchan Singh the legitimate sons of Atta Singh, instituted a suit for the recovery of the land comprising an area of 25 *bighas* 13 *biswas* 13 *biswansis* and asked that those lands be decreed to them by way of maintenance so that they might cultivate them and that they would pay rent thereof like tenants and would manage to support themselves by those means. The plaintiffs' predecessors-in-interest agreed to this with the result that the decree already mentioned was passed. In the circumstances therefore, the decree of the 14th February 1869, cannot be construed to have conferred an under-proprietary tenure on the defendants' predecessors. If that is the true interpretation of the decree, as I hold it is, the entries made in the papers of the first and the subsequent Settlements as regards the nature of the tenure are of no consequence.

In the *wajib-ul-arz* (Ex. 10), in the *khasra* (Ex. 9) and in the *khatauni* (Ex. 8) of the first Settlement the 25 *bighas* odd land dealt with by the decree of the 14th February 1869, were shown as *qabzadari* tenure. In the proceedings relating to the assessment of the Government revenue of the village in the year 1903, these lands were treated as *matahti*. The fact that they were so treated for the purpose of assessing Government revenue cannot make them under-proprietary tenure if they were really not so. In Register No. 5 prepared at last Settlement these lands were again shown as *matahti* (Ex. a8). Now Register No. 5 would contain entries of heritable and non-transferable tenures as well. See s. 56 of Act XVII of 1879. The entries of these lands, therefore, in that Register with the description of *matahti* does not make them under-proprietary tenure. Finally we have the *Khewat* of 1326 *Fasli*, that in 1919 A. D. (Ex. A1). Here again these lands are described as *matahti*. No separate and further comment is necessary as regards this entry. Reliance was also placed on the fact that the defendants have been making subsequent transfers of portions of the 25 *bighas* odd tenure. When once the interpretation of the decree of the Settlement Court which is the fountain-head of the plaintiffs' title is determined the fact that the defendants had been acting contrary to the title conferred thereby cannot be given the effect of entering a larger title than the defendants originally have had.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

April 3, 1925.

Present:—Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

DIWAN CHAND-KIRPA RAM AND COMPANY—APPELLANTS

versus

WELD AND COMPANY—RESPONDENTS.

Principal and agent—Forward contracts—Purchase made by agent contrary to instructions of principal—Principal, liability of—Liability of principal to deposit margin—Amount of margin to be determined by agent—Discretion, exercise of—Wrongful closing of contracts by agent—Loss on one contract, whether can be set-off against profit on other contracts—Appeal—Consent, whether can be withdrawn—Interest pendente lite—*Discretion of Court.*

Plaintiffs, who were general merchants, used to make forward contracts for the sale and purchase of cotton through the defendants, who were cotton brokers and merchants at Liverpool with a branch office at Bombay. In respect of each contract the plaintiffs used to sign an agreement whereby they bound themselves to deposit a certain sum of money as a margin with the defendants in respect of the contract and further agreed to maintain such deposit

and to deposit such further sum of money as the defendants may from time to time require as further margin to meet any difference in price, the amount of such further margin being in the absolute discretion of the defendants. If such further deposit was not made the defendants were authorized to close out all the contracts of the plaintiffs without any notice to the plaintiffs and notwithstanding any objections or instructions from the plaintiffs to the contrary. On 27th November 1916 defendants had open on the plaintiffs' account two contracts in future one for the sale of one hundred bales of cotton on the New York exchange and the other for the purchase of two hundred bales of cotton in Liverpool. On 27th November plaintiffs instructed defendants by wire to purchase four hundred bales of cotton. On receipt of defendants' reply, however, the plaintiffs on 29th November countermanded their wire of the 27th November and instructed the defendants to wait to execute the order and to wire opinion. Notwithstanding the receipt of these instructions the defendants made the purchase directed by the plaintiffs' wire of the 27th and notified the plaintiffs of the fact. The plaintiffs at once repudiated liability in respect of the contracts. Shortly afterwards defendants demanded from the plaintiffs a further margin of five thousand rupees on the basis of the New York and Liverpool contracts and also of the four hundred bales subsequently purchased. The plaintiffs refused to comply with this demand stating that they were not responsible for the last mentioned contract and that there was a sufficient margin for the previous contracts. The defendants thereupon closed out all the contracts of the plaintiffs. The plaintiffs brought this suit to recover a certain sum of money made up of the balance in favour of the plaintiffs in the hands of the defendants on the date on which the contracts were closed out, and damages calculated on the basis of the difference between the contract price and the market price of the one hundred bales to be sold on New York exchange which was alleged by the plaintiffs to have been wrongly closed by the defendants and interest:

Held, (1) that the defendants having purchased the four hundred bales of cotton notwithstanding the instructions of the plaintiffs to the contrary, the plaintiffs were not responsible for the purchase and that no margin could, therefore, be demanded by the defendants, in respect of that contract; [p. 57, col. 1.]

(2) that admittedly the sum in the hands of the defendants being sufficient margin in respect of the New York and Liverpool contracts, the defendants were not justified in demanding further cover from the plaintiffs on the basis that the latter were liable in respect of the purchase of four hundred bales of cotton; [*ibid.*]

(3) that although it was within the absolute discretion of the defendants to demand any further margin the discretion was nonetheless to be exercised with reference to the true position and with even a greater sense of responsibility in that it was within limits final; [p. 60, col. 1.]

(4) that there being no exercise of discretion at all by the defendants, the demand for further cover was not properly made and the subsequent closing by the defendants of the two open contracts on New York and Liverpool could not be justified; [*ibid.*]

(5) that the New York and Liverpool contracts which were effected in different markets for different quantities of cotton with different delivery dates on separate instructions and evidenced by separate memoranda were in law for all purposes distinct one from the other and that the liabilities of the defendants to the plaintiffs in respect of each were separate; [*ibid.*]

(6) that the closing of the New York contract having resulted in loss to the plaintiffs the latter were entitled to recover the amount of that loss from the defendants and that the defendants could not claim any credit in respect of any benefit which might as the result of the defendant's wrongful act have accrued to the plaintiffs in connection with the Liverpool contract. [*ibid.*]

Interest *pendente lite* is in the discretion of the trial Court and an Appellate Court will not interfere with the exercise of that discretion merely on the basis of conjecture. [p. 60, col. 2.]

It is only in special circumstances that a consent which has formed the foundation of the judgment appealed from can be treated as open to withdrawal in the Appellate Court. [p. 59, col. 2.]

Messrs. *A. M. Dunne* and *S. Hyam*, for the Appellants.

Messrs. *A. T. Miller* and *Dickinson*, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—The appellants in this case are general merchants carrying on business at Kasauli, and the respondents are cotton brokers and merchants at Liverpool with a branch office at Bombay.

The business transactions between the two firms, carried out by the respondents through their Bombay house, commenced in the month of September, 1915, and had the appearance, at all events, of a succession of contracts for the purchase or sale of cotton for future delivery made by the respondents on the instructions and for the account of the appellants. These purchases and sales on the appellants' side look, it must be confessed, very like gambling transactions, not intended to be completed, and never, in fact, completed either by the taking or the making of delivery of any cotton. Genuine contracts by the respondents were apparently in no way necessary to secure for the appellants all that they desired from their enterprise, and it was at one stage of the case strongly contended by them—it was, indeed, so found by the Trial Judge—that a set of contracts under discussion in these proceedings—the three contracts, that is to say, which their Lordships will later on refer to as the disputed contracts—were not shown by the respondents to have been entered into with any reference at all to the appellants.

It has, however, all through been the case of the respondents, and their Lordships for the purposes of their judgment freely accept it, that the transactions in cotton

futures between the appellants and themselves were in every case translated into real contracts of purchase or of sale involving them in serious liabilities to third parties. All of these contracts had to be made by the respondents in their own name; upon each of them they became personally liable either as buyers or sellers; their relation to the appellants under them was the relation of brokers only, their expected profit being derived exclusively from the commission charged by them on the contracts entered into for behoof of their clients.

On the occasion of and in relation to every agreement to purchase a future in cotton made by the respondents at the appellants' instance, a memorandum of the transaction was presented by the respondents to the appellants for signature. That memorandum where the custom to purchase was on New York or Liverpool contained the clause following or its equivalent:—

"We have deposited with you the necessary deposit at the rate of Rs. 1,500 per 100 bales and we agree to maintain such deposit and to forthwith deposit with you in Bombay such further sum of money as you may from time to time require as further margin to meet any difference in price which may occur in the event of the market rate in Liverpool declining, and we agree that the amount of such further margin from time to time required by you shall be in your absolute discretion. Interest at 5 per cent. per annum will be credited to us on the amount of the margin or any further margin. If we neglect or fail to pay you in Bombay any sum of money required by you as aforesaid after demand by letter or telegram addressed to our usual or last known residence or place of business it shall be lawful for you or your Liverpool firm without any notice to us to sell the cotton in respect of which such demand shall have been made on our account and risk and notwithstanding any objections or instructions from us to the contrary."

The clause of the memorandum presented to the appellants by the respondents on the occasion of an agreement for the sale of a future by them was in identical terms, with the substitution of the word "advancing" for the word "declining," and of the words "buy back" for the word "sale" where the words "declining" and "sale" respectively occur.

The main question now remaining between the parties is whether the respondents, relying upon the above clause in each memorandum were, upon the appellants' alleged default in providing further cover demanded by the respondents, justified without the appellants' authority in closing on the 11th December, 1916, and before their due dates, two forward contracts in cotton, one in New York and the other in Liverpool, then open on account of the appellants.

The facts, many of them the subject of acute controversy in both Courts below, are no longer in dispute. They can be compendiously stated so far as they are now material.

On the 27th November, 1916, the respondents had open on the appellants' account two contracts in futures. The first of these was a contract of the 17th November, 1916, for the sale on the New York Exchange of 100 bales middling American cotton at 20·80 cents per lb., delivery March, 1917; and the second was a contract of the 22nd November, 1916, for the purchase in Liverpool of 200 bales Liverpool Americans at 12·30 cents per lb., delivery March-April, 1917. On the 27th November, 1916, no other contracts were open between the parties

During that week the cotton market was apparently in a disturbed state, and the appellants, bent on speculation, seem to have oscillated from day to day between buying and selling. On the 26th November they wired the respondents to sell 200 bales Bengals, but on receipt of advice from the respondents recommending a purchase, the appellants on the next day, the 27th, cancelled the selling order and instructed the respondents, instead of a sale, to purchase 100 Akola, 100 Broach and 200 Bengals, 400 bales in all. This instruction to buy not being quite clear to the respondents, it was, at their request, confirmed on the 28th November by a further telegram from the appellants, which in turn, on the morning of the 29th November, after receipt from the respondents of advice intimating a considerable fall in prices as compared with those of the previous day, was finally countermanded by a wire from the appellants instructing the respondents to wait to execute the order and to wire opinion. Notwithstand-

ing this instruction, however, and, as is not now contested, after it had been received, the respondents made the purchases directed by the appellants' wire of the 28th, and they notified the appellants that they had made them by the following telegram despatched from Bombay on the same afternoon:—

Bought one hundred Broach [at] Rs. 448; one hundred Akola at Rs. 420; two hundred Bengals at Rs. 349·8.

These are the three disputed contracts above referred to. The appellants at once repudiated the authority of the respondents to make them on their behalf; they said that a reference to the telegrams with other evidence showed that the contracts, if made at all by the respondents on their account, had been entered into after the appellants' instruction to delay execution had been received. This position the respondents vigorously contested. They asserted and continued to assert that the appellants' telegram of the 29th was not received until after the order contained in that of the 28th had been executed; they insisted and persisted that the appellants were bound by the three contracts of purchase, and on the 9th December they wired the appellants as follows:

"Bazar rumours ninety-one for New York, thirty-five Liverpool down. We require Rs. 5,000 against your open contracts. Unless we receive this money on Monday we cannot carry contracts on such fluctuating markets. Reply immediately."

The open contracts referred to in that telegram are specified in a further telegram of the respondents of the 10th December. They were the three disputed contracts of purchase of the 29th November, the sale contract of the 17th November, and the purchase contract of the 22nd November —sometimes in the proceedings referred to as the New York and Liverpool straddle, which were then admittedly open.

With the demand for cover by the respondents, the appellants refused to comply. Their answer to it was that for the two last contracts the respondents had sufficient margin, and for the others the appellants held no responsibility. To this on the same day, the 11th December, the respondents replied by telegram that the appellants were mistaken; that the respondents held them responsible; that all transactions were stopped because they had not responded to the margin call of Rs. 5,000 and the telegram continued as follows:—

"Have closed out all your business: 100 Broach 392: 100 Akola 362: 200 Bengal 288: also cabled Liverpool to buy 100 March, New York, and sell 200 March-April. Statements will follow."

There had been, it will be noticed, a serious fall in the prices agreed to be paid under the disputed contracts, and the necessity, or at all events the propriety, of demanding further cover if these were, in fact, the contracts of the appellants can hardly be questioned. And it was, as will appear, only on this footing that the respondents at the trial sought to justify their demand. They admitted then, that if, on the 11th December, the only contracts open by which the appellants were bound were the so-called Liverpool straddle, the demand for further cover could not be maintained. But they were permitted to withdraw that admission in the High Court, which adopted the view then presented that even on that footing the respondents' demand for cover was justified. With this aspect of the case, therefore, their Lordships must deal on this appeal, and it is convenient now to state some further facts.

The respondents' course of business in the matter of additional cover was described at the trial by Mr. Vaz, their head clerk at Bombay. The ledger account of each client in the respondents' books is, he explained, a money account which shows also the clients' profit or loss on closed transactions. Transactions still open are not recorded in the ledger account. These appear in what apparently is called a margin money account. There they are calculated at the current market, and show the profit or loss of the client in account with the respondents. The collation of the results of the two accounts enables the respondents to see at a glance the amount standing with them to the credit or debit of the client—the governing factor in the decision whether further cover shall or shall not be demanded.

Now it is admitted that upon the 11th December, 1916, the respondents held at the credit of the appellants the sum of Rs. 13,496-6-11 arrived at in this way. Of the two contracts with which we are now alone concerned one, as will have been

seen, was for a future purchase of 200 bales; the other was for a future sale of 100. The market was falling; it was accordingly against the first contract only that the respondents, if at all, required protection, while the fall producing the loss on the first contract added approximately to the profit per bale accruing on the second. The result was that the respondents were substantially, although not precisely, at risk only on balance of 100 bales on the first contract over the second; and against that they had a fund in hand of Rs. 13,496-6-11. In this connection it will be re-called that under the memoranda, Rs. 1,500 per 100 bales was the normal deposit, and the actual sufficiency of what they held is further shown by the fact that when these two contracts were closed by the respondents on the 11th of December there still remained in their hands to the credit of the appellants approximately Rs. 10,850.

These are the facts with reference to which this question of further cover will now have to be determined. It may, however, be convenient by way of contrast to indicate what the position of the respondents would have been if the disputed contracts when demand for cover was made, had been, as they were assuming, binding on the appellants. The closing of these contracts, added to those of the New York and Liverpool straddle, would in that event have left the appellants in debit to the respondents in the sum of approximately Rs. 1,280—of the sum for which, as will be seen hereafter, the respondents actually counterclaimed in these proceedings.

Returning to the closing of the two earlier contracts as the only closing now relevant, the effect was that as a result there was shown, on the 100 bale contract for sale, a profit to the appellants of Rs. 2,785-9-6, and on 200 bale purchase contract a loss of Rs. 5,488-2-9. By the date when the appellants commenced the present suit, the difference between the contract price and the market price as to the first of the two contracts had increased to Rs. 7,269 in favour of the appellants.

The suit was commenced by the appellants in the Court of the Senior Subordinate Judge of Ambala on the 6th January 1917. In it the plaintiffs claimed Rs. 20,998-1-11 made up as follows.—

Rs.	a.	p.	
13,496	6	11	... Balance in favour of the appellants on the 8th December, 1916, as above stated.
7,269	0	0	... Damages calculated on the basis of difference between the contract price and the market price of the 100 bales alleged to have been wrongfully closed on 11th December, 1916.
232	11	0	... Interest at the rate of 9 per cent. per annum to date of suit.

The main question litigated in the Trial Court was whether the disputed contracts were made on behalf of the appellants by the respondents as brokers, and whether these contracts, if they were in fact so made, were made with the authority of the appellants. The learned Judge, in his judgment, found it not to be proved that any purchases at all were made by the respondents for the appellants on the 29th November, 1916, and he also found that even if the alleged purchases of that day were made for the appellants they were made after the order for them had been duly cancelled. He records in his judgment the admission of the respondents already alluded to, that if the disputed purchases were made after cancellation of the order therefor, they were not justified in closing the "New York-Liverpool straddle."

"It is admitted," the learned Judge says in his judgment, "that in view of the above findings the defendants were not justified in closing the contracts on the 11th December, 1916, as they had sufficient margin money and the amount of the damages arising from this closing up and the rates of interest are also not disputed. I accordingly grant a decree to the plaintiffs for Rs. 20,998-1-11 with costs against the defendants."

The defendants had counterclaimed for Rs. 1,283-1-3, the exact amount which, as above appears, was due to them if the appellants had been bound by the disputed contracts. That counterclaim was dismissed. It will be noted that the learned Judge, while including in his judgment a sum in respect of interest up to the date of suit, omitted, as it is said by inadvert-

ence, to give, although it was claimed, either interest at 9 per cent. per annum to the date of judgment or interest at the rate of 6 per cent. per annum on the judgment debt until payment.

From that decree both the appellants and respondents appealed to the High Court at Lahore. The respondents' appeal, so far as the notice thereof was concerned, was confined to the matters which they had argued and on which they had failed in the Court below; the present appellants' cross-appeal was with reference to the omissions of interest from the decree of the Subordinate Judge.

The learned Judges of the High Court confirmed the second finding of the Subordinate Judge as to the three disputed contracts. They held that the respondents effected these contracts after receipt by them of the appellants' telegram cancelling their instructions to purchase, and that consequently the appellants were not responsible therefor.

And there, if the admission made by the respondents in the Court below had been adhered to, the case would have ended, for the respondents no longer contest these concurrent findings of both Courts. But in circumstances which are not fully explained the learned Judges of the High Court allowed the respondents to withdraw their former admission.

"There is no admission now," they say in their judgment, "that if the plaintiffs' telegram of revocation reached the defendants before the purchases of the 29th November were made, the defendants were not justified in closing the New York and Liverpool contracts on the 11th December," and they proceed to deal with the case on that footing, deciding in the result that even if these were the only contracts open on that date, the respondents were empowered to demand further cover of Rs. 5,000 in respect of them and to close the contracts upon failure by the appellants to provide it. Accordingly the learned Judges treated both contracts as properly closed, varied the decree of the Subordinate Judge by making it one for Rs. 10,857-4-10 only, and they dismissed the present appellants' appeal as to interest.

Their Lordships, while not regretting that the contention referred to was treated in the High Court as being still open to the respondents, must add that it does seem to them that an indulgence which permitted them to raise it after it had been so deliberately abandoned at the trial was extended to them too much as a matter of course. It is only in special circumstances that a consent which, as in this case, formed the foundation of the judgment appealed from is in the Appeal Court to be treated open to withdrawal.

From the decree of the High Court the present appeal is brought, and the principal question argued before their Lordships has been whether, on the footing that the New York and Liverpool contracts were alone open, the decision of the High Court that the respondents were entitled to demand further cover of Rs. 5,000 and close the contracts on failure by the appellants to provide it can be supported.

Their Lordships would at once observe that the decision of the High Court on this point is made of less weight by the circumstance that it is apparently based upon a misconception of fact. The learned Judges there proceed upon the statement which they make quite definitely in their judgment that the demand for cover was made by the respondents as "additional margin money against the two contracts mentioned in the plaint." Such was not the fact, as their Lordships have been at pains to show. The demand was made with reference, and only with reference, to the five alleged outstanding contracts as to which the demand for further cover was so reasonable that its propriety could not have been questioned. As applied to the two contracts only, however, the demand was, as has been shown, extravagant, and can only be justified, if at all, on the ground that the discretion of the respondents in the matter being "absolute" its exercise in the absence of fraud is not open to review. But even this view will not avail the respondents if in fact their discretion, however absolute, was in relation to these two contracts never exercised at all. And it was not. The only discretion they did exercise was that which they treated themselves as possessing with reference to their commitments on the five contracts. As applied to two of these only, their Lordships, on the figures which they have detailed, cannot doubt that, the *bona fides* of the respondents not being questioned and their intelligence as businessmen being assumed, no demand for cover ever would have presented itself to their minds as being even possible.

The respondents' Counsel faced with this were, their Lordships felt, not far from suggesting that an absolute discretion, like that of the respondents in this matter, was the equivalent of a right to make a purely arbitrary demand. It is not so. A discretion although absolute, it is nonetheless a discretion to be exercised with reference to the true position and with perhaps even a greater sense of responsibility in that it is within limits final. On the true position of the parties as it existed on the 11th December, 1916, their Lordships are satisfied that there was never by the respondents any exercise of discretion at all. The demand for further cover was accordingly not properly made, and the subsequent closing by the respondents of the two open contracts cannot be justified.

It was, however, further contended by the respondents that in any case the judgment of the learned Subordinate Judge was erroneous in this that he therein treated the so-called New York and Liverpool straddle as two transactions carried out by two separate contracts, whereas he ought to have regarded the transaction as one, the second contract being merely a hedge against the liabilities subsisting under the first. Their Lordships cannot agree. The phrase employed to describe the two contracts is picturesque and it may well have, as indeed has been shown, a certain business significance. But their Lordships cannot doubt that these contracts, effected in different markets for different quantities of cotton, with different delivery dates on separate instructions and evidenced by separate memoranda, are in law for all purposes distinct the one from the other, and the liabilities of the respondents to the appellants in respect of each are separate. The respondents were at fault in cancelling either contract. It is fortunate for them that it is in respect of one cancellation only that any loss has been sustained by the appellants. The fact that as the result of the respondents' wrongful act a benefit may have accrued to the appellants in connection with the other is a fact for which no credit can be claimed by the respondents. Upon this point the case of *Lacey* v. *Hill* (1), may, their Lordships think, be usefully referred to. This contention of the respondents accordingly fails.

It remains only to deal with the appellants' claim that the order of the learned Subordinate Judge should have included a sum in respect of interest up to date of judgment and should as a judgment have been expressed to carry interest at the rate of 6 per cent. per annum.

Their Lordships think it more than likely that both items were excluded from the learned Judge's order by an oversight. He included in the decretal amount, as has been shown, interest at 9 per cent. up to the date of suit, and in his judgment he expressed approval of the rate charged. Rightly or wrongly, too, he took a stronger view of the respondents' evidence than did the High Court, and their Lordships have little doubt that if the point had been present to his mind, the learned Judge would in both matters have adopted the general rule and allowed interest until payment. Their Lordships, however, are not merely on conjecture prepared to direct any variation of the decree in respect of interest up to its date. Such interest is not as of course. They think, however, that in all the circumstances it would only be right to direct a variation of the decree in respect of interest subsequent thereto.

On the whole case accordingly their Lordships are of opinion that the decree of the High Court should be discharged and the decree of the learned Subordinate Judge restored with the variation that the decretal amount carry interest at the rate of 6 per cent. per annum until payment, and their Lordships will humbly advise His Majesty accordingly.

The respondents must pay to the appellants their costs in the High Court and of this appeal.

Z. K. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondents:—Messrs. *Alfred, Bright & Sons.*

(1) (1873) 8 Ch. App. 921; 42 L. J. Ch. 657; 29 L. T. 281; 21 W. R. 857.

CALCUTTA HIGH COURT.

CIVIL APPEAL No. 368 OF 1923.
June 24, 1924.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Graham.
GOBINDA LAL GHOSE—APPELLANT
versus
NALINI KANTA GHOSE—RESPONDENT.

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 182—Decree obtained by minor—Judgment-debtor appointed guardian—Failure to execute decree—Fraud—Limitation, extension of.

A minor obtained a decree and the judgment-debtor subsequently got himself appointed the guardian of the minor and failed to take any steps to execute the decree against himself. Several years afterwards the guardian was removed and another guardian was appointed in his place. When the latter attempted to execute the decree against the former guardian, he was met by the plea that the execution was barred by time:

Held, (1) that the judgment-debtor was bound to satisfy the Court that at the time when he was appointed guardian of the minor he had made a full disclosure of his indebtedness to the estate of the minor to the Court and that in default of such proof it must be assumed that no such disclosure was made and that the judgment-debtor perpetrated a fraud both on the Court and on the minor by not making the disclosure;

(2) that in these circumstances the time during which the judgment-debtor had continued to be the guardian of the minor must be excluded in computing the period of limitation for the execution of the decree.

Appeal from an order of the District Judge, Birbhum, dated the 17th July 1923.

Mr. *Prakash Chandra Pakrashi*, for the Appellant.

Mr. *Kanji Lal*, for the Respondent.

JUDGMENT.—This is an appeal by the judgment-debtor against an order of the District Judge, dated the 17th of July 1923. On the 1st August 1914 the father of a minor obtained a decree against the present appellant. The father subsequently died and on the 10th of September 1915 the present appellant who was a debtor to the estate of the minor got himself appointed as guardian of the minor's property. Therefore, the present appellant was the person who, as guardian of the minor, was under the obligation of enforcing against himself the decree which had been obtained against him by the minor's father on the 1st August 1914. I cannot think that this fact was disclosed to the District Judge at the time he made the order appointing the appellant as guardian of the minor. There is, it is true, no finding on this point but the guardian who is seeking to prevent the enforcement of the decree against himself on the ground that limitation has run, ought to have satisfied the Courts that he made a full disclosure of his indebtedness to the estate to the District Judge and in my opinion the burden lies heavily on him to show that he made such disclosure. In default, we are bound to assume that no such disclosure was made and that the appellant perpetrated a fraud both on the Court and the minor by not making the disclosure. Matters continued in this state until the 18th of June 1921 when the mother of the minor got the present appellant discharged from his position of guardianship and got herself appointed as guardian of her minor son. After her appointment on the 31st August 1921 she applied for execution of the decree which her husband had obtained against the present appellant. The judgment-debtor took a point that the decree was no longer enforceable as more than three years had elapsed since it was passed without any steps being taken to execute it, but the judgment-debtor clearly cannot rely on his own fraud and in our opinion the period of time between the 10th of September 1915 and the 18th of June 1921 must be excluded from the calculation in computing the period of limitation. In this view the decree is not time-barred and we think that the Courts below were right in refusing to allow this claim of limitation to be set up by a man who had acted in the fraudulent manner which we have indicated.

The result is that the appeal fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 42 OF 1923
AND
REVISION APPLICATION No. 120 OF 1923.
January 16, 1925.
Present :—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.
FIRM OF BOLMAL-CHELLARAM—APPELLANTS
versus
FIRM OF JHAMANDAS-KISHARAM—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Arbitration—Reference during pendency of suit—Award, whether can be pleaded as adjustment—Procedure—Award set up by defendant—Amendment of written statement—Court-fees, whether payable.

Where an arbitrator to whose arbitration the parties to a pending suit have referred their dispute without intervention of the Court properly comes to a decision, the parties must be held to have adjusted their differences and the adjustment can be recorded under O. XXIII, r. 3 of the C. P. C. [p. 63, col. 1.]

Where such an adjustment is set up by the defendant and he claims a specific sum as due to him under the award, it is open to the Court to direct the defendant to amend his written statement and to plead the award as an adjustment so as to enable the Court to raise and try an issue on the point and the Court can call upon the defendant to pay Court-fees on the specific sum claimed by him. [p. 63, col. 2.]

Appeal and revision application against the orders of the First Class Sub-Judge, Sukkur.

Mr. *Srikishindas H. Lulla*, for the Appellants.

Mr. *Asudomal Rewachand*, for the Respondents.

JUDGMENT.

Aston, A. J. C.—This is an appeal against an order of the learned First Class Sub-Judge, Sukkur, dated 15th October 1923 directing the defendant to amend his defence and plead an award and claim a set off and an application for the revision of his order dated 16th November 1923, directing the defendant to pay Court-fees on Rs. 20,900.

It appears that the firm of Jhamandas Kisharam by its proprietors Shewakram and others filed a suit in the Court of the learned First Class Sub-Judge, Sukkur against the defendant-applicants. The defendants in their written statement denied that any money was due to the plaintiffs and prayed for an account alleging that a large sum of money would be found due to them. Defendants, however, tentatively valued the relief they claimed at Rs. 100 and paid Court-fees on that basis. Pending the suit the plaintiffs and defendants referred the matter in difference between them to private arbitration and it is alleged that the arbitrators by their award directed the plaintiffs to pay Rs. 21,000 to the defendants. The defendants then applied to the Court to record the reference and award as an adjustment under O. XXIII, r. 3 of the C. P. C. The learned First Class Sub-Judge by his order directed the defendants to amend their written statement and plead the reference and award by way of defence and claim a set off. The defendants filed an amended written statement and were then directed as above-mentioned to pay Court-fees on Rs. 20,900. Against these orders they have filed the present appeal and revision application which have been argued together.

There has been a conflict in the decisions relating to the question, whether a reference to private arbitration of matters in dispute in a suit followed by an award are an adjustment of the suit within the meaning of O. XXIII, r. 3, C. P. C. Sir Norman MacLeod in *Manilal Motilal* v. *Gokal Das Rowj* (1) while conceding that he did not think O. XXIII, r. 3, was ever intended by the Legislature to apply to arbitration proceedings, as such, considered that by treating agreements to refer combined with the award as an adjustment by lawful agreement or compromise, they could be brought within the scope of the Rule. He, therefore, concurred in over-ruling his previous decision in *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (2) that s. 89 of the Code prevented any attempt to admit any informal arbitrations or awards under the provisions of O. XXIII, r. 3. This latter view, however, commended itself to Rankin, J. of the Calcutta High Court in *Dekari Tea Company* v. *Asam Bengal Railway Co.* (3) and in a later case *re Amar Chand Chamaria* v. *Banwari Lall Rakshit* (4) Rankin, J. expressly dissented from the ruling in *Manilal Motilal* v. *Gokal Das Rowji* (1). In my judgment in *Haji Umar* v. *Shivaldas* (5). I expressed the opinion that the recording of an award by consent as an adjustment would be a valid adjustment under O. XXIII, r. 3, but that the order could not be legitimately used for the purpose of deciding contentious disputes about references and awards for these were matters relating to arbitration for which special provision has been expressly made. I am still of the same opinion: the recording of an award by consent seems to me permissible under O. XXIII, r. 3, for although the terms of settlement there have been arrived at by the the intervention of a third party it is by consent of both parties that the award is recorded as the adjustment of their disputes. The Legislature in my opinion never intended that contentious disputes about arbitration should by treat-

(1) 59 Ind. Cas. 53; 45 B. 245 at p. 254; 22 Bom. L. R. 1048.
(2) 37 Ind. Cas. 140; 40 B. 386; 18 Bom. L. R. 559.
(3) 61 Ind. Cas. 919; 25 C. W. N. 127.
(4) 69 Ind. Cas. 808; 49 C. 608; (1922) A. I. R. (C.) 404.
(5) 81 Ind. Cas. 653; 16 S. L. R. 174.

ed as matters of adjustment within the meaning of O. XXIII, r. 3. I agree with the remarks of Rankin, J., that it is difficult to see what point there is in the Second Schedule saying or meaning that arbitration must be done in a particular way if according to some other law or principle it may still be done in another way and that in any case the logical gap if there be any is stopped up by s. 89. Were this matter *res integra*. I would, therefore, be inclined to hold that O. XXIII, r. 3, had no application to the present proceedings but it has been held by the Full Bench of our Court in *Haji Umar* v. *Shivaldas* (5) that if the arbitrator to whose arbitration the parties in a pending suit have referred their disputes without the intervention of the Court properly comes to a decision, the parties must be held to have adjusted their differences and that the adjustment must be recorded under O. XXIII, r. 3, C. P. C. This decision is binding on us and the only questions, therefore, to be determined are whether the procedure adopted by the Court in directing the defendants to amend their written statement should be revised and whether the order directing the defendants to pay a Court-fee on Rs. 20,900 was valid. I am of opinion that the first question should be answered in the negative and the second question in the affirmative. It is to be noticed that the procedure adopted by the learned Sub-Judge was that adopted by the Court in *Lowes* v. *Kermode* (6) where the Court said:

"What we should do in case of an undisputed award, is another question. Here, the award is disputed and the Court will not, upon motion, decide this controverted matter. The award must be pleaded, when the plaintiff may either reply or demur."

Similarly in *Storey* v. *Bloxam* (7) the Court held that the award relied on by the defendant which had been made in his favour after issue had been joined must be pleaded as a plea *puis darrein continuance*. The procedure adopted was also in accordance with the procedure laid down by Macleod, Chief Justice, in *Manilal Motilal* v. *Gokal Das Rowji* (1) for he observed:

"If the plaintiff disputes the award for any reason and proceeds with the suit the defendant can plead the award and have the suit set down for hearing on the issue whether the award is binding as an adjustment."

There is a rule in Bombay High Court, *viz.*, r. 242 that no decree in a suit save as provided in r. 348 (decree in terms of an award filed under para. 10 of the Second Schedule) shall be passed unless the suit appears on the daily trial board. The correct procedure, therefore, in Bombay for a party who wants an adjustment recorded under O. XXIII, r. 3, is not by motion but by putting down the suit for hearing and pleading the adjustment after obtaining leave for a supplementary pleading *Manilal Motilal* v. *Gokal Das Rowji* (1).

No such rule as r. 242, has been brought to our notice as governing the procedure in this Court. But the absence of such a rule would not in my opinion oust the discretion of the Court to order the question of adjustment to be tried formally as an issue in the suit, should that course commend itself to the Court, as preferable to the disposal of the matter by way of motion, and it appears to me to follow that it would be equally within discretion of the Court to direct the party relying on the adjustment to plead it with a view to the proposed trial of the issue. The learned Sub-Judge having acted within the limits of his discretion in making the order complained of, this appeal must in my opinion be rejected with costs. With regard to the question of Court-fees had the prayer for relief contained in the form originally made, *viz.*, a prayer for an account valued by the defendants at Rs. 100 there would be considerable force in the contention that it was not within the discretion of the Court to direct the defendant to pay a Court-fee on Rs. 20,900. Under the amended written statement, however, prayer was also made for a decree in accordance with the award in which a specific sum of Rs. 21,000 was awarded to the defendants. I am, therefore, of opinion that grounds for the revision of the order directing the defendants to pay a Court-fee on Rs. 20,900 have not been established and would also reject this revision application with costs. We direct, however, that the Court-fee be paid within 2 months.

As a result, the appeal and revision application are both dismissed with costs.

Kennedy, J. C.—I agree that the appeal and revision application should be

(6) (1818) 8 Taunt. 146 at p. 147; 2 Moore 30; 129 E. R. 339.

(7) (1796) 2 Esp. 504.

dismissed. I think the Subordinate Judge had the power to pass the order he did. Whether he could not equally legally have acted as the appellants desired him to do I need not discuss.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2163 OF 1921.

February 3, 1925.

Present:—Mr. Justice Broadway and Mr. Justice Jai Lal.

NARAIN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SADA KAUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Custom—Widow, acquisition of occupancy rights by—Alienation, power of.

Where the widow of a grantee of *abadkar* rights acquires occupancy rights in the holding, such acquisition enures to the benefit of the widow personally and cannot be treated as having been made by her in any representative capacity as the widow of her husband. In such a case the widow has an absolute power of disposal over the occupancy rights so acquired.

First appeal from a decree of the Senior Subordinate Judge, Lyallpur, dated the 4th July 1921.

Messrs. *Ghulam Rasul* and *Ghulam Mohi-ud-din*, for the Appellants.

Lala *Ram Chand Manchanda* and *Iqbal Singh*, for the Respondents.

JUDGMENT.

Broadway, J.—One Hira Singh, a Military Pensioner, was granted certain *Abadkar* rights on the 25th of August 1899 in certain land situate in Chak No. 295 G. B., Chanab Canal. He died on the 20th June 1903 leaving him surviving a widow *Musammat* Sada Kaur and three daughters. This land was mutated in favour of the widow on the 18th of January 1904 and she subsequently acquired occupancy rights in the land on the 17th April 1906. Subsequently to that, she applied for sanction to gift the land to her three daughters. The Government acting through the Colonization Collector accorded the necessary sanctions on condition of her making over the occupancy rights to her said three daughters. This she did and the daughters paid the necessary money to Government; and became proprietors of the land in question and were recongised by Government as such.

Narain Singh and others claiming to be reversioners of Hira Singh instituted a suit asking for a declaration that the gift to the daughters by *Musammat* Sada Kaur would not affect their reversionary rights. This suit was contested on various grounds, one of them being that the plaintiffs were not Hira Singh's reversioners. This has been found against the defendants but the plaintiffs' suit was dismissed on the ground that the occupancy rights had been acquired by *Musammat* Sada Kaur for herself and as self-acquired property an alienation by her could not be controlled by the reversioners of her husband.

The reversioners of Hira Singh have come up to this Court in appeal through Mr. Ghulam Mohi-ud-din, who has contended that although the daughters must be regarded as proprietors of the land inasmuch as it is they who paid the money and purchased the proprietary rights in it, the gift to them of the occupancy rights by the widow of Hira Singh can form the subject of the declaration sued for. This contention is based on an assertion that *Musammat* Sada Kaur had acquired the occupancy rights not for herself but as representing her husband. The present case is practically on all fours with the case of *Sewa Singh* v. *Bholi* (1). The view I took of the question in that case is the view I still take of law on the subject and in agreement with the decision of the Court below. I hold that *Musammat* Sada Kaur acquired the occupancy rights in this land for herself and not in any representative capacity. Admittedly her right to dispose of such self-acquired property is unlimited. The view taken by the Court below is correct and I would, therefore, dismiss this appeal.

The respondents have filed cross-objections on the question of the costs. It appears that the judgment of the Trial Court concluded as follows :—"The plaintiffs' suit stands dismissed with costs." It is said that according to the proper method of calculating Pleader's fees the sum claimable is a good deal more than Rs. 50 which is entered in the decree. There appears to be some force in this argument, for the learned Senior Sub-Judge appears to have dismissed the suit with costs without any reservation. I would, therefore, accept the cross-objections and direct that the proper costs be allowed in the Court below. The respondents will also get their costs in this Court.

Jai Lal, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 36 Ind. Cas. 382; 129 P. R. 1916; 83 P. L. R. 1917.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 110 OF 1924.

January 6, 1925.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Ashworth, A. J. C.

TIRBHAWAN DATT PANDE—PLAINTIFF—APPLICANT

versus

RAM PIARE—DEFENDANT—OPPOSITE PARTY.

Oudh Rent Act (XXII of 1886), s. 119—Civil Procedure Code (Act V of 1908), ss. 100, 101—Appeal, second, whether lies on question of fact.

Under s. 119 of the Oudh Rent Act a second appeal will not lie to the District Judge on grounds other than those mentioned in s. 100, C. P. C.

Jagannath Pershad v. *Bechhu*, 80 Ind. Cas. 327; 11 O. L. J. 77; 9 O. & A. L. R. 931; (1924) A. I. R. (O.) 349; L. R. 5 A. (O.) 78, followed.

Application against an order of the District Judge, Gonda, dated the 9th April 1924, upholding that of the Deputy Commissioner, Bahraich, dated the 4th December 1922, reversing that of the Honorary Collector, First Class, Bahraich.

Mr. *S. N. Roy*, for the Appellant.

Mr. *S. M. Ahmad*, for the Opposite Party.

ORDER.—In these civil revision cases the only point for this Bench to decide is whether, under s. 119 of the Oudh Rent Act XXII of 1886, as amended by all subsequent Acts including the Oudh Rent, (Amendment) Act I of 1923, a second appeal will lie to the District Judge on grounds other than those mentioned in s. 100 of the C. P. C., or, in other words, whether such an appeal will lie on a question of fact.

Section 119 of the Oudh Rent Act contains the preamble "subject to the provisions of the C. P. C., 1908". In s. 101 of the C. P. C. it is enacted that no second appeal shall lie except on the grounds mentioned in s. 100. The objection has been raised that these words refer merely to provision of the C. P. C., specifying what may be termed "procedure in its strict sense," and cannot be held to apply to such a provision as s. 101 of the C. P. C., which it is urged is a provision regarding jurisdiction. This objection appears to us to have no force. It is true that in the proviso to s. 116 of Oudh Rent Act explicit reference is made to "the grounds mentioned in s. 100 of the C. P. C.," notwithstanding that that section begins with the words "Subject... .....to the C. P. C." But, it was necessary in s. 116 to refer specifically to the grounds mentioned in s. 100 of the C. P. C., because the proviso to s. 116 deals with an appeal from an original decree and there is nothing in the C. P. C., to limit an appeal from an original decree to an appeal on a question of fact.

In this decision we are following the decision of the Judicial Commissioner of this Court in *Jagannath Pershad* v. *Bechhu* (1). That decision invoked s. 100 of the C. P. C., and the "principles of legislation in India", but it failed to invoke s. 101 of the C. P. C. This section was also ignored by Counsel who argued this case before us. We consider that this section is conclusive in the matter.

For the above reasons we dismiss these applications, but make no order as to costs.

Z. K. *Applications dismissed.*

(1) 80 Ind. Cas. 327; 11 O. L. J. 77; 9 O. & A. L. R. 931; (1924) A. I. R. (O.) 349; L. R. 5 A. (O.) 78.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 195 OF 1924.

November 21, 1924.

Present:—Mr. Justice Krishnan.

Sri Rajah BOMMADEVARA SATYANARAYANA VARA PRASADA RAO BAHADUR, *Zemindar* GARU—DEFENDANT COUNTER-PETITIONER—PETITIONER

versus

SANKARAHANAPALLI VENKATA TIRUMALA MANAVALLASWAMY—PLAINTIFF—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings, power of, extent of.

The language of r. 17 of O. VI of the C. P. C. gives wide powers of amendment and these powers should always be liberally exercised.

Ma Shwe Mya v. *Maung Mo Hnaung*, 63 Ind. Cas. 914; 48 C. 832 at p. 835; (1921) M. W. N. 396; 4 U. B. R. (1921) 30; 30 M. L. T. 28; 24 Bom. L. R. 682; (1922) A. I. R. (P. C.) 249; 48 I. A. 214 (P. C.), followed.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Cocanada, in C. M. P. No. 1326 of 1923, in O. S. No. 6 of 1923.

Mr. *V. Suryanarayana*, for the Petitioner.

Mr. *C. Rama Rao*, for the Respondent.

JUDGMENT.—It is argued that the lower Court acted without jurisdiction in allowing the amendment allowed by it. I think the amendment is quite unobjectionable and falls clearly within the scope of r. 17, O. VI, of the C. P. C. The observations in the case cited in *Ma Shwe Mya* v. *Maung*

Mo Hnaung (1) have to be read with the facts of that case. The amendment allowed here does not change the nature of the suit at all. The words of r. 17 give wide powers of amendment and we have the authority of the Privy Council itself in *Ma Shwe Mya* v. *Maung Mo Hnaung* (1) cited for holding "that full powers of amendment must be enjoyed and should always be liberally exercised." The petition fails and is dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

(1) 63 Ind. Cas. 914; 48 C. 832 at p. 835; (1921) M. W. N. 396; 4 U. B. R. (1921) 30; 30 M. L. T. 28; 24 Bom. L. R. 682; (1922) A. I. R. (P. C.) 249; 48 I. A. 214 (P. C.).

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 166 OF 1923.

August 11, 1924.

Present:—Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Baguley.

MA HTAY—APPELLANT

versus

U THA HLINE—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 123—Buddhist Law, Burmese—Partition—Property transferred to children of first marriage on second marriage—Transfer, nature of—Registered deed, whether necessary—Specific Relief Act (I of 1877), s. 42—Declaration, suit for, when can be maintained.

On a second marriage it is open to a Burmese Buddhist father to satisfy the claims of his children by the first marriage at once by transferring a portion of his property to them and such transfer is not in the nature of a gift but is by way of partition and no registered deed is necessary to carry the transfer into effect. [p. 67, col. 1.]

Equity will not allow the provisions of the Transfer of Property Act to be invoked to enable fraud to be committed. [*ibid.*]

M. P. R. L. M. P. Chetty v. *Ma Ngwe Sin*, 79 Ind. Cas. 485; (1924) A. I. R. (R.) 200; 1 R. 665, followed.

A plaintiff who is out of possession cannot maintain a suit for a bare declaration without any prayer for possession. [*ibid.*]

First appeal against a judgment and decree of the District Court, Hanthawaddy, in Civil Regular Suit No. 49 of 1922.

JUDGMENT.—The respondent, U Tha Hline, was twice married. By his first wife Ma Ein Gywe, who died in 1270 B. E., he had two sons and three daughters. The appellant is the widow of his younger son by Ma Ein Gywe. By his second marriage U Tha Hline had four children. After his second marriage, he began to partition his property, which consisted of about 700 acres of paddy land, between the children of the two marriages. He began by making over possession of 201 acres to the five children of Ma Ein Gywe. No document was executed, but they were put into possession, and he had mutation effected in their names. It is noted that the transfer was by way of inheritance. Later, he transferred 288 acres to these five children by registered deed, and, finally, he transferred the balance of his lands to the children of the second marriage.

It is not denied that the 201 acres were mortgaged by the children to a Chetty with the knowledge of U Tha Hline. The five children had executed a power-of-attorney in favour of the eldest son, Tha Dun E, and he managed these lands, which were still held jointly, on behalf of all of them. When the 288 acres were transferred, two Chetties were present, and, on the same day, mortgages of both sets of lands were executed, the money being used to redeem the prior mortgage on the 201 acres, and the balance used in buying other lands. There is no doubt that U Tha Hline was aware of these facts.

Tha Dun E managed the lands for some time, and then, after San Shwe's death, disputes arose between his widow, Ma Htay and the other heirs. She brought a suit for partition and for accounts. By consent of all the parties, a decree for partition and for accounts was passed, and a Commissioner appointed to take the accounts.

During the course of the proceedings before the Commissioner, U Tha Hline gave evidence on behalf of Tha Dun E. After the first day of his examination he says that he was advised that the gift of the 201 acres being invalid, because there was no registered deed, he could take back these lands, and that he decided to do so. He says that Tha Dun E gave him possession, and that he, therefore, brings the present suit for a bare declaration that he is the sole owner against Ma Htay and does not implead the other four children.

There can be no question whatever that this action was taken for the benefit of his children against his daughter-in-law, who had quarrelled with them.

The learned District Judge has granted him a decree with a considerable amount of reluctance and he has, in view of his conduct, deprived him of his costs, and directed that he do pay Ma Htay's costs, although she had lost the suit. Ma Htay

appeals, and there is a cross-appeal on the question of costs.

It has been held that the transfer of the 201 acres was by way of gift; that it was invalid; that, therefore, U Tha Hline was entitled to take back the lands, and that he was entitled to the declaration he sought.

In our opinion, this view is wrong. There is no doubt that, on a second marriage, it is open to the father to satisfy the claims of his children by the first marriage at once, and that the transfer of these lands was not by way of gift, but was, in part, effecting a partition of his properties, so that the children of his first marriage should have no claim to inherit on his death. It was done to avoid disputes and litigation hereafter; it was not a mere gift, but was by way of partition.

If that be the correct view to take no registered deed was required to transfer this property. U Tha Hline did all that was necessary; he gave possession, he effected mutation; and he recorded that the transfer was by way of inheritance. Moreover, he was fully aware that his children were dealing with the property as if it was their absolute property. He allowed them to mortgage it, he allowed them to re-mortgage it; he allowed them to purchase other properties with the proceeds of the mortgages and to recognize that after all this, he should be allowed to take advantage of the provisions of the Transfer of Property Act, admittedly to defeat the just claims of Ma Htay, because she had fallen out with her brothers and sisters-in-law, would be to permit the Act to be used to perpetrate a fraud in a manner which could not be recognized.

It was held by our brother May Oung, J., in *M. P. L. M. P. Chetty* v. *Ma Ngwe Sin* (1) that equity would not allow the provisions of the Act to be invoked to enable fraud to be committed. But a further question arises, namely, whether, as a matter of fact, U Tha Hline was, at the time of suit, in possession of these lands, so as to permit of his bringing a suit for a bare declaration, without any prayer for possession. There is, as to this, but his own bare word, coupled with a half-hearted admission to that effect by Tha Dun E, his eldest son. U Tha Hline was aware of the previous suit; he was aware that his children had consented to a preliminary decree being passed, and it was only when it was seen that the taking of the accounts might be very much against the children that he suddenly conceived the idea of taking back these lands, putting forward his present pleas, in order to save the necessity of paying Court fees.

Tha Dun E is supposed to have given him possession. It is clear that, if any such possession was given, it was done without notice to Ma Htay and in fraud of her rights by the person who was her attorney to look after and manage these lands. Tha Dun E in his evidence states that he has been managing these lands for the last three years, including the present year, that is 1923, for his five brothers and sisters. He states that he had engaged coolies for the current year. He was examined in May, and these coolies must have been engaged for the year 1923-24. After saying this, he adds that he had engaged the coolies for the four of them, excluding Ma Htay.

The statement that he had made over possession to his father comes in at the very end of his evidence. He says that he did so in 1284, which is certainly not true; that he did so for himself and his three brothers and sisters; and that he did not inform Ma Htay or obtain her consent.

On this evidence, it is clear that there is every reason to believe that no possession was given to U Tha Hline; that, therefore, his suit for a bare declaration would not lie; and that his suit should have been dismissed.

The grant of a declaratory decree is discretionary, and there is ample reason in this case for that discretion having been exercised against U Tha Hline. The whole suit is clearly fraudulent.

The appeal will, therefore, be accepted, and the suit dismissed with costs throughout.

The order as to costs made by the learned District Judge will stand and we allow, as Advocate's fees in this Court, twenty gold *mohurs*.

The cross-appeal as to costs is dismissed.

Z. K. *Appeal accepted.*

(1) 79 Ind. Cas. 485; (1924) A. I. R. (R.) 200; 1 R. 665.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 351 OF 1922.

July 12, 1923.

Present:—Mr. Justice Shah and Mr. Justice Kemp.

HARI RAMCHANDRA NAVARE—PLAINTIFF—APPLICANT

versus

G. I. P. RY. Co.—DEFENDANTS—OPPONENTS.

Railways Act (IX of 1890), s. 72—Rules framed under Act, r. 34-A—Goods consigned for carriage—Non-compliance with r. 34-A—Loss of goods—Negligence—Liability of Railway Company.

Plaintiff consigned certain goods for carriage to the defendant Railway Company and instead of the goods consigned the defendant Company offered some other goods to the plaintiff of which the plaintiff declined to take delivery. The plaintiff thereupon sued the defendant Company for the value of the goods lost and it was found that the loss of goods was due to the negligence of the servants of the Railway Company. It was also found that r. 34-A of the rules framed under the Railways Act had not been complied with by the plaintiff:

Held, that the failure of the plaintiff to comply with r. 34-A did not absolve the defendant Company from liability in respect of the value of the goods which had been lost owing to the negligence of the Company.

Application for reversal of the decision of the Judge, Small Cause Court, Poona, in Suit No. 3973 of 1921.

Messrs. *G. N. Thakor* and *R. A. Jahagirdar*, for the Applicant.

Mr. *Campbell*, for the Opponents.

JUDGMENT.—The plaintiff in this case sued the G. I. P. Railway Co. for the value of the goods which consisted of goat skins consigned by him at Ahmednagar on the 11th July 1921, for dispatch to Poona. It appears that instead of the bags containing the goat skins some other consignment of 9 bags containing sheep-skins reached Poona. These 9 bags were offered to the plaintiff, but he naturally declined to accept them. Ultimately the Railway Co. sold these 9 bags containing sheep-skins and realised Rs. 140.

The plaintiff's claim was for Rs. 932-8-0 as representing the value of goods lost through the negligence of the Railway Company. The Company put the plaintiff to the proof of the value of the goods, and also contended that on account of the non-observance by the plaintiff of r. 34-A the Company was not liable. There was some confusion in the identification and the marking of the goods at Ahmednagar. As a result of these pleadings the following fours points were raised for decision:—

1. Were plaintiff's bags correctly marked 48?
2. Were bags marked 48 not plaintiff's?
3. What is the value?
4. Whether suit is not tenable as contended by defendant.

The learned Judge found that the suit was maintainable. The learned Judge also found that the plaintiff's bags were not marked 48, and he also found that the bags marked 48 were not the plaintiff's bags. In effect it was found that the bags offered to the plaintiff at Poona were not the bags consigned by him at Ahmednagar. The learned Judge also found that this was due to the negligence of the servants of the Railway Company. But the learned Judge found that the plaintiff did not observe the requirements of r. 34-A, and, therefore, he was not entitled to the relief claimed. But he proceeded to award a sum of Rs. 140 minus freight and tax to the plaintiff, which was the sum realised by the Railway Company from the sale of the 9 bags, which were received at Roona, and which contained sheep-skins.

The result reached by the learned Judge is really anomalous, and cannot be accepted as being in accordance with law. If the findings of the learned Judge on the main questions of fact are accepted, it is clear that the defendant Company received the consignment of 9 bags at Ahmednagar, and they never delivered that consignment to the plaintiff at Poona. Therefore, it seems to us that the defendant Company was liable to pay to the plaintiff the value of the goods. We do not think that r. 34-A can help the defendant in the present case, because if the sender does not comply with the rules, the consignment will be booked as "contents unknown", and the Railway will not be responsible for the number, condition and description or contents of such consignment. The learned Judge has found that the noting of the words "contents unknown" was not properly done, and the loss of goods was due really to the negligence of the servants of the Railway Company at Ahmednagar.

Under these circumstances assuming without deciding that the rule is otherwise a valid and binding rule it is difficult to hold that the Company is absolved under that rule from liability under the Risk Note to pay for the value of the goods. It is not contended before us on behalf of the Railway Company that having regard to the terms of the Risk Note A.

and the facts as found by the learned Judge, the liability could be disputed. Unfortunately the learned Judge has not found what the value of the goods was. Point No. 3 was raised and the finding is that the value is Rs. 133-2-0. That really does not represent the value of the goods consigned by the plaintiff to the Company. That is only the value of the goods which admittedly were not the goods of the plaintiff.

The lower Court should really find what the value of the goods was, and pass a decree for that amount. We make the Rules absolute, set aside the decree and send back the case for disposal in accordance with this judgment. Parties to be at liberty to adduce evidence on the question of valuation.

The defendant to pay the plaintiff's costs of this application. Costs of the suit to be dealt with by the lower Court.

Z. K. *Rules made absolute.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 28-B OF 1924.

February 7, 1925.

Present:—Mr. Hallifax, A. J. C., and Mr. Kotval, A. J. C.

FAKHRULDIN AND OTHERS—APPLICANTS

versus

FARID KHAN AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 109, O. XLI, r. 23—Remand, order of, whether final—Appeal to Privy Council, whether lies.

An order of remand passed by an Appellate Court under O. XLI, r. 23 of the C. P. C., is not a "final order" within the meaning of s. 109 of the Code, and no appeal, therefore, lies against such an order to the Privy Council.

Application for leave to appeal to the Privy Council against a decree of Mr. Kinkhede, A. J. C. in First Appeal No. 53-B F. A. and No. 3-B of 1920, dated the 22nd April 1924.

Mr. *G. L. Subedar*, for the Applicants.

Sir *H. S. Gour*, Messrs. *Abdul Razak*, *S. K. Ghose*, *M. B. Niyogi*, *B. R. Pendharkar* and *W. B. Pendharkar*, for the Non-Applicants.

ORDER.—The applicants for leave to appeal to the Privy Council were the defendants in a suit for partition of property belonging to them and the opposite party, children of the same father by another wife. The property up till then had been held in common, and according to the ordinary rules of inheritance it would seem that the applicants would get only six-thirteenths of it. They pleaded however that there had been a "family arrangement" in 1904 whereby they became entitled to nine-sixteenths and the other party to seven-sixteenths.

In the lower Court this agreement was found proved, and a decree for partition was passed which was in many respects final, leaving only a few details to be settled. In appeal it was held by a Single Judge of this Court that the alleged "family arrangement" of 1904 had not been made and would not be binding if it had. The case was accordingly remanded under r. 23 of O. XLI of the C. P. C. with instructions to pass a preliminary decree for partition in the shares that would fall to the various members of the family by inheritance and not by the unproved agreement of 1904, and then to proceed to settle all the other details.

It is against this judgment that application is now made for leave to appeal to the Privy Council. The value of the property in dispute is undoubtedly over Rs. 10,000, but it is objected that the order is not a final order for the purposes of s. 109 of the C. P. C. In *Vinkataranga Row* v. *Vekatarama Narasimha Rao* (1) it was held in the Madras High Court that s. 105 of the C. P. C. did not apply to appeals to His Majesty in Council and did not operate to give a new meaning to the word "final" in s. 109 or supply a guide to the interpretation of that section. We understand that this view was upheld by their Lordships of the Privy Council.

It may be that the last of the five divisions of Part VII of the C. P. C. dealing with Appeals to the King-in-Council, is self-contained and complete, and that no section in any of the other four applies to such appeals. In that case it is clear that no appeal lies to the Privy Council against any interlocutory order at all,

(1) 21 Ind. Cas. 842; 26 M. L. J. 96; 14 M. L. T. 560; (1914) M. W. N. 64; 38 M. 509.

with the possible exception of one falling within the terms of cl. (c) of s. 109.

But even if s. 105 does govern the matter, the appeal is equally forbidden. The first part forbids an appeal against any order unless it is expressly allowed otherwise, and neither s. 109, with the possible exception already mentioned, nor any other part of the Code allows an appeal to the Privy Council against an order that is not final. The second part of the section deals only with orders of remand against which an appeal does lie. Such an appeal lies only by virtue of cl. (*u*) of r. 1 of O. XLIII, and that rule certainly is not concerned with appeals to His Majesty in Council.

There appears, therefore, to be no right of appeal here, nor any necessity to appeal now, as objection can be taken to the interlocutory order in an appeal against the final order or decree passed later. The application for leave to appeal is accordingly rejected, but in the circumstances we consider it proper to pass no order in regard to the costs incurred.

Z. K. *Application rejeceted.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 94 OF 1923.

July 2, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

In re RAM KRISHNA MISRA.

Provincial Insolvency Act (V of 1920), ss. 41, 43 —Discharge, application for, when to be made-- Period originally fixed by Court, whether can be enlarged.

The provisions of s. 43 of the Provincial Insolvency Act are mandatory and there is no discretion in the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge.

Under s. 41 of the Provincial Insolvency Act a debtor has a complete discretion to apply when he likes for his discharge provided that he applies within the period specified by the Court. The word "shall" in this section imposes a duty upon the insolvent the breach of which involves the consequences pointed out in s. 43 of the Act.

Appeal from an order of the District Judge, Bhagalpur, dated the 19th February 1923.

Mr. *Nirod Chandra Roy*, for the Appellant.

JUDGMENT.

Das, J.—This appeal must be dismissed. The only question is, whether the provisions contained in s. 43 of the Insolvency Act are mandatory. That sections provides that:

"If the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of s. 37 shall apply accordingly."

It is contended on behalf of the appellant that the provisions of s. 43 are not mandatory and that there is a discretion in the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge. I am unable to agree with this view. Section 27 of the Act provides that:

"If the Court does not dismiss the petition, it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge."

The provision was intended to remedy the defect in the existing law under which the conduct of the debtor in many cases never came under the scrutiny of the Insolvency Court. It is a new provision and, in my opinion, must receive a strict interpretation. Section 41 provides that:

"A debtor may, at any time after the order of adjudication, and shall, within the period specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto."

It is obvious to my mind that the debtor has complete discretion to apply when he likes provided he applies within the period specified by the Court. The word "shall" in s. 41 of the Act imposes, in my opinion, a duty upon the insolvent the breach of which involves the consequences pointed out in s. 43. In my opinion the decision of the learned District Judge on this point is right and must be affirmed.

I would dismiss the appeal.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL APPEAL No. 2719 OF 1921.
February 20, 1925.
Present:—Mr. Justice Harrison and Mr. Justice Campbell.

PIR BUKSH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Musammat ABO AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom — Succession — Self-acquired property—Daughter versus *collaterals*—Arains *of Hoshiarpur District*—Riwaj-i-am, *entry in, applicability of.*

Where a *riwaj-i-am* talks of landed property and succession to it without making any discrimination between ancestral and self-aquired property, the rules laid down therein must be taken to be applicable to ancestral property only. [p. 71, col. 2.]

Among *Arains* of the Hoshiarpur District daughters exclude the brothers of the last male holder in succession to the latter's self-acquired property. [p. 72, col. 2.]

Appeal from a decree of the Sub-Judge, Lyallpur, dated the 25th August 1921.

Messrs. *Niaz Muhammad* and *Muhammad Munir*, for the Appellants.

Messrs. *Ram Chand Manchanda* and *Jagan Nath Bhandari* (for Mr. *Gobind Ram Khanna*), for the Respondents.

JUDGMENT.—The subject of the suit is land in the Lyallpur District acquired by Mara, an *Arain*, whose original home was in the Hoshiarpur District. After Mara's death his widow, *Musammat* Abo, succeeded him and she then gifted the land to her two daughters and to a son of a deceased daughter. The plaintiffs are Mara's brothers, and they sue for a declaration that the gift should not effect their revesionary rights. They allege in their plaint that Mara left a Will bequeathing the property to them after the death of *Musummat* Abo, and also that they are preferential heirs to the daughters and daughter's son.

The following were the issues:—

1. Did Mara make an oral Will providing that the plaintiffs would succeed him on the death of his widow *Musammat* Abo?

2. If not, have the plaintiffs a right to succeed Mara *qua* the property in suit in the presence of defendants Nos. 2 to 4?

3. If not, have they got a *locus standi* to sue? and

4. If so, does the gift by defendant No. 1 amount to an acceleration of succession and if such is it not liable to challenge by reversioners?

On the first issue it was held that no Will had been proved. On the second issue the plaintiffs relied upon the answer to question No. 45 in Humphreys' Customary Law of the Hoshiarpur District and claimed that this established the plaintiffs' right as preferential heirs. That answer states that *Arains* of the Hoshiarpur District had said that a daughter could succeed in the absence of descendants of a great-grandfather. There was no distinction made in either question or answer between ancestral and self-acquired property, and the Trial Court held on the authority of *Rajkuar* v. *Talok Singh* (1) that the entry must be taken to relate only to ancestral property. It found further that the general rule was in favour of daughters succeeding their father to self-acquired property and that no instance to the contrary had been established by the plaintiffs. The issue accordingly was decided against them.

Upon the third issue the learned Subordinate Judge held that the plaintiffs had a *locus standi* to sue, and on the fourth that the gift was in favour of the next heirs and thus merely an acceleration of succession. As a result the suit was dismissed.

The plaintiffs have appealed and again rely upon the *riwaj-i-am* entry. There is this to be said for their learned Counsel's argument that the decision in *Rajkuar* v. *Tolak Singh* (1), appears to have been given in respect of a *riwaj-i-am* in which no discrimination was made between ancestral and self-acquired property. It is to the effect that where the *riwaj-i-am* talks about landed property and succession to it without such discrimination, the rule laid down can usually only be taken to apply to ancestral property. In the present instance, however, there are passages elsewhere in the *riwaj-i-am* in which ancestral is distinguished from self-acquired property and these occur not only in the section relating to the gifts but also in the section relating to succession. It is possible, therefore, that *Rajkuar* v. *Tolak Singh* (1) is not precisely applicable, for we have been unable, to consult the 1878 *Riwaj-i-am* of the Ferozepore District which is the record with which it deals. At the same time the general rule of Punjab Custom as stated in para 23 (2) Remark 2, of Rattigan's Digest is that the onus of proving their superior title against daughters to succeed to self-acquired property lies upon the collaterals. The answer to question No. 45 of the Hoshiarpur *Riwaj-i-am* is unsupported

(1) 33 Ind. Cas. 992; 38 P. R. 1916; 99 P. W. R. 1916.

by instance of *Arain* collaterals succeeding against daughters to property either ancestral or self-acquired. There are two direct instances of daughters succeeding, presumably to ancestral property, but these do not refer to the existence or non-existence of near collaterals. This same *riwaj-i-am* has recently been held in *Umra* v. *Raji* (2), not to be a reliable piece of evidence on a question of gift where the entry was not supported by instances and was admittedly wrong in one respect. There are indirect instances in favour of daughter's succession to be found under question and answers No. 41 which deal with alienations by widows and lay down the rule that the widow has no right to make any alienation. A number of illustrations are appended of exceptions to this rule, and among them are several examples of gifts by widows to daughters and daughters' sons which gifts are said not to have been set aside. In *Ghausa* v. *Nathu* (3) it was found on the authority of several previous cases that amongst *Arains* of the Hoshiarpur District a gift by a sonless proprietor of ancestral property in favour of a daughter is valid by custom, and it appears from the judgment that such a person's power to gift self-acquired property had not been disputed. The same judgment contains the following passage which emphasises the undoubted fact that in an endogamous tribe the position of a daughter as heir is much stronger than in exogamous tribes:—

"I find that taken as a class there is one characteristic that pre-eminently distinguishes the *Arains* and that is the far greater regard they have than that shown by other agricultural tribes for the rights of women. This, no doubt, is largely due to the fact that they are a strictly endogamous tribe, and that consequently land when it passes into a woman's hands is not likely to leave the family to which it belongs."

In the present case except the *riwaj-i-am* which may or may not be evidence against the general rule therein no other evidence of any value that *Arain* collaterals exclude daughters. Three judicial instances were put forward but they do not cover the point for decision, namely, the right of daughters and daughters' sons to succeed to the self-acquired property of a sonless father and grandfather and if we assume that the answer given to question No. 45 in the Hoshiarpur *Riwaj-i-am* was intended to apply to self-acquired as well as to ancestral property that answer so far as it concerns *Arains* is unsupported by instances and is opposed to a very clear general custom.

For these reasons, we agree with the Court below that the plaintiffs have failed to prove that they are preferential heirs and we affirm the decision that the gift was merely an acceleration of succession by the next heirs. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 85 Ind. Cas. 185; 5 L. 473; 6 L. L. J. 601; (1925) A I. R. (L.) 222.
(3) 82 P. R. 1900; P. L. R. 1900 p. 549.

LAHORE HIGH COURT.
FULL BENCH.

MISCELLANEOUS SECOND CIVIL APPEAL No. 390 OF 1924.

January 9, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, Justice Sir Henry Scott-Smith, KT., Mr. Justice Martineau, Mr. Justice Campbell and Mr. Justice Zafar Ali.

SARDAR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat AISHA BIBI *alias* MARAYAM BIBI—DEFENDANT—RESPONDENT.

Suits Valuation Act (VII of 1887), s. 11, scope of —Objection to valuation, when can be taken—Jurisdiction.

The general rule relating to jurisdiction is that neither consent nor waiver by a party to a suit can confer jurisdiction upon a Court which has no inherent jurisdiction; jurisdiction over the subject-matter of a suit can be given only by law. Section 11 of the Suits Valuation Act, however, provides an exception to the general rule and lays down that a party who has not taken objection as to the pecuniary jurisdiction of the Court at the time specified in cl. (*a*) of the section cannot be allowed to dispute that jurisdiction afterwards. The object of the Legislature in enacting this provision was to insure that the time and labour spent by a Court in deciding a case should not be wasted if the party concerned has joined issue and gone to trial upon the merits without raising objection to the pecuniary jurisdiction of the Court at the earliest opportunity. [p. 76, col. 1.]

Section 11 of the Suits Valuation Act governs all cases of erroneous valuation irrespective of the question as to whether the value of the suit is determined by rules having the force of law or any other manner. [p. 76, col. 2.]

Case-law reviewed.

Miscellaneous second appeal from an order of the District Judge, Gurdaspur, dated the 21st January 1924, reversing that of the Subordinate Judge, Second Class, Gurdaspur, dated the 17th May 1923.

ORDER OF REFERENCE TO A FULL BENCH.

Martineau and Zafar Ali, JJ.—(*18th June 1924*)—The *jama* or revenue assessed on the land in dispute being Rs. 177-14-0, the value of the suit for purposes of jurisdiction was thirty times that amount, *i.e.*, Rs. 5,336-4-0, and the suit was, therefore, beyond the pecuniary jurisdiction of a Second Class Subordinate Judge. But though the amount of revenue assessed was correctly stated in the petition of plaint, thirty times that amount was stated to be Rs. 4,336-4-0 instead of Rs. 5,336-4-0, and on that erroneous valuation the suit was made over to and tried and decided by a Subordinate Judge, Second Class. From his decision, which was in favour of the plaintiffs, the defendants appealed to the District Judge and even before that officer no objection as to valuation or jurisdiction was taken. The result of the appeal to him was that he remanded the case for fresh decision. From that order of remand the plaintiffs have lodged a second appeal in this Court and have taken the objection for the first time that the proper value of the suit being Rs. 5,336-4-0, the defendant's appeal from the judgment and decree of the Subordinate Judge lay to the High Court and not to the District Judge, and that the proceedings of the District Judge being without jurisdiction are null and void.

As the plaintiffs themselves under-valued their suit the responsibility for what followed as a result of that under-valuation rests entirely on their heads, and it is a question whether they can be allowed to raise the objection as to jurisdiction in second appeal. In *Kishan Lal* v. *Rup Chand* (1) it was held that such objection cannot be entertained in second appeal. But the learned Counsel for the defendants-respondents meets the objection by a reference to s. 11 of the Suits Valuation Act (VII of 1887) which lays down that an obiection as to pecuniary jurisdiction shall not be entertained by an Appellate Court unless (*a*) it was taken in the Court of first instance or in the lower Appellate Court, or (*b*) the Appellate Court is satisfied that the over-valuation or under-valuation "has prejudicially affected the disposal of the suit or appeal on its merits." The present case does not fall under cl. (*a*), and as regards (*b*) it was neither stated in the grounds of appeal nor in arguments before us that the under-valuation of the suit "had prejudicially affected the disposal of the appeal on its merits." But Counsel for the appellants on the authority of *Ganga Sahai* v. *Sheo Lal* (2) and the string of the Punjab cases noted in the margin (foot-note)* in which that ruling was followed, contends that s. 11 is not applicable. In *Ganga Sahai* v. *Sheo Lal* (2), it was held for the first time that "s. 11 is limited to cases in which the valuation depends on the discretion of the parties or the Court, and is not applicable to cases in which the valuation is fixed by rules having the force of law." This proposition was recited and followed in all the subsequent cases quoted above; but with all respect to the learned Judges, who laid down or adopted that rule, we consider it opposed to the plain and comprehensive language of the section which enacts a general rule without any indication, express or implied, of the intention of the Legislature to exclude from its scope any class of cases whatever. Where the language of a legal enactment is neither vague nor ambiguous the Courts are bound to interpret it as it stands and for obvious reasons it is not permissible to read between the lines anything which the Legislature itself would have undoubtedly added if it had been its intention to frame a rule of limited and not general application. The proposition that "the section must be limited to cases in which the valuation depends on the discretion of theparties or the Courts" (*a*) and "is not applicable to cases in which valuation is fixed by the rules having the force of law" (*b*) which occurs in *Ganga Sahai* v. *Sheo Lal* (2) and was repeated in almost every subsequent case would itself, if scrutinised, appear to be neither well-conceived nor sound. The valuation of a suit is in

(1) A. W. N. (1889) 169.

(2) 132 P. R. 1894.

**Khuda Yar* v. *Wahab Din*, 35 P. R. 1901; 47 P. L. R 1901, *Cheloo* v. *Kali Das*, 44 Ind. Cas. 816; 21 P. R. 1918, *Sukh Raj* v. *Kanhaya Lal*, 28 Ind. Cas. 113; 2 P. R. 1915; 194 P. L. R. 1915, *Sanga* v. *Mali*, 8 Ind. Cas. 1043; 214 P. L. R. 1910, *Mahammad Shah* v. *Abdullah Shah*, 56 Ind. Cas. 918 and *Ghulam Akbar Khan* v. *Bakhat Bibi*, 29 Ind. Cas. 796; 116 P. L. R. 1915; 229 P. W. R. 1915.

no case left to the discretion of the *parties i.e., both parties*, or the Court. The *plaintiff* can in certain classes of suits put his own valuation on the relief sought by him and that valuation cannot be questioned and determines the forum. How then would s. 11 come into play in cases where plaintiff's valuation of the suit has to be accepted? In no case does the valuation of a suit depend on the discretion of the Court, though the Court can make an enquiry and determine the valuation. Thus part (*a*) of the proposition is untenable, and (*b*) cannot stand if it rested on (*a*). If it did not, there is nothing else to support it. Section 11 was enacted to validate proceedings that were otherwise void for want of pecuniary jurisdiction. If the intention of the Legislature had been to exclude from the scope of the section cases in which valuation is fixed by the rules having the force of law it would have given expression to that intention by adding a clause to that effect. But it appears that the construction put on s. 11 in *Ganga Sahai* v. *Sheo Lal* (2) was never properly criticised till a Punjab ruling based upon it, *i.e. Ghulam Akbar Khan* v. *Bakhat Bibi* (3) was referred to in the Madras High Court in *Vedaji Baskara Tirumal Rao* v. *Subramania Gurukkal* (4). Kumara Swami Sastri, J., who disposed of that case, observed as below:—

"Mr. Govindaraghava Aiyar contends that s. 11 can only apply to cases where the plaintiff having an option as to valuation gives an incorrect valuation, and not to cases where the principle of valuation is incorrect and a wrong principle has been followed in cases where there is only one method by which the suit is to be valued. He refers to *Ghulam Akbar Khan* v. *Bakhat Bibi* (3). I do not think there is anything in s. 11 of the Suits Valuation Act which suggests the difference sought to be made by Mr. Govindaraghava Aiyar. The words are general and the section refers to over-valuation and under-valuation. It does not matter how the same arises. The very object of s. 11 is to prevent the operation of the general rule that neither consent nor waiver can confer jurisdiction on Courts which have under law only a limited pecuniary jurisdiction in cases where there has been no prejudice on the merits. In *Govinda Menon* v. *Karunakara Menon* (5) it was held that in cases of over-valuation or under-valuation the Appellate Court should not interfere unless the disposal of the suit has been prejudicially affected."

The Punjab rulings were again cited before a Division Bench of the Madras High Court in *Ammalu Ammal* v. *Krishnan Nair* (6) and were dissented from. One of the learned Judges observed as below:—

"As pointed out in *Narayani Ammal* v. *Secretary of State* (7), *Vedaji Baskara Tirumal Rao* v. *Subramania Gurukkal* (4) and *Raghava Chariar* v. *Raghava Chariar* (8) the language of s. 11 of the Suits Valuation Act is very wide and the restrictions sought to be imposed by the decisions of the Punjab Chief Court cannot, in my opinion, control the plain words of the section."

We are also strongly of opinion that the language of s. 11 does not admit of the construction put upon it in *Ganga Sahai* v. *Sheo Lal* (2) and the subsequent cases based upon that ruling, and we, therefore, refer to a Full Bench the question whether s. 11 of the Suits Valuation Act admits of the interpretation put on it in *Ganga Sahai* v. *Sheo Lal* (2) or, in other words, whether s. 11 is limited to cases in which valuation depends on the discretion of the parties or the Court and is not applicable to cases in which valuation is fixed by rules having the force of law?

Mr. *Sagar Chand*, Sheikh *Chiragh Din* and Mr. *Niaz Muhammad*, for the Appellants.

Bakhshi *Tek Chand* and Sir Dr. *Muhammad Iqbal*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

Shadi Lal, C. J.—This Reference raises the question of the correctness of the rule laid down in *Ganga Sahai* v. *Sheo Lal* (2) and followed in *Khuda Yar* v. *Wahab Din* (9) and other subsequent judgments that s. 11 of the Suits Valuation Act VII of 1887 is limited to cases in which the valuation depends on the discretion of the parties or the Court and is not applicable to cases in which valuation is fixed by rules having the force of law.

The action, which has led to the Reference, was brought for the possession of agricul-

(3) 29 Ind. Cas. 796; 116 P. L. R. 1915; 229 P. W. R. 1915.
(4) 52 Ind. Cas. 992.
(5) 24 M. 43.
(6) 62 Ind. Cas. 715; 30 M. L. T. 38.
(7) 41 Ind. Cas. 167.
(8) 8 Ind. Caa. 545; 20 M. L. J. 726; 8 M. L. T. 404.
(9) 35 P. R. 1901; 47 P. L. R. 1901.

tural land, and it is common ground that, if the suit had not been under-valued, it would have been tried in the first instance by a Subordinate Judge of the First Class, instead of a Subordinate Judge of the Second Class whose jurisdiction was limited to suits not exceeding Rs. 5,000 in value; and that the first appeal from the decree of the Trial Court would have been heard by the High Court and not by the District Judge. No objection on the ground of under-valuation was, however, taken either in the Court of first instance or in the lower Appellate Court ; and it was only in this Court that the objection was first raised that neither the Trial Court nor the District Court was competent to adjudicate upon the dispute between the parties.

Now, if the judgment in *Ganga Sahai* v. *Sheo Lal* (2) correctly interprets s. 11 of the Suits Valuation Act, the objection urged by the appellants must prevail because it is beyond dispute that the valuation of the suit was fixed by rules having the force of law. The section in so far as is relevant to the question before us runs as follows :—

"Notwithstanding anything in s. 578 of the C. P. C., an objection that by reason of the over-valuation or under-valuation of a suit or appeal a Court of first instance or lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless—

(*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in the memorandum of appeal to that Court, or

(*b*) the Appellate Court is satisfied for reasons to be recorded by it in writing, that the suit or appeal was over-vlaued, or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

(2) If the objection was taken in the manner mentioned in cl. (*a*) of sub-s. (1), but the Appellate Court is not satisfied as to both the matters mentioned in cl. (*b*) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of the first instance or lower Appellate Court.

(3) If the objection was taken in that manner and the Appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals ; but if it remands the suit or appeal ; or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal."

The language of the section is comprehensive enough to include all cases of erroneous valuation and does not suggest any distinction between cases in which the valuation depends upon rules having the force of law and those in which the valuation is determined otherwise. The learned Judge, who decided the case of *Ganga Sahai* v. *Sheo Lal* (2) holds that the section "is limited to cases in which the valuation depends on the discretion of the" parties or the Court.....and is not applicable to cases, in which the valuation is fixed by rules having the force of law." He does not, however, give any reason for making this distinction, nor does he state how it can be deduced from the language of the Statute which is general in its terms. Moreover, if the value of a particular suit depends upon the discretion of the plaintiff, *e. g.*, a suit for accounts, or upon the decision of the Court, it seems to me that, when the plaintiff exercises his option or the Court determines the value, the suit has been properly valued and no question of over-valuation or under-valuation could arise. It does not appear what cases were within the contemplation of the learned Judge when he referred to valuation "which depends upon the discretion of the parties." There are no doubt some suits in which the law allows the plaintiff to state the amount at which he values the relief sought by him, but I am not aware of any case, and certainly none has been mentioned by the learned Vakil for the appellants, in which the defendant has any discretion in fixing its valuation.

I consider that the distinction referred to above is not warranted by the language of the section and appears to be arbitrary. It is no doubt undesirable that a Court whose pecuniary jurisdiction is limited to suits not exceeding, say, Rs. 1,000 in value, should be allowed to try a suit regarding property worth a lac of rupees, and that in the event of no objection as to under-

valuation being raised in the manner mentioned in cl. (*a*) of s. 11, sub-s. (1), the decree passed by such Court should be held to be binding upon the parties.

The general rule relating to jurisdiction is that neither consent nor waiver by a party to the suit can confer jurisdiction upon a Court which has no inherent jurisdiction; and that jurisdiction over the subject-matter of a suit can be given only by law. As pointed out by their Lordships of the Privy Council in *Ledgard* v. *Bull* (10). "When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him."

Section 11, however, provides an exception to the general rule and lays down that a party who has not taken objection as to the pecuniary jurisdiction of the Court at the time specified in cl. (*a*), cannot be allowed to dispute that jurisdiction afterwards. It appears that the object of the Legislature in enacting this provision was to ensure that the time and labour spent by a Court in deciding a case should not be wasted, if the party concerned has joined issue and gone to trial upon the merits without raising objection to the pecuniary jurisdiction of the Court at the earliest opportunity. It will be observed that a similar rule has been enacted by the new C. P C. in order to cure a defect of territorial jurisdiction. Section 21 of the C. P. C. of 1908 provides that no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice.

The object of the Legislature in both cases is the same, namely, that the defect of jurisdiction on territorial or pecuniary ground should not render proceedings in a case abortive if such objection was not taken at the earliest opportunity and there has been no consequent failure of justice. I must, therefore, hold that there is nothing in the language of s. 11 of the Suits Valuation Act which would warrant the distinction drawn in *Ganga Sahai* v. *Sheo Lal* (2) and that the section governs all cases of erroneous valuation irrespective of the question as to whether the value of the suit is determined by rules having the force of law or in any other manner.

Scott-Smith, J.—I concur.

Martineau, J.—I concur.

Zafar Ali, J.—I concur.

Campbell, J.—I also concur.

By the Court.—The case will now be heard by the Division Bench on the merits.

Z. K. *Order accordingly*

(10) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 7 OF 1924.

April 16, 1925.

Present :—Mr. Justice Sulaiman and Mr. Justice Daniels.

JAGAT PANDE—PLAINTIFF—APPELLANT

versus

SARWAN PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104, Sch. II, para. 21 (2)—Arbitration without intervention of Court—Order filing award—Decree—Appeal, whether lies.

An appeal is allowed under s. 104 (1) (*f*) of the C. P. C. from an order filing or refusing to file an award but no second appeal is allowed from an order passed on such an application. On the other hand, under para. 21 (2) of Sch. II to the C. P. C., when an award has been filed and a decree is made in accordance with it no appeal lies from such decree except in so far as it is in variance with the award. The right of appeal given by s. 104 (1) (*f*), however, is not taken away by the fact that a decree has subsequently been passed in accordance with the award. [p. 77, col. 1.]

Hari Kunwar v. *Lakhmi Ram Jain*, 35 Ind. Cas. 833; 38 A. 380; 14 A. L. J. 481 and *Lachmi Narain* v. *Sheonath Pande*, 54 Ind. Cas. 443; 42 A. 185; 1 U. P. L. R. (A.) 177; 18 A. L. J. 78, referred to.

Where instead of passing an order directing the award to be filed and then proceeding to pass a decree upon it in accordance with the law the Court disposes of the whole case by one order, an appeal against the order is in substance an appeal against an order directing the award to be filed and is competent under s. 104 (1) (*f*) of the C. P. C. [p. 77, col. 2.]

First appeal from an order of the First Additional Judge, Gorakhpur, dated the 31st October 1923.

Messrs. *Sankar Saran* and *Brajmohan Lal Dave*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—This first appeal from order arises out of an arbitration award made without the intervention of the Court. The plaintiff-appellant came into Court with an application which is very inartistically drawn, but which has been treated throughout and is now treated by him as in substance an application to file an award under para. 20 of the Second Schedule of the C. P. C. In para. 6 of the plaint he stated that his object was to get the award filed and to obtain a decree upon it. In the course of the proceedings a plea was taken before the learned Munsif that the defendant was a lunatic and incapable of representing his own interests. The learned Munsif ultimately, however, disposed of the matter by an *ex parte* order in these terms:—

"Judgment. Suit for the enforcement of an award.

"Defendant's Pleader states that he has no instructions. Suit is heard *ex parte*. Claim is proved. Decreed with costs."

The defendant went in appeal to the learned District Judge. The learned District Judge held that the question of the defendant's capacity had not been properly disposed of in the proceedings. He, therefore, set aside the order of the learned Munsif and remanded the whole case for trial *de novo*. The plaintiff comes here in appeal from that order. His contention is that the appeal was one from a decree passed in accordance with the award, and that, therefore, under para. 21 (2) of the Second Schedule of the C. P. C. the appeal to the District Judge was incompetent.

The law governing the right of appeal in these cases is contained in s. 104 (1) (*f*), s. 104 (2), and para. 21 (2) of the Second Schedule of the C.P. C. An appeal is allowed from an order filing or refusing to file an award, but no further appeal is allowed from an order passed on such an application. On the other hand when an award has been filed and a decree is made in accordance with it, no appeal lies from such decree except in so far as it is at variance with the award. In this case the appellant's contention is that the respondent should have appealed from the separate order directing the award to be filed. The difficulty is that no such separate order is to be found on the record. Instead of passing an order directing the award to be filed and then proceeding to pass a decree upon it in accordance with law the learned Munsif disposed of the whole case by the very brief order which has been quoted above. This was the only order from which it was possible for the respondent to appeal. We think, therefore, that the appeal was in substance an appeal from an order directing the award to be filed. It is established by ample authority that the right of appeal is not taken away by the fact that the decree has subsequently been passed in accordance with the award. We may refer to *Hari Kunwar* v. *Lakhmi Ram Jain* (1) and *Lachmi Narain* v. *Sheonath Pande* (2). The appeal to the Court below having been one from an order directing an award to be filed, no further appeal lies to this Court. We accordingly dismiss the appeal with costs including in this Court-fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 35 Ind. Cas. 833; 38 M. 380; 14 A. L. J. 481.
(2) 54 Ind. Cas. 443; 42 A. 185; 1 U. P. L. R. (A.) 177 18 A. L. J. 78.

BOMBAY HIGH COURT.

INSOLVENCY PETITION No. 143 OF 1924.
January 23, 1925.
Present:—Mr. Justice Crump.
In re MAHOMED ESMAIL FAZLA—APPELLANT.

Presidency Towns Insolvency Act (III of 1909), s. 35 (4) (5)—Examination for discovery of insolvent's property, when to be directed—Dispute as to title—Procedure.

Clauses (4) and (5) of s. 36 of the Presidency Towns Insolvency Act are intended to provide a summary procedure for ordering payment of debts due to the insolvent and delivery of property where there is no dispute. The procedure provided under these clauses, however, is inappropriate in a case where the person against whom the order is sought to be made claims to hold the property under a conveyance from the insolvent and sets up the validity of the conveyance in his own favour.

In re Lucas, 28 Ind. Cas. 469; 42 C. 109, referred to.

Mr. *Mulla*, for the Appellant.

JUDGMENT.—Mahomed Ismail Fazla was adjudicated insolvent on February 1, 1924. On September 27, 1924, the Official Assignee applied to the Court for an order for the examination of five persons under s. 36 of the Presidency Towns Insolvency Act. On December 16, 1924, the three petitioners, being three of these persons, obtained a Rule *nisi* calling upon the Official Assignee to show cause why the order for

their examination should not be vacated. The Rule was argued before me on January 20, 1925, and I reserved my judgment.

The nature of the controversy between the parties can be gathered from the affidavits. The insolvent in his affidavit of September 27, 1924, in support of the application for an order under s. 36, sets out a number of very serious charges against the petitioners. The substance of those charges is that they by coercion, fraud, undue influence, and forgery obtained mortgages of the insolvent's property for which no adequate consideration was paid. The properties in dispute are valued at many *lakhs* of rupees. The petitioners in their affidavit of December 16, 1924, deny those charges. The insolvent in his counter-affidavit of January 19, 1925, re-affirms them. In paras. 4 and 6 of that affidavit it is stated that the object of the proposed examination under s. 36 is to obtain an order under cl. 5 of s. 36 for the delivery of the property to the Official Assignee thereby avoiding the expense and delay of a regular suit.

I am not concerned at this stage with the merits of this dispute. It may, however, be noted that the Official Assignee at one time expressed an intention to file a suit. In the circumstances is it proper to allow the proposed examination under s. 36? In my opinion the object in view is beyond the scope of that section. It would not be possible to obtain the relief desired without setting aside the mortgages on the ground suggested. As to the scope of s. 36 I agree with the remarks of Chitty, J., in a somewhat similar case: *In re Lucas* (1). If it is correct to say, as I think it is, that s. 36 (4) and (5) was intended to provide a summary procedure for ordering payments of debts due and delivery of property where there was no dispute (see page 114), it is obvious that the procedure under that section is inappropriate in the case of such disputes as we have here.

The Rule must be made absolute. No order as to costs.

Z. K. *Rule made absolute.*

(1) 28 Ind. Cas. 469; 42 C. 109.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 14 OF 1924.

April 20, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

BAIJNATH PANDAN—CREDITOR—APPELLANT

versus

THE ESTATE OF MR. E. C. DENNET (INSOLVENT), THROUGH THE DISTRICT JUDGE OF JHANSI—RESPONDENT.

Usurious Loans Act (X of 1919), s. 2 (3) (b)—Claim against surety—Interest, whether can be reduced—Interest at 75 per cent. per annum, whether excessive.

Where a creditor wishes to bind a debtor and recovers from him a sum of money said to be due on a transaction entered into between the parties, the Usurious Loans Act would be applicable irrespective of the fact whether the debtor is liable as a principal debtor or as a surety. Section 2 (3) (*b*) of the Act is wide enough to cover the case of a surety also, and the Act makes no distinction whatsoever between a principal debtor and a surety. [p. 79, col. 1.]

Interest at the rate of 75 per cent. per annum is not only excessive but is extortionately high and it is grossly unjust to allow a claim for such a high rate of interest to succeed in a Court of Law [*ibid.*]

First appeal from an order of the District Judge, Jhansi, dated the 11th October 1923.

Mr. *A. Sanyal*, for the Appellant.

Mr. *L. M. Banerji*, for the Respondent.

JUDGMENT.—This is a creditor's appeal arising out of an application in an insolvency case to be entered as a scheduled creditor in respect of an amount due on a promissory-note, dated the 19th of July 1922, executed by the insolvent along with two other persons for a sum of Rs. 800. The promissory-note bore an interest at the rate of one anna per rupee per mensem, which works out at 75 per cent. per annum.

The learned District Judge came to the conclusion that the rate of interest was excessive and that the transaction was unfair as between the parties thereto.

He accordingly reduced the rate of interest to 12 per cent. per annum simple interest which he considered to be adequate having regard to all the circumstances of this case.

The creditor has appealed.

The first point urged on his behalf is that the Act has no application to this case because the respondent E. C. Dennett was not the principal debtor but a mere surety. In our opinion, this argument has no force whatsoever. If the creditor wishes to bind the respondent and recover from him a sum of money said to be due on a transac-

tion entered into between the parties the Usurious Loans Act (X of 1919) would be applicable irrespective of the fact whether the respondent is liable as a principal debtor or as a surety.

Section 2 (3) (*b*) is wide enough to cover the case of a surety also. We think that the Act makes no distinction whatsoever on this account.

The next point urged is that the rate of interest was not excessive. We think that it was not only excessive but was extortionately high, and the learned District Judge was perfectly justified and in fact was bound to reduce the amount and it would have been grossly unjust to allow a claim for such a high rate of interest to succeed in a Court of Law.

It is lastly urged that 12 per cent. per annum simple interest which had been allowed by the District Judge is too low. The learned District Judge has before him several circumstances. It was not only one person but three persons who joined in executing the promissory-note. The promissory-note was for Rs. 800 and was payable on demand and the creditor was not bound to wait for any long period. One of the executants, namely, the persent respondent was employed on the Railway and was earning from Rs. 155 to Rs. 100 a month as pay. No other circumstances were brought before the Court to show that the creditor was running any serious risk in advancing the money to these three persons who had been held jointly and severally responsible. Having regard to all the circumstances of this case he arrived at the conclusion that the rate of interest at 12 par cent. per annum was a proper and fair rate of interest. We find it impossible to differ from the view which he has taken. The result is that the appeal fails and we dismiss it with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 2211 OF 1924.

January 23, 1925.

Present :—Mr. Justice Pratt.

ARDESHAR COWASJI PATEL—PLAINTIFF

versus

K. D. AND BROS.—DEFENDANTS.

Transfer of Property Act (IV of 1882), ss. 108, 109—Lease—Assignment of lease—Privity of estate between lessor and assignee—Assignee, liability of, to pay rents and taxes.

A lessee does not by assignment of his interest in the lease escape personal liability on the covenants contained in the lease. [p. 80, col. 1.]

An absolute assignment by a lessee of his interest in the lease creates a privity of estate between the lessor and the assignee of the lessee and the assignee is liable to the lessor on all covenants that run with the land including the covenant to pay rents and taxes. [*ibid.*]

A mortgage by a lessee of his interest in the lease by way of absolute assignment creates a privity of estate between the lessor and the assignee. [*ibid.*]

Case-law discussed.

Mr. *J. H. Vakeel*, for the Plaintiff.

Mr. *Kania*, for Defendant No. 3.

JUDGMENT.—Plaintiff is a lessee of a plot of land at Kirkee measuring 13,639 square yards, under a lease from the Secretary of State for the term of thirty-three years from April 1, 1918.

The plaintiff sub-leased to the first defendant a plot out of the said land measuring 8,704 square yards. The sub-lease was dated April 8, 1922, but the term began from September 1, 1921, and was for seven years. The rent reserved by the sub-lease is Rs. 600 per mensem, and the sub-lessee covenanted to pay a proportion of the ground-rent and taxes of the property so demised. The ground-rent was a proportionate part of the rent reserved by the head-lease to the Secretary of State.

On June 1, 1922, defendant No. 1 with the consent of the plaintiff assigned by way of mortgage his interest as sub-lessee to the third defendant.

Plaintiff has been paid rent up to January 31, 1923, but no ground-rent or taxes have been paid ever since the commencement of the term, *i. e.*, from September 1, 1921.

Plaintiff sues to recover these arrears up to February 29, 1924.

Defendant No. 1 was adjudicated insolvent on January 24, 1924, and defendant No. 2 is the Official Assignee. No relief is claimed against the Official Assignee and he is not liable and he is not a necessary party for the term was assigned prior to the insolvency and did not vest in him; and the liability on which defendant No. 2 is sued is purely personal and contractual.

There is no question as to the liability of defendant No. 1 who has not appeared. He is the lessee of the plaintiff and is liable on his covenant for rent from February 1, 1923, and for a proportion of the ground-rent and taxes from September 1, 1921.

Section 108 (*j*) of the Transfer of Property Act expressly enacts that a lessee does not by assignment escape personal liability on the covenant of the lease, and follows on this point the English Law, for which see *Eaton* v. *Jaques* (1) and *Auriol* v. *Mills*, (2).

The arrears of rent are from February 1, 1923, to February 29, 1924, Rs. 7,800. The plaintiff drops his claim for a proportion of the taxes. The proportion of the ground-rent from September 1, 1921, till February 29, 1924, is the fraction of 8,704-13,639 multiplied by 150 per month, *i. e.*, Rs. 95 per month for thirteen months. For defendant No. 3, the assignee of the lessee, it is contended that his liability is limited by s. 76 of the Transfer of Property Act as he is a mortgagee. That section defines his duties to his mortgagor but has no bearing on his liability to the lessor. The Transfer of Property Act defines the rights and liabilities of the lessor's transferee in s. 109, but is curiously silent as to the assignee of the lessee. But under English Law it is clear that an absolute assignment by the lessee creates privity of estate, and that the assignee is liable to the lessor on all covenants that run with the land including the covenant to pay rent: *Walker* v. *Reeves* (3) and *Williams* v. *Bosanquet* (4). And this law has been followed by the Madras High Court before and after the Transfer of Property Act in *Kamala Nayak* v. *Ranga Rau* (5) and *Kunbanujan* v. *Anjelu* (6), and has been applied by this High Court in *Timmappa Kuppaya* v. *Rama Venkanna Naik* (7).

The mortgage to defendant No. 3 is by way of absolute assignment and, therefore, creates privity of estate: see *Theethalan* v. *Eralpod Rajah* (8). Defendant No. 3 is, therefore, liable to pay rent from the date of the assignment, *i. e.*, from June 1, 1922. The covenant to pay ground rent and taxes is a covenant which runs with the land as it affects the land, which is the subject of the demise. See *Spencer's case* (9), *Dyson* v. *Foster*, (10) and *Mathewson* v. *Sri Ram Kanai Singh Deb* (11). In *South of England Dairies, Ld.*, v. *Baker*, (12), a similar covenant to pay rates and taxes was held to be a covenant running with the land. Defendant No. 3 is, therefore, liable to pay a proportionate share of the ground-rent and taxes from June, 1, 1922. The plaintiff drops his claim for the share of taxes, *i. e.*, water rate and conservancy, and it is agreed that the proportion of the ground-rent is Rs. 2,644.

There will, therefore, be a decree for the plaintiff against the first defendant for the sum of Rs. 95 per month for nine months from September 1, 1921, to May 31, 1922. There will also be a decree against defendants Nos. 1 and 3 for rent at the rate of Rs. 600 per mensem from February 1, 1923, till February 29, 1924, and for a proportion of the ground-rent at the agreed figure of Rs. 2,644 with costs and interest and interest on judgment at six per cent.

Z. K. *Suit decreed.*

(1) (1780) 2 Dong. 455; 99 E. R. 290.
(2) (1790) 4 T. R. 94; 100 E. R. 912; 1 H. Bl. 433; 2 R. R. 341.
(3) (1780) 2 Dong. 461n; 99 E. R. 293.
(4) (1819) 1 Brod. & Bing. 238; 129 E. R. 714; 3 Moore 500; 21 R. R. 585.
(5) 1 M. H. C. R. 24.
(6) 17 M. 296; 6 Ind. Dec. (N. S.) 205.
(7) 21 B. 311; 11 Ind. Dec. (N. S.) 210.
(8) 40 Ind. Cas. 841; 40 M. 1111; 32 M. L. J. 442; 21 M. L. T. 401.
(9) 1 Sm. L. C. (11th Ed.) 55; 5 Co. Rep. 16a; 77 E. R. 72.
(10) (1909) A. C. 98; 78 L. J. K. B. 246; 99 L. T. 942; 25 T. L. R. 166.
(11) 1 Ind. Cas. 626; 36 C. 675 at p. 702; 9 C. L. J. 523.
(12) (1906) 2 Ch. 631; 76 L. J. K. B. 78; 96 L. T. 48.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 93 OF 1924.
January 30, 1925.
Present :—Mr. Justice Campbell.
KISHAN SINGH—PLAINTIFF—APPELLANT
versus
SUNDER *alias* DINDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Art. 1—Suit to challenge alienation—Limitation, commencement of—Mutation effected not in name of vendee but in name of pre-emptor, effect of.

The limitation for a suit which falls within the purview of Art. 1 of the Punjab Limitation (Ancestral Land Alienation) Act of 1900 begins to run from the date of the attestation of mutation, and it is immaterial that mutation was not effected in the name of the original vendees but was effected in the names of persons who had obtained a decree for pre-emption in respect of the sale and who had been substituted as vendees in the place of the original vendees. [p. 81, col. 1.]

Fazla v. *Badan Singh*, 11 Ind. Cas. 765; 48 P. R. 1911; 237 P. L. R. 1911; 141 P. W. R. 1911, followed.

Second appeal from a decree of the Additional District Judge, Amritsar, dated the 6th October 1923.

Mr. *Des Raj Sawhney*, for the Appellant.

Mr. *Jai Gopal Sethi*, for the Respondents.

JUDGMENT.—The question involved in this second appeal is whether a suit instituted on 29th July 1920 for a declaration to avoid a sale effected on the 19th February 1902 is within time.

The facts are that the sale was pre-empted by Sant Singh and others from Budha Singh and others the original vendees by a decree of the Civil Court dated the 15th January 1904 and that no mutation was attested until the 21st February 1915 when the names of the pre-emptors were substituted for those of the original vendees. Admittedly Punjab Act I of 1900 contains the law that applies. The learned District Judge has held the suit to be barred because the mutation was not attested with respect to the original sale of 1902 because there is no evidence of the date of which the alienees took physical possession and because it must be assumed that the present appellants had knowledge of the sale of 1902 when the pre-emption suit was instituted.

This decision is clearly wrong. The mutation effected in 1915 was of the alienation which the suit seeks to impugn. The fact that pre-emptors were substituted afterwards for the original vendees does not make any difference, and the suit is within time since it was instituted within 12 years of the date of the attestation of the mutation. Even if Sant Singh and others had been transferees by a second sale from the original vendees, the situation apparently would have been precisely the same according to what was ruled in *Fazla* v. *Badan Singh* (1), namely, that it is immaterial whether the mutation referred to in Art. 1 of the Schedule of Punjab Act I of 1900 is effected by the original transferees or by a second transferee from him.

I accept the appeal with costs, set aside the order of the lower Appellate Court and remand the suit for re-decision on the merits. Stamp on appeal will be refunded and costs in the Court below will abide the result.

Z. K. *Appeal accepted.*

(1) 11 Ind. Cas. 765; 48 P. R. 1911; 237 P. L. R. 1911; 141 P. W. R. 1911.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUMMARY SUIT No. 2355 OF 1922.

January 19, 1925.

Present:—Mr. Justice Taraporewala.

VED AND SOPHER—PLAINTIFFS

versus

R. P. WAGLE & Co.—DEFENDANTS.

Practice—Solicitor's lien in respect of costs—Charging order in favour of Solicitor—Money lying in Court—Attachment by creditor before charging order—Priority.

A Solicitor who has obtained a charging order in respect of his costs as against certain money of his client which is lying in Court and which has been realised in execution of a decree by a creditor of his client, has a right to receive his costs out of the money so charged in priority to the attaching creditor, so long as the money has not actually been paid out to the creditor. It is immaterial that the attachment by the creditor was prior to the date of the charging order obtained by the Solicitor. [p. 84, col. 2.]

Case-law discussed.

Messrs. *Merwanji, Kola and Co.*, for the Plaintiffs

Mr. *B. K. Desai*, for the Defendants.

JUDGMENT.—In this matter the plaintiffs, Messrs. Ved and Sopher, ask for payment to them of the amount of a decree obtained by the defendants R. P. Wagle & Co., against one Narotamdas Haridas attached in execution of the decree in favour of Ved and Sopher in the suit and realised by the Sheriff

The application is opposed by Messrs. Hiralal & Co., who acted as Solicitors for R. P. Wagle & Co., and who have got a charging order in their favour on the decrees in favour of R. P. Wagle & Co., one of which is the decree attached in the present execution proceedings. The said decree was passed on July 8, 1924, and was attached by Ved and Sopher on July 10, 1924. The Solicitors, Messrs. Hiralal & Co., got the charging orders on July 15 and 16, 1924. Thereafter Narotamdas Haridas, the judgment-debtor in the said decree, paid the monies in the Sheriff's office on August 5, 1924. The Prothonotary has certified that the only claim in execution against the amount of the decree is that of the decree-holders, Messrs. Ved and Sopher. The amounts paid in execution are not two sums of Rs. 2,500 and Rs. 500. Messrs. Hiralal & Co., contend that they are entitled to receive the said amounts in priority to the attaching creditors.

I have taken time to consider this matter because I was told that there were orders of this Court wherein the right of the judg-

ment-creditor was held to have priority over the lien of the Solicitor where a charging order had not been obtained prior to the attachment by the judgment-creditor. I am unable to find any judgment with grounds or reasons for the judgment, and as this is a matter of importance to Solicitors, I have gone through all the authorities on the point and I have given very careful consideration to the matter.

Now, the whole argument of the judgment-creditor in claiming to exclude the Solicitor's lien comes to this, that the Solicitor's lien, as existed in Common Law, could only attach to the property remaining in the hands of the judgment-debtor and once that property was attached by a decree-holder the property went out of the hands of the client and the Solicitor, therefore, could not claim a lien on the money which so went out of his client's hands, that the decree-holder who by his diligence attached the property prior to the Solicitor's asserting or realising his lien was entitled to exclude the Solicitor even from participating in the distribution of the moneys. In England there has been statutory provision giving effect to the lien of the Solicitor by 23 & 24 Vic. c. 127, s. 28. It has been contended before me that prior to the enactment of the Statute, the Solicitor's lien only attached in cases where the moneys remained in the hands of his client, and that immediately the moneys were attached, the Solicitor's lien came to an end. Unfortunately the English cases dealing with this point are mostly after the enactment of the Statute 23 & 24 Vic. c. 127, and, therefore, there is some difficulty in getting at the real principle laid down in those decisions. The matter is treated by Cordery in his Law relating to Solicitors, (3rd Edition), at page 388, as follows:—

"Where the lien is on a judgment recovered for the client the question of priority has often arisen between the Solicitor and a judgment-creditor attaching the debt under O. XLV (attachment of debts).

The result of the more recent cases seems to be, that so long as the money is within the jurisdiction of the Court a charging order will have priority over an attachment, unless there has been *mala fides*, or great neglect on the part of the Solicitor, notwithstanding that execution has actually issued on behalf of the judgment-creditor at the time when the Solicitor applies for the charging order."

These observations mix up the charging order under the Statute with the lien under Common Law. But looking into the cases, I find it is distinctly laid down in *Shippey* v. *Grey* (1) that the Solicitor's lien under Common Law, independently of the charging order, has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court, that is to say, they are not realised and paid off to the judgment-creditor. In this case, the learned Lord Justices of the Appeal Court have followed a previous decision of the Court in *Faithfull* v. *Ewen* (2). The matter has been fully dealt with by Lord Justice Brett in his judgment, and he has, independently of the previous decision in *Faithfull* v. *Ewen* (2) come to the conclusion that a Solicitor was entitled to his lien in priority to an attaching creditor, and the principle on which the learned Lord Justice comes to the conclusion is this, that the money was earned by the act of the Solicitor and that unless something had occurred to take away his right, he had a right in law and in equity to an order in his favour so that the moneys so earned might not be paid away to any one without his costs being reserved. In that case the defendant obtained an *ex parte garnishee* order before the Solicitors could tax their costs and before they could do anything or take any steps to preserve their right. The argument of the judgment-creditor, as put by Lord Justice Brett, came to this, that in that case the Solicitor could in no event have got a priority over the judgment-creditor as his costs had not been taxed before the *garnishee* order was taken out. Lord Justice Brett characterises the proposition as extravagant and holds that the only principle on which the Solicitor could be deprived of his lien would be that if before the Solicitor took any steps, the money had been disposed of in some way beyond the power of the Court so that the Court had no longer any jurisdiction over it then in that case the right of the Solicitor would be at an end and the Court would be powerless to interfere. He gives an instance.—An execution had issued and been carried out so that the execution creditor had received the money; in such a

(1) (1880) 49 L. J. C. P. 524; 42 L. T. 673; 28 W. R. 877.

(2) (1878) 7 Ch. D. 495; 47 L. J. Ch. 457; 37 L. T. 805; 26 W. R. 270.

case an application by the Solicitor would be too late. Or again, if the client had received the money and paid it over to some creditor of his, in such a case the right of the Solicitor would be at an end. He held that the *garnishee* order was not effective without a subsequent order, for cause might be shown against it, that a Court of Equity considered that that which the Solicitor had a right to have done was done and that the *garnishee* order obtained by the defendant did not take priority over the Solicitor's lien. This judgment is not based on the statutory lien in respect of which a charging order could be obtained by the Solicitor under 23 & 24 Vic. c. 127, but entirely on the Solicitor's lien at Common Law. If one considers the object for which that Statute was enacted, it is quite clear that the provision in the Statute was made with a view to give a further right to the Solicitors which they had not prior to the enactment of the Statute. They had no lien over the real property of their client and that was sought to be remedied by the Statute 23 & 24 Vic. c. 127. But in making the said provision by Statute, the Legislature made it as wide as possible and the Solicitor was empowered under the statute to obtain a charging order in respect of all the property of his client recovered through his exertions whether it was real or personal property. It does not, therefore, follow that before the enactment of the Statute the lien so far as personal property was concerned was anything different from the lien given by Statute. To my mind the effect of making a charging order under the Statute is nothing more than to provide for enforcing the Solicitor's lien which existed in respect of personal property prior to the Statute and which was for the first time given in respect of real property of the client by the Statute. The Solicitor's lien at Common Law has been the lien which has been given effect to and enforced by the High Courts of Bombay and Calcutta. There is no statutory provision in India as regards the Solicitor's lien. The Solicitor's lien as it prevailed in England before the statutory enactment is clearly defined by Lord Justice Brett in *Shippey* v. *Grey* (1). If effect was given to the Solicitor's lien at Common Law in the sense in which the judgment-creditor asks the Court to give it, it would be frustrating the whole object of the protection which the Court seeks to give to the Solicitor by enforcing the lien, because as happened in this case the decree having been passed on July 8, and the attachment having been levied on July 10, there was no time for the Solicitor to have his costs taxed so as to assert his lien in respect of these costs. And simply because the judgment-creditor obtains an order for attachment within two days of the passing of the decree he cannot be heard to say that the moneys by reason of such attachmeht go out of the jurisdiction of the Court so as to prevent the Court from interfering on behalf of the Solicitor.

After all the lien is enforced for the protection of the Solicitor who is an officer of the Court by the Court interfering so long as the moneys are within the jurisdiction of the Court. By a mere attachment the moneys do not go out of the jurisdiction. I can well understand that if moneys had been realised in the course of the attachment and distributed and paid to the creditor and the Solicitor had not obtained his charging order or had not come forward to claim his lien until that was done, he could not have claimed it as against the judgment-creditor who had got those moneys. Until the moneys are paid to the judgment-creditor they are still in the hands of the Court and within its jurisdiction and I do not see how a solicitor, who is entitled to his lien on the moneys obtained by his exertions which are in the hands of the Court, could be deprived of the fruits of his exertion by the mere fact of an attachment being levied on the moneys. Until the moneys are disposed of they remain within the jurisdiction of the Court and the Solicitor is entitled to come to the Court and ask for its interference so as to protect his rights as regards his costs.

It has been pointed out to me that in Calcutta the Solicitor's lien has been given effect to in a very wide manner. The question before the Calcutta High Court in *Harnandroy Foolchand* v. *Gootiram Bhuttar* (3) is not the question before me to-day but the judgment supports my view that the Solicitor is entitled to the protection of the Court as far as possible and that the Solicitor's lien should be enforced and given effect to by the Court in all possible cases where the Court can effectively do so.

(3) 54 Ind. Cas. 691; 46 C. 1070.

My attention was drawn to *North* v. *Stewart* (4), in support of the proposition that the statutory enactment made a difference in the rights enjoyed by the Solicitors prior to the enactment and thereafter in respect of lien for their costs on the moneys of their clients. Now that case decides entirely a different point and the question of the effect of the Statute 23 and 24 Vic. c. 127 is merely incidentally brought in. There is no doubt that there are some words in the judgment of Lord Watson at page 463* which lend colour to the argument of the judgment-creditor here. But considering the facts of the case on which the decision was given, I do not see that they are capable of the wide construction which the judgment-creditor wants to put upon them. The question in that case was of jurisdiction and it was contended that jurisdiction was ousted by reason of the attachment being invalid as the moneys attached did not belong to the judgment-debtor but to the Solicitor who had a lien on the moneys, and their Lordships merely considered this point, whether prior to the obtaining of the charging order it could be said that the moneys belonged to the Solicitor and were not capable of being attached by the creditor of the client. Lord Watson observes at page 463* as follows:—

"Assuming that their lien, when charged by the order of June 13 might operate in the same way as an intimated assignation by the original judgment-creditor, and terminate his interest in the debt; so long as the debt remains his property, the mere existence of a lien does not exclude the diligence of others having claims against him. The opinions expressed by the English Bench in *Hough* v. *Edwards* (5) and *Mercer* v. *Graves* (6) appear to me clearly to show that, in the Courts of Common Law, a Solicitor's lien upon costs decreed does not, until it is converted into a charge by virtue of the Statute, prevent their attachment by other persons having claims against the judgment-creditor."

The question there was whether the debt could be attached and what Lord Watson holds is that the debt could be attached so long as there was no charging order but if there was a charging order to the fullest extent of the debt then, no doubt, no interest of the judgment-creditor would remain and, therefore, there would be nothing which others could attach. But it does not follow from these observations that once the property is attached by others, the lien of the Solicitor comes to an end. The judgments of the other Lords clearly show that their whole attention was given to the point whether the attachment, in the first instance, could be levied or not and not as to the effect of the attachment if the Solicitor claimed to exercise his lien as against the moneys so attached. For that the decision in *Shippey* v. *Grey* (1) is quite clear. This decision is later in date than the decisions in *Hough* v. *Edwards* (5) and *Mercer* v. *Graves* (6) referred to by Lord Watson in *North* v. *Stewart* (4), and in my opinion, *Shippey* v. *Grey* (1) lays down the correct principle and is in no way in conflict with the decision of the House of Lords in *North* v. *Stewart* (4).

The decision of this High Court in *Devkabai* v. *Jefferson* (7) was cited to me, but it does not touch the point raised in this case. It merely says that the Solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic. c. 127 by which that lien was very much extended. "Very much extended" means the extension to the real property which did not exist before the statutory enactment. The lien was confined to personal property before the Statute. These passing remarks in the judgment in no way affect the question which is before me for decision. There is no judgment of this Court which is binding on me with which my present decision is in conflict. In my opinion the Solicitor in the matter before me is entitled to the interference of the Court on his behalf, and he is entitled to enforce his lien as against the moneys in dispute in priority to the attaching creditor.

I may mention a further point and that was a point taken by the attorneys for Ved and Sopher that the charging order was in respect of costs incurred by R. P. Wagle & Co. in other matters, *i. e.*, partnership suits, which have been fought out by Hiralal & Co., and that, therefore, they could not claim a lien on the judgment debt in this particular case excepting for

(4) (1890) 15 A. C. 452; 63 L. T. 718.

(5) (1856) 1 H. & N. 171; 26 L. J. Ex. 54; 2 Jur. (N. S.) 814; 156 E. R. 1164; 108 R. R. 506.

(6) (1872) 7 Q. B. 499; 41 L. J. Q. B. 212; 26 L. T. 551; 20 W. R. 605.

*Page of (1890) 15 A. C.—[Ed.]

(7) 10 B. 248; 10 Ind. Jur. 422; 5 Ind. Dec. (N. S.) 553.

the costs of that case and not for their costs in general in respect of which they have obtained the charging order. In my opinion the question is not open to me as Mr. Justice Mulla, after consideration of the point, has made the charging order in respect of the Solicitor's costs in general on the ground that the property was recovered by the exertions of the Solicitor including the judgment-debt in this matter and that they were entitled to a lien for all their costs on all property recovered by their exertions for the partnership. I do not express any opinion on the point as I hold that the learned Chamber Judge's order is clear on the point and he has given effect to the lien as claimed by the Solicitors by giving the charging order. I, therefore, hold that Messrs. Hiralal & Co., are entitled to recover their costs under the charging order obtained by them in priority to the attaching creditor.

I am told that another sum of Rs. 500 has been paid into the Sheriff's office after this notice was taken out and as the Solicitors' costs amount to a sum larger than Rs. 3,500, I direct that the Solicitors are entitled to receive the said sum of Rs. 500 also.

All costs should come out of the moneys first. Counsel certified.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1441 of 1922.

January 23, 1925.

Present:—Mr. Justice Phillips.

THE OFFICIAL ASSIGNEE AT MADRAS —DEFENDANT No. 1—APPELLANT

versus

AIYU DIKSHITHAR AND OTHERS—PLAINTIFFS Nos. 3 AND 4 AND DEFENDANTS Nos. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 47—Official Assignee, whether legal representative of insolvent—Small cause suit—Order in execution on Original Side—Subsequent suit on title —Res judicata.

The Official Assignee does for certain purposes represent the insolvent, but he has other capacities such as the representative of the body of creditors; and in each case in order to determine what particular character he holds regard must be had to the circumstances. If in a case he is litigating under the same title under which the insolvent had previously litigated, he may be held to be the legal representative of the insolvent and the decision in the previous case would operate as *res judicata* against him.

But where in a suit the Official Assignee claims certain properties as belonging to the insolvent and, therefore, available for the benefit of all the creditors, he cannot be deemed to claim under or be litigating under the same title as the insolvent.

Kashi Prasad v. *Miller*, 7 A. 752; A. W. N. (1885) 166; 4 Ind. Dec. (N. S.) 851 and *Frederick Peacock* v. *Madan Gopal*, 29 C. 428; 6 C. W. N. 577, relied on.

Therefore, an order in execution proceedings that certain properties are liable to be attached in execution of a decree against the judgment-debtor is not *res judicata* in a later suit in which the Official Assignee claims the properties on behalf of the creditors of the judgment-debtor since adjudged an insolvent.

An order in execution proceedings on the Original Side in a small cause suit cannot operate as *res judicata* in a later suit on title on the regular side.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Tanjore, in A. S. No. 138 of 1920 (A. S. No. 299 of 1920 on the file of the District Court, Tanjore), preferred against that of the Court of the District Munsif, Tanjore, in O. S. No. 716 of 1917.

Mr. *K. S. Krishnaswami Iyengar*, for the Appellant.

Mr. *T. R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—The only question that has been argued in this appeal is the fourth point in the judgment of the learned Subordinate Judge, namely, whether the suit is barred by s. 47 of the C. P. C. or Explanation 4 to s. 11. So far as the first portion is concerned it is quite clear that this is not a matter coming under s. 47, for it does not relate to the execution of any decree and it is not seriously contended that this suit should have been brought under s. 47 as an execution petition. The second portion is the point chiefly relied on, namely, that this suit is barred by s. 11 of the C. P. C. in that there was a prior decision in execution proceedings to which the 2nd plaintiff, the 2nd defendant and the 3rd defendant were parties, when it was held that the suit property was liable to be attached in execution of a decree against the 2nd defendant. So far as that point is concerned it is concluded by the order as between the parties to it but, certainly, the 1st plaintiff was not a party to these proceedings and the question is whether the 1st defendant, who is the Official Assignee, can be deemed to be the legal representative of the insolvent 2nd defendant within the meaning of s. 11, C. P. C. In order that it

may be binding as between the plaintiffs and the 1st defendant, it is necessary that the 1st defendant should claim under the 2nd defendant and be litigating under the same title. The question in issue in the former suit was solely one relating to the execution of a decree in which the 2nd defendant was the judgment-debtor; but in the present proceedings that is not at all the position which the Official Assignee takes. He does not seek to oppose the decree-holder in that suit but wishes to obtain the property for the benefit of the 2nd defendant's creditors and, consequently, I do not think that he can be deemed to be litigating here under the same title as the 2nd defendant in the prior proceedings. The case which seems to be in point here is *Kashi Prasad* v. *Miller* (1) which seems to be entirely similar and decides that the Official Assignee is not the legal representative in these circumstances. Reliance is placed by the appellant on *Miller* v. *Lukhimani Debi* (2), but apart from the fact that the observations are *obiter*, they were expressly withdrawn by the same Judge in a subsequent case, a Full Bench decision, reported as *Frederick Peacock* v. *Madan Gopal* (3). No doubt the Official Assignee does for certain purposes represent the insolvent, but he has other capacities such as the representative of the body of creditors; and in each case in order to determine what particular character he holds one must have regard to the circumstances. If in a case he was litigating under the same title under which the insolvent had previously litigated he might be held to be the legal representative. In the present case I think the Subordinate Judge is right in holding that he is not the legal representative of the 2nd defendant, and certainly he is not the legal representative of any of the other parties to the previous order. The second appeal, therefore, fails and is dismissed with costs.

The appeal might also be disposed of on another ground, namely, that the prior proceedings were in a suit of small cause nature, whereas that is not so in the present case. I do not think that the fact that the order was passed in execution on the Original Side could give it any higher authority than an order in the proceedings to which it was consequent for s. 11, C. P. C., is not in terms applicable to such proceedings and can only be applied by anology.

V. N. V. *Appeal dismissed.*

Z. K.

(1) 7 A. 752; A. W. N. (1885) 166; 4 Ind. Dec. (N. S.) 851.

(2) 28 C. 419; 5 C. W. N. 761.

(3) 29 C. 428; 6 C. W. N. 577.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3988 OF 1924.

February 3, 1925.

Present:—Mr. Justice Taraporewala.

JOHN ROBERT BALL—PLAINTIFF—

versus

CHARLES WILLIAM BALL AND OTHERS—DEFENDANTS.

Will, construction of—Legatees, several—Estate, insufficient—Abatement, proportionate.

The intention of a testator to give priority to a particular legatee cannot be gathered from a mere use of the words that a particular legacy is to be given immediately or that a particular legacy is to be given first and another legacy in the second place, and after the payment of these legacies, a third legacy is to be given. *Prima facie* all bequests stand on an equal footing and it lies upon those who assert the contrary to prove it. It is not sufficient that the words in the Will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing. In considering whether such was the intention of the testator, words which are merely interlocutory should not by themselves be held to direct any order of payment. [p. 87, cols. 1 & 2.]

Case-law reviewed.

A testator gave a legacy to a particular legatee and then "subject to the aforesaid" directed the payment of other legacies to certain near relatives. His estate turned out to be insufficient to pay all the legacies directed to be given by the Will:

Held, that the words "subject to the aforesaid" did not indicate the intention of the testator that the legacy in favour of the first legatee should be paid first and that, therefore, all the legacies directed to be given by the Will must abate proportionately. [p. 87, col. 2; p. 88, col. 1.]

Mr. *Pandia*, for the Plaintiff.

JUDGMENT.—In this case the estate of the deceased testator is not sufficient to pay all the legacies directed to be given by the Will and the questions raised in this Originating Summons are as to whether the legacy of Rs. 15,000 under cl. (2) (*a*) in favour of Mrs. Mary Josephine Ball should have priority over the legacies in favour of the grand-children and great-grand-children under cl. (2) (*b*), and further

whether the legacies under cl. 2 (*c*) should rank *pari passu* with the legacies under cl. 2 (*a*), or should also be paid, after the legacies under cl. 2 (*a*) has been fully satisfied.

It has been argued on behalf of the plaintiff that because in cl. 2 (*b*) the words used are "subject to the aforesaid," the legacy under cl. 2 (*b*) can take effect only after the legacy under cl. 2 (*a*) has been fully satisfied and that there being no such words in cl. 2 (*c*), the legacy under cl. 2 (*c*) should rank with the legacy under cl. 2 (*a*) and that unless and until they are satisfied the legacy under cl. 2 (*b*) cannot take effect.

The other view of the matter is that all the legacies under cls. 2 (*a*), (*b*) and (*c*) should proportionately abate in view of the insfficiency of the estate.

Mr. Pandia cited to me the observations of Williams on Executors at page 1096 and the case of *Lewin* v. *Lewin* (1) in support of the proposition that the words in this Will clearly indicated an intention of the testator to give the legacies under cls. 2 (*a*) and (*c*) priority over the legacy under cl. 2 (*b*). The observations at page 1096 are elaborated at pages 1097 and 1098, and there are subsequent cases on the point which show how the intention of the testator is to be gathered from the Will. In *Lewin* v. *Lewin* (1), the priority was given to one general legatee on the ground that the legacy was in favour of the wife and children and on the words of the Will the testator could not have intended that the legacy in favour of the wife and children should abate along with the legacies in favour of other legatees.

In my opinion, that case has no bearing on the construction of the Will in this case. But the cases which have a bearing and which, to my mind, cover the point raised in this case, are *Blower* v. *Morret*(2), *In re, Schweder, Oppenheim* v. *Schweder* (3) and *In re Harris, Harris* v. *Harris* (4). These cases clearly show that the intention of of the testator to give priority to a particular general legatee cannot be gathered from a mere use of the words that a particular legacy is to be given immediately or that a particular legacy is to be given first and another legacy in the second place and after the payment of these legacies a third legacy is to be given.

The question is elaborately discussed by Mr. Justice Warrington in *In re Harris, Harris* v. *Harris* (4) and there he cites with approval a passage in the judgment of Knight Bruce, V. C., in *Thwailes* v. *Foreman* (5) which is as follows :—

"*Prima facie*, all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words of the Will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing. Now, in considering whether such was the intention of this testator, we must re-collect that words that are merely introductory cannot, generally, by themselves be held to direct any order of payment; we should also bear in mind an apposite observation of Sir John Leach, (I think contained in *Beeston* v. *Booth* (6) that, unless the testator tells you himself, that he believes his assets to be insufficient, you must attribute to him the notion that he has assets sufficient to satisfy all the bequests that he makes; and, if you attribute that notion to him, you cannot well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient."

Mr. Justice Warrington on these observations goes on to hold in *In re Harris, Harris* v. *Harris* (4) that although the testator in that case had used the words that certain legacy should be paid in the first place and another legacy in the next place, and that afterwards or after payment of the earlier legacies, certain further legacies should be paid, those words were not capable of the construction that the testator thought that his estate would be insufficient and in that case certain legacy, which was asked to be paid first, should have priority over subsequent legacies.

The words in this Will, to my mind, are in no way stronger than the words in *In re Harris, Harris* v. *Harris* (4). If anything, they are weaker. The words "subject to the aforesaid" do not indicate the intention of the testator that

(1) (1752) 2 Ves. Sen. 415; 28 E. R. 265.
(2) (1752) 2 Ves. Sen. 420; 28 E. R. 268.
(3) (1891) 3 Ch. 44; 60 L. J. Ch. 656; 65 L. T. 64; 39 W. R. 588.
(4) (1912) 2 Ch. 241; 81 L. J. Ch. 512; 106 L. T. 755.
(5) (1844) 1 Coll. 409; 63 E. R. 477; 66 R. R. 124.
(6) (1819) 4 Madd. 161 at p. 168; 56 E. R. 667; 20 R. R. 287.

the legacy in favour of Mrs. Mary Josephine Ball should be paid first. The legacy under cl. 2 (*b*) is in favour of grand-children and great-grand-children. It is inconceivable that the testator should have intended that his companion and friend Mrs. Mary Josphine Ball and her sons should get the legacy in the first place and only after they had been paid, the legacies in favour of his own kith and kin—his own grand and great-grand-children—should be paid. It is further clear from the Will that there was no such intention on the part of the testator as shown by sub-cl. (*e*) of cl. 2, where the testator specifically mentions that after satisfaction of the above legacies if anything remains as residuary estate, the same should be divided equally among his grand-children and great-grand-children. It clearly indicates that the testator considered that the estate would be sufficient to pay the said legacies and that there might be a surplus and, therefore, he tried to provide for the disposition of such surplus.

The first question is not correctly put. The legacies other than the legacies in favour of Mrs. Mary Josphine Ball are legacies given by cl. 2, sub-cl. (*b*) and sub-cl. (*c*).

I, therefore, answer the questions as follows:—

Q. 1. Whether the legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball given by cl. 2, sub-cl. (*a*). of the said Will has priority over the other legacies given by cl. 2, sub-cl. (*a*), cls. 1, 2, 3 and 4 of the said Will?

A. In the negative.

Q. 2. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josphine Ball is liable to rank *pari passu* with the said above-mentioned legacies and to abate proportionately with them having regard to the estate?

A. In the affirmative.

Q. 3. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball has priority over the legacies given by cl. 2, sub-cl. (*c*), of the said Will?

A. In the negative.

Q. 4. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball is liable to rank *pari passu* with the said above-mentioned legacies and to abate proportionately with these having regard to the estate?

A. In the affirmative.

Costs to come out of the estate.

Z. K. *Answered accordingly.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No 25 OF 1923.

August 8, 1924.

Present:—Mr. Justice Jackson.

BASUVAN—RESPONDENT No. 1—APPELLANT

versus

A. R. RENGASAMI BY HIS AGENT T. V. MANICKAM PILLAI—PLAINTIFF—PETITIONER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Application, defective—Step-in-aid of execution—Extension of time.

A decree-holder applied for execution of the decree and was asked to explain within a certain time how the application could be treated as being within limitation. He explained that he relied upon two payments which had been made towards the decree by the judgment-debtor, and the explanation was furnished within the time limited by the Court. The application was nevertheless dismissed on the ground that there had been delay in furnishing the explanation:

Held, that nevertheless the application was a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to extend limitation for execution of the decree.

Narayanaswami Naidu Garu v. *Krovidi Gantayya*, 32 Ind. Cas. 691; (1915) M. W. N. 865, *Gopisetti Narayanaswami Naidu Garu* v. *Muthyala Venkatratnam*, 32 Ind. Cas. 816; 2 L. W. 1207 and *Gurrala Seshayya* v. *Yedida Venkatasubbiah*, 29 Ind. Cas. 16; 2 L. W. 540; 28 M. L. J. 494, relied on.

Appeal against an order of the District Court, Coimbatore, in Civil Appeal No. 67 of 1922, preferred against that of the Court of the Subordinate Judge, Nilgiris at Ootacamond, in E. P. R. No. 722 of 1921, in O. S. No. 95 of 1911.

Mr. *S. Natesa Sastri*, for the Appellant.

Mr. *A. Suryanarayana Aiyar*, for the Respondent.

JUDGMENT.—Appeal against the order of the District Judge of Coimbatore in A. S. No. 67 of 1922, setting aside the order of the Subordinate Judge of Nilgiris, in E. P. No. 722 of 1921. The respondent got a decree on 6th July 1912. He applied for execution on 5th July 1915. Again on 3rd January 1919, he applied for execution and was asked to explain how the application was not time-barred. He explained that he relied upon two payments made on 10th March 1916 and 15th August 1918. Then the application was dismissed because the delay in representation was too great. He had been given time till 30th March 1921, and made his representation on 30th March 1921, so the order is difficult to explain. But that is how it stands. On 27th June 1921 he made an-

other application the validity of which was upheld by the lower Appellate Court and is now attacked. The ground of attack is that the application of 3rd January 1919 was not filed and amended in time as ordered by the lower Court and, therefore, it is not a step-in-aid of execution. It was filed and amended in time, but nevertheless it was rejected. This does not prevent its being reckoned as a step-in-aid of execution; a proposition which hardly needs legal authority, but can be supported by rulings in *Narayanaswami Naidu Garu* v. *Krovidi Gantayya* (1) and *Gopisetti Narayanaswami Naidu Garu* v. *Muthyala Venkatratnam* (2) and *Gurrala Seshayya* v. *Yedida Venkatasubbiah* (3). In argument a fresh ground was developed that the application of 3rd January 1919, was not in accordance with law because the payments which saved it from being barred were not made for interest as such. The lower Appellate Court has found that these payments were for interests as such and I am not prepared to say that the presumption on which its finding is based is so entirely without foundation as to warrant its being traversed in second appeal. But apart from that it is too late to impugn the application of 3rd January 1919 which on its face is an application in accordance with law on the ground that payments which are found to be genuine were not payments for interest as such.

The appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

(1) 32 Ind. Cas. 691; (1915) M. W. N. 865.
(2) 32 Ind. Cas. 816; 2 L. W. 1207.
(3) 29 Ind. Cas. 16; 2 L. W. 540; 28 M. L. J. 494.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 436 OF 1922.
February 16, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

SUDHA—APPELLANT

versus

FIRM NANAKCHAND-DAULATRAM—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Transfer by transferee of insolvent, whether can be cancelled.

Section 36 of the Provincial Insolvency Act of 1907 gives no power to the Court to cancel a transfer made by a transferee of the insolvent.

Lala *Ram Chand Manchanda*, for the Appellant.

Mr. *Sher Singh* for Mr. *Dhanpat Rai*, for the Respondents.

JUDGMENT.—Arura gifted 1½ squares of land to his sons Sher Singh and Ghasita on the 10th February 1916. The donees sold half square out of this to Sudha, appellant, on the 16th July 1916. On the 22nd March 1916 Daulat Ram Nanak Chand, creditors, applied that Arura should be adjudged insolvent, and he was so adjudged on the 25th May 1917. On the 23rd March 1918 Arura and Sher Singh appeared in Court and made a statement to the effect that the gift might be cancelled. The gift was cancelled on the same day. Notice was subsequently issued to Sudha and on the 10th December 1921, when he appeared in Court the sale to him was annulled by the Insolvency Court. From this order Sudha has appealed.

Two points are urged on behalf of the appellant. One is that s. 36 of the Provincial Insolvency Act (1907) gives no power to the Court to cancel a transfer made by a transferee of the insolvent. It clearly lays down that if the transferee was adjudged insolvent after the date of transfer the transfer shall be void and may be annulled by the Court. The person who made the transfer in Sudha's favour has not been adjudged insolvent and, therefore, the section does not in terms apply.

The second point urged is that the Receiver had made no application for annulment of the transfer and that there has been no enquiry as to whether the transfer was made in good faith and for valuable consideration or not. The first objection appears to us to have force and we, therefore, accept the appeal and set aside the order annulling the sale in favour of Sudha with costs to be paid out of the estate.

Z. K. *Appeal accepted.*

BOMBAY HIGH COURT.

February 13, 1925.

Present:—Mr. Justice Taraporewala.

VALLABHDAS MEGHJI—
PETITIONER

versus

CAWASJI FRAMJI & CO.—
RESPONDENTS.

Arbitration Act (IX of 1899), s. 9—Arbitration—Refusal of both arbitrators to act—Appointment of new arbitrators—Procedure.

Where both the arbitrators to whom a dispute has been referred refuse to act, each party has a right to appoint an arbitrator in the place of the arbitrator previously appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his previous arbitrator, the provision of sub-s. (*b*) of s. 9 of the Arbitration Act would come into force and the party so appointing would be entitled, after giving notice to the other party, to appoint his own arbitrator as sole arbitrator.

The word "either" is used in cl. (*a*) of s. 9 of the Arbitration Act, because it may happen that one or both of the arbitrators may refuse to act, etc.

Mr. *B. K. Desai*, for the Petitioner.
Mr. *Mulla*, for the Respondent.

JUDGMENT.—In this matter the petitioner prays that the appointment of Vithaldas Damodar Govindji as sole arbitrator under s 9 (*b*) of the Indian Arbitration Act made by the respondents may be set aside and that it may be declared that the power of appointing arbitrators under the partnership agreement having once been exercised by both the partners has been exhausted and that reference to Vithaldas Damodar Govindji be revoked. In the alternative the petitioner asks that a fit and proper person nominated by the petitioner may be appointed as an arbitrator on petitioner's behalf to act along with the said Vithaldas Damodar Govindji.

The whole argument as to the revocation of the appointment of Vithaldas Damodar Govindji is based on s. 9 of the Indian Arbitration Act. It has been argued that that section applies only where one of the arbitrators dies or becomes incapable or refuses to act, but that were both the arbitrators refuse to act, the arbitration comes to an end and that there is no power in the parties or in Court to appoint other arbitrators in place of the arbitrators so refusing to act.

In this case it appears that the arbitrators, after proceeding for about eighteen months, declined to act any further. Thereupon after some time the respondents appointed Mr. Vithaldas Damodar Govindji as their arbitrator and called upon the petitioner to appoint his arbitrator under s. 9 (*b*), and as the petitioner refused to appoint his arbitrator, the respondents appointed Vithaldas Damodar Govindji as sole arbitrator in the matter under s. 9 (*b*).

The construction of s. 9 to my mind is quite clear. It provides for supplying vacancy in case where the submission provides that reference shall be to two arbitrators one to be appointed by each party. The previous section provides for supplying vacancy in case where the submission is to one arbitrator, umpire or third arbitrator. Section 9, cl. (*a*) speaks of "either of the appointed arbitrators refusing to act, etc." That means only that when two arbitrators are appointed and by each party the right of appointing another arbitrator in place of the arbitrator refusing to act, etc., lies with the party oppointing him and not with both the parties. The meaning which is tried to be put upon s. 9, sub-cl. (*a*), that the right of a party to appoint an arbitrator in place of the arbitrator appointed by that party who refuses to act, etc., cannot be exercised if the other arbitrator refuses to act, seems to me not the proper construction of the clause at all. The word 'either' is used because it may happen that one or both of the arbitrators may refuse to act, etc. In that case each party has a right to appoint an arbitrator in the place of the arbitrator appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his arbitrator, the provisions of sub-s. (*b*) would come into force and the party so appointing would be entitled after giving notice to the other party, to appoint his own arbitrator as sole arbitrator. Therefore, the petition fails on the first two grounds.

As regards the alternative ground, it was conceded by the respondents that they were willing to have another arbitrator appointed by the petitioner to act with Vithaldas Damodar Govindji

I, therefore, set aside the appointment of Vithaldas Damodar Govindji as sole arbitrator made under s. 9 and I order that the said Vithaldas Damodar Govindji should act with an arbitrator nominated by the petitioner within a fornight.

The said two arbitrators to proceed with the arbitration.

Z. K. *Order set aside.*

PATNA HIGH COURT.

CIVIL REVIEW No. 22 OF 1925.

May 14, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir Jwala Prasad, KT.

Musammat GOBINDA KUER—PETITIONER

versus

JAI-NARAIN CHAUDHRY—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. III, r. 4 (3)—General Clauses Act (X of 1897), s. 8 (2)—Government of India Act, 1919 (9 and 10, Geo. V, Ch. 101), ss. 45, 47—Advocate, whether bound to file vakalatnama—*Reference to Indian High Courts Act, meaning of.*

An Advocate of the Patna High Court is exempted under O. III, r. 4 (3) of the C. P. C. from presenting any document empowering him to act on behalf of his client.

By virtue of the provisions of ss. 45 and 47 of the Government of India Act of 1919 any reference in an Act of the Indian Legislature to the Indian High Courts Act of 1861 must now be taken as a reference to the Government of India Act.

Mr. *Lakshmi Narain Singh* for Mr. *Banwari Lal*, for the Petitioner.

ORDER.—The question is whether an Advocate of this Court is exempted under O. III, r. 4, cl. (3) of the C. P. C. from presenting any document empowering him to act on behalf of his client.

The only point which arises is whether the reference in that rule to the High Courts established in India under the Indian High Courts Act, 1861, includes the Patna High Court which was established not under the provisions of that Act but under the provisions of the Government of India Act, 1915. There can be no doubt that under the provisions of ss. 45 and 47 of the Government of India Act, 1919 and since the amendment of the General Clause Act, 1897 by the Repealing and Amending Act XVIII of 1919 any reference in an Act of the Indian Legislature either to an earlier Act of the Indian Legislature or to an Act of the British Parliament which has been repealed and re-enacted by a subsequent enactment must be taken as a reference to the subsequent enactment in so far as it re-enacts the repealed Act and in fact under the Government of India Act 1919, it is clear that any reference in an Act of the Indian Legislature to the Indian High Courts Act, 1861 must now be taken as a reference to the repealing and re-enacting enactment of 1915 as now amended and known as the Government of India Act.

It is clear, therefore, that an Advocate of the Patna High Court is not required to present any document empowering him to act under the rules as they now exist.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

STAMP REFERENCE No. 24570 OF 1923 IN CIVIL MISCELLANEOUS PETITION No. 2199 OF 1923 AND

STAMP REGISTER No. 12691 OF 1923.

March 7, 1924.

Present:—Mr. Justice Jackson.

In re A. S. RADHAKRISHNA AIYAR —PETITIONER.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3, O. XXXIII, r. 1—Pauper plaintiff, death of—Legal representative, whether entitled to continue suit in forma pauperis.

The legal representative of a deceased pauper plaintiff or appellant cannot continue the suit or appeal *in forma pauperis* if he is not a pauper himself.

Manaji Rajuji v. *Khandoo Baloo*, 11 Ind. Cas. 724; 36 B. 279; 13 Bom. L. R. 577 and *Lalit Mohan Mandal* v. *Satish Chandra Das*, 33 C. 1163 at p. 1168; 4 C. L. J. 234, relied on.

Petition, praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to bring on record the petitioner herein as 2nd petitioner in S. R. No. 12691—petitioner to be permitted to prefer *in forma pauperis* the second appeal sought to be preferred to the High Court against a decree of the District Court, Chingleput, in A. S. No. 166 of 1921 and in C. M. P. No. 2199 of 1923—petition praying to excuse the delay in presenting the said S. R. No. 12691 of 1923.

Mr. *N. Chandrasekara Aiyar*, for the Petitioner.

ORDER.—Bangaru Govinda Aiyar, petitioner in C. M. P. No. 2199 of 1923 applied to excuse 39 days' delay in presenting S. R. No. 12691 of 1923, an application to be allowed to sue *in forma pauperis.* He died and one Radhakrishna Aiyar has applied to be brought on record as petitioner in C. M. P. No. 2199 of 1923. Apparently he only wishes to be allowed to sue *in forma pauperis* as having derived that right from Bangaru Govinda Aiyar. He does not allege that he himself is a pauper. It has been ruled in *Manaji Rajuji* v. *Khandoo Baloo* (1) that the representative of a pauper cannot continue the suit *in forma pauperis* if not a pauper himself: [*cf.*

(1) 11 Ind. Cas. 724; 36 B. 279; 13 Bom. L. R. 577.

Lalit Mohan Mandal v. *Satish Chandra Das* (2)] The old Calcutta ruling which Davar, J., in *Manaji Rajuji* v. *Khandoo Baloo* (1) says he cannot understand [*Bhagbut Doss* v. *Buloram Doss* (3)] does not really present much difficulty. A party died, his legal representative applied to be placed on record, the District Munsif embarked upon an enquiry whether the legal representative was or was not a pauper and meanwhile the suit abated. The High Court held that so long as he was the actual legal representative he should have been brought on record independently of a collateral inquiry whether he should sue as a pauper or not. In ruling, "there was really no necessity for inquiry whether the applicant was a pauper or not," the High Court means such enquiry was not a necessary precedent to admitting the applicant to carry on the suit. The High Court did not mean that it was not a necessary precedent to admitting him as a pauper. For that, of course, there would have to be an enquiry. The assignee of the pauper must pay the necessary Court-fees or else have himself *qua pauper* declared entitled to sue *in forma pauperis* before continuing the proceedings. Time allowed for paying Court-fee is one month from this date.

V. N. V. *Court-fee ordered to be paid.*

Z. K.

(2) 33 C. 1163 at p. 1168; 4 C. L. J. 234.
(3) 3 W. R. Mis. 20.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 2421 OF 1924.

February 26, 1925.

Present :—Mr. Justice Pratt.

PRANLAL TRIBHUWANDAS—PLAINTIFF

versus

GOCULDAS DAMODAR—DEFENDANT.

Letters Patent (Bom.), cl. 12—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage suit—Mortgaged land outside jurisdiction—Suit, whether can be entertained—Jurisdiction of Court.

The High Court, as a Court of Equity, will assume jurisdiction in relation to land abroad only where as between the litigants, or their predecessors, some privity or relation is established on the ground of contract, trust or fraud. It will not entertain a suit the object of which is to obtain a declaration of title to foreign land in the absence of any such relationship between the parties. [p. 93, col. 2.]

Case-law discussed.

An interest in land is land and a mortgage suit, which is a suit to realise an interest in land, must be regarded as a suit for land within the meaning of cl. 12 of the Letters Patent of the Bombay High Court. [p. 94, col. 1.]

Venkatarao Sethupatty v. *Khimji Assur Virji*, 80 Ind. Cas. 442; 26 Bom. L. R. 535, dissented from.

Rule 1 of O. XXXIV of the C. P. C. enacts a rule of procedure and not a rule that can be invoked in order to extend jurisdiction. The object of the rule is that the rights of all parties interested in a mortgage should be determined in one suit and that multiplicity of suits should be avoided. That cannot, however, apply to a case where the Court has no jurisdiction to adjudicate on the rights of the parties sought to be impleaded. [p. 93, col. 1.]

Mr. *Kanga* (Advocate-General), for the Plaintiff.

Mr. *Munshi*, for Defendant No. 2.

JUDGMENT.—In this suit plaintiff sues as mortgagee of certain property in Cutch belonging to the first defendant. The mortgage was made in Bombay on November 20, 1923, by deposit of title deeds.

He has joined in that suit the second defendant on the ground that the second defendant falsely alleges that he is now in possession as prior mortgagee of the properties and denies the plaintiff's right to a charge on the said properties. Plaintiff accordingly prays not only for a decree for the sale of the properties but also for a declaration of his charge as against the second defendant.

The suit as between the plaintiff and the first defendant was decided by a consent decree taken on August 19, 1924, whereby a decree for sale was made on behalf of the plaintiff, with, however, this reservation as regards the second defendant, that that decree was to be without prejudice to the rights of the plaintiff and the second defendant, and the suit was adjourned in order that the rights of the plaintiff and the second defendant should be determined.

The second defendant claims a prior charge on the properties by a mortgage of May 1923. By a prayer in the original written statement he prayed for a declaration of the enforcement of that charges but that written statement was amended on November 11, 1924, and by the amendment the second defendant pleaded that the Court had no jurisdiction to make a declaration of plaintiff's charge as against

him and all the other pleas in his written statement were subject to that objection. The point which has now been argued before me is as to whether I have jurisdiction in this suit to make a declaration that the mortgage alleged to have been created by the first defendant in favour of the plaintiff was not subject to the prior charge by the first defendant in favour of the second defendant in May 1923.

Now in the suit against defendant No. 1 jurisdiction was assumed following the rule in *Yashvantrao Holkar* v. *Dadabhai Cursetji* (1) that the provision of cl. 12 of the Letters Patent as to 'suits for land' does not override the equitable jurisdiction assumed by English Courts in such cases. My own view, however, is that *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) is not good law and that *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) has been in fact overruled by the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (2), but as the contrary has been held by two other Judges of this Court and as *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) has been upheld and followed in a decision of the Appeal Court in *Venkrtrao Sethupathy* v. *Khimji Assur Virji* (3), subsequent to the Privy Council decision, I have to treat *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) as being still good law.

The question then remains whether it necessarily follows that I have jurisdiction to give plaintiff declaration that he seeks as against the second defendant, I think not. Such a declaration is not within the equitable jurisdiction that is assumed in English Courts in such cases, and which was the basis of the decision in *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1). That equitable jurisdiction was explained in *Norris* v. *Chambres* (4) and its limits stated in *Deschamps* v. *Miller* (5). That equitable jurisdiction has also been very well summarised by Sir Lawrence Jenkins in *Vaghoji* v. *Camaji* (6). The learned Judge there says (page 256*):—

"An examination of the authorities appears to me to establish the proposition that a Court of Equity in England only assumed jurisdiction in relation to land abroad, where as between the litigants or their predecessors some privity or relation was established on the ground of contract, trust or fraud, but in no case of which I am aware has the Court of Equity entertained a suit, even if the defendant was within the limits of its jurisdiction, where the purpose was to obtain a declaration of title to foreign land."

It seems to me to be clear that there is no such privity between the plaintiff and second defendant and that *Vaghoji* v. *Camaji* (6) is an express decision of this Court that I have no jurisdiction to give a declaration that has been asked for. Also in *Norris* v. *Chambres* (4), the Court refused to declare a lien on foreign land.

Then the Advocate-General contends that the charge which defendant No. 2 has was created in Bombay. But that is a consideration which seems to me irrelevant. It would only be material if the suit were between the first and second defendants.

A reference has also been made to O. XXXIV, r. 1, and it is said that plaintiff could not have filed this suit without making—as required by that rule—every person interested in the mortgage, parties to the suit. But that rule is a rule of procedure and not a rule that can be invoked in order to extend jurisdiction. The object of the rule is that the rights of all parties interested in the mortgage should be determined in one suit and a multiplicity of suits avoided. That cannot apply where the Court has no jurisdiction to adjudicate on the rights. It is true that in the case of *Sorabji* v. *Rattonji* (7), where a foreclosure suit was brought by the mortgagee in respect of land outside the original civil jurisdiction of this Court, an order was made to join as a party the prior mortgagee Jivraj Ludha, but it does not appear from the judgment in that case that the point of jurisdiction was taken or that there was any conflict in that case between Jivraj Ludha the prior mortgagee and the puisne mortgagee, who brought the foreclosure suit, or that a declaration against Jivraj Ludha was sought.

The Advocate-General also refers to a

(1) 14 B. 353; 7 Ind. Dec. (N. S.) 695.
(2) 23 Ind. Cas. 637; 41 I. A. 110; 16 Bom. L. R. 400; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 12 A. L. J. 774; 1 L. W. 1050; 41 C. 972 (P. C.).
(3) 80 Ind. Cas. 442; 26 Bom. L. R. 535.
(4) (1861) 29 Beav. 246; 30 L. J. Ch. 285; 7 Jur. (N. S.) 59; 9 W. R. 259; 54 E. R. 621; 3 L. T. (N. S.) 729; 131 R. R. 551.
(5) (1908) 1 Ch. 856; 77 L. J. Ch. 416; 98 L. T. 564.
(6) 29 B. 249 at p. 256; 6 Bom. L. R. 958.
(7) 22 B. 701; 11 Ind. Dec. (N. S.) 1050.

*Page of 29 B.—[*Ed.*]

dictum in *Venkatrao Sethupathy* v. *Khimji Assur Virji* (3) stated above by Scott, C. J. to the effect that a suit in which a mortgagee seeks to have land sold is not a suit for land. I find it difficult to understand this *dictum*. An interest in land is land and a suit in which an interest in land is realised must be a suit for land.

Again it is contended that if there is jurisdiction as in *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) against the first defendant, it stands to reason that there must be jurisdiction against the second defendant who derives his interest from him. But a mortgage not in the English form does not even create privity of estate [see *Theethalan* v. *Eralpod Rajah* (8)] but it is not privity of estate that equity is concerned with but privity of [contract or notice. There can be and is no such privity between the plaintiff and the second defendant.

It is true that the effect of my decision will lead to an anomaly, for whereas according to *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) each of the mortgagees may file a suit against the mortgagor and have their rights as between each of them and the mortgagor determined in a suit in this Court, while the respective interests of the mortgagees *inter se* cannot be so determined. This, however, is the necessary effect of the judgment in *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) and until that judgment is reversed by the decision of a Full Bench, that anomaly must persist.

I, therefore, decide the Issue No. 1 in the negative.

The suit is accordingly dismissed with costs as against the second defendant.

Z. K. *Suit dismissed.*

(8) 40 Ind. Cas. 841; 40 M. 1111; 32 M. L. J. 442; 21 M. L. T. 401.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1077 OF 1923.

December 12, 1924.

Present:—Mr. Justice Phillips.

VEERAPPA KOUNDAN MINOR THROUGH HIS GRANDFATHER AND NEXT FRIEND ALAGIA GOUNDAN—PLAINTIFF—PETITIONER

versus

VEERAPPA KOUNDAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition suit—Preliminary and final decrees—Mesne profits, omission to award—Appeal—Review—Inherent power of Court, exercise of—Civil Procedure Code (Act V of 1908), s. 151.

Where in a preliminary decree for partition, no relief was given in respect of mesne profits, the mere omission to refer to the relief cannot make the decree a preliminary decree in respect of that relief. The omission must be deemed to be a refusal of the relief, whether it was done intentionally or accidentally, and it is open to the plaintiff to apply for a review of this decree, or to appeal against it.

Where there is no appeal against such a decree and a petition for review is dismissed it is not competent, to the plaintiff to invoke the inherent jurisdiction of the Court under s. 151, C. P. C.

An order on an application to pass a further decree for mesne profits in respect of properties awarded in a preliminary decree for partition must be treated as a decree and an appeal will lie therefrom.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of 19th April 1923 of the Court of the Subordinate Judge, Dindigul, in I. A. No. 47 of 1923, in O. S. No. 29 of 1918, on the file of the Court of the Temporary Subordinate Judge, Madura.

Mr. *S. Panchapagesa Sastri*, for the Petitioner.

Mr. *P. N. Appuswami Iyer*, for the Respondents.

JUDGMENT.—In this case a preliminary decree for partition and for mesne profits was passed in favour of the plaintiff, and this was confirmed in appeal, the original decree being dated 11th December 1919, and the appellate decree 21st February 1922. Meanwhile the final decree had been passed by the Trial Court on 15th September 1920; and in this final decree the partition was decreed in accordance with a memorandum put in by the parties, and no relief was given in respect of the mesne profits. Seven or eight months after the passing of the appellate decree confirming the preliminary decree, an application was made to the First Court to amend the final decree either by way of amendment or by way of review on the ground that the final decree had omitted to give relief which had been allowed in the preliminary decree. That petition was dismissed and no appeal has been preferred against it nor any application to review that order. Subsequently an application was put in under s. 151 of the C. P. C., asking for a further final decree for the mesne profits awarded in the preliminary decree. Objection is now taken by the respondent that this petition will not lie. If the application is treated as an application for a final

decree in the suit, the order on such application must be treated as a decree and an appeal will lie. This is the view taken by this Court in *Subbalakshmi Ammal* v. *Ramalinga Chetty* (1) and apparently no appeal lies to this Court.

Apart from this, the argument proceeds on the assumption that the final decree of the 15th September 1920, is partly a final decree and partly a preliminary decree, *i.e.*, it was final as regards partition and preliminary as regards mesne profits. Inasmuch as there is no mention whatever of mesne profits in the decree, it is difficult to understand this view. It purports to be a final disposal of the suit. The mere omission to refer to one of the reliefs asked for cannot make the decree a preliminary decree in respect of that relief. The omission must be deemed to be a refusal of the relief whether it was, done intentionally or accidentally, and it was open to the party to apply for a review of this decree, or to appeal against it. He did not appeal; his review petition was dismissed and he accepted the dismissal. Now he comes in with this further application under s. 151; but there is no authority and no sufficient ground for invoking the inherent jurisdiction of the Court, the whole matter having been previously disposed of in accordance with law and no objection having been taken.

The only other ground urged before this Court is that, as the plaintiff is a minor, he should be treated with the greatest indulgence. When as in this case an application by a major cannot be granted I know no reason for granting a similar application by a minor. It will be open, to him on attaining majority to take any steps that he thinks fit on account of his guardians alleged negligence of which there is at present no evidence. No action need be taken now.

I must hold that, as the petition is framed, no revision petition lies, as there could have been an appeal; and on the merits there is no reason to interfere.

The petition is accordingly dismissed with costs.

Petition dismissed.

V. N. V.

Z. K.

(1) 48 Ind. Cas. 298; 35 M. L. J. 552; (1918) M. W. N. 792; 8 L. W. 526; 24 M. L. T. 486; 42 M. 52.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 219 OF 1923.

April 15, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Lala MOTI LAL—PLAINTIFF—APPELLANT

versus

BISHAMBER NATH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 141, O. XXII, rr. 3, 4, 10—Death of party—Rules applicable—Procedure—Order on application to bring legal representatives on record—Appeal, whether lies.

In cases of deaths of parties to a pending proceeding the rules applicable are rr. 3 and 4 of O. XXI of the C. P. C., which exclude the operation of r. 10 of the Order altogether. [p. 96, col. 1.]

It is only by analogy or by applying s. 141 of the C. P. C. that these rules can be made applicable to an application to set aside an *ex parte* decree. [*ibid.*]

Where in an original suit no appeal is provided for against an order bringing a certain person on the record as a legal representative of a deceased party much less would an appeal lie from such an order passed on an application to set aside an *ex parte* decree. [*ibid.*]

Where the genuineness of the Will of a deceased defendant is considered by the Court only with reference to the question whether the right to sue does or does not survive against his legal representatives and the Court pronounces against the genuineness of the Will and finds that the right to sue does survive and that the heirs of the deceased defendant are entitled to come on to the record as his legal representatives, the finding must be accepted as final for the purposes of the suit and the order cannot be set aside in appeal. [p. 96, cols. 1 & 2.]

First appeal from an order of the Judge, Small Cause Court, Agra, dated the 16th November 1923.

Mr. *S. K. Dar*, for the Appellant.

Dr. *K. N. Katju* and Mr. *G. Agarwala*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff from an order dated the 16th of November 1923. The plaintiff had instituted a suit against Chhunnu Lal and obtained an *ex prate* decree. Chhunnu Lal applied to have that *ex parte* decree set aside, and while that application was pending he died. His son Bishambhar Nath applied to continue the application as the legal representative of the deceased applicant. Moti Lal, on the other hand, objected to the application on the ground that the right to sue did not survive, and that, therefore, Bishambhar Nath, though the son of the deceased, was not his legal representative so far as this case was concerned. In support of his contention Moti Lal relied on an alleged oral Will said to have been made by the deceased Chhunnu Lal under

which he is said to have directed that this litigation should be put an end to and that the decree passed against him should be accepted.

The learned Subordinate Judge in disposing of the application of Bishambhar Nath which professed to have been made under O. XXII, r. 4 (1) of the C. P. C., proceeded to consider, first, whether the right to sue did or did not survive. In this connection he felt himself called upon to go into the question of the alleged Will and came to the conclusion that this Will had not been established. He, therefore, held that the right to sue did survive to the son. He has accordingly passed an order granting the application of Bishambhar Nath.

An appeal has been preferred from this order. On behalf of the respondent a preliminary objection is taken that no appeal lies. It is conceded by the learned Vakil for the appellant that, if the case had fallen under O. XXII, rr. 3 and 4, the order passed would have been final and no further appeal would lie. His contention, however, has been twofold: first, that the case fell under O. XXII, r. 10, and that, therefore, an appeal lies, and, secondly, that it is in effect a case where the Court below has refused to record an adjustment of the claim. We are of opinion that it is impossible to hold that O. XXII, r. 10, has any application to this, case. That rule only applies to cases other than those previously mentioned. In cases of deaths of parties the rules applicable are rr. 3 and 4, which would, therefore, exclude the operation of r. 10 altogether. Furthermore, it is only by analogy or by applying s. 141 of the C. P. C., that we can bring in these rules, for the proceeding pending before the Court below was not the suit itself but an application to set aside an *ex parte* decree. When in an original suit no appeal is provided from an order bringing a certain person on the record as the legal representative of a deceased party much less would an appeal lie from such an order passed on an application to set aside an *ex parte* decree.

The other contention also, in our opinion, has no force. There was no suggestion anywhere in the objections filed by Moti Lal that the claim itself has been adjusted, compromised, or settled. These words are not to be found in the order appealed from. The Court below has considered the question of the Will merely in connection with the question as to whether the right to sue did or did not survive. It is in that connection that the evidence has been discussed. The finding of the learned Judge that the right to sue did survive and that the respondent as his son is the legal representative of the deceased Chhunnu Lal must be accepted as final for the purpose of this case, and the order cannot be set aside in appeal.

The result is that this appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 118 OF 1924.

March 17, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

HABIB ROWJI—DEFENDANT—APPELLANT

versus

STANDARD ALUMINIUM & BRASS WORKS, LIMITED—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 112—Company—Articles of Association—Failure of member to pay allotment money and amount of calls—Forfeiture of shares—Suit to recover amount due from members—Limitation.

Defendant applied for a certain number of shares in the plaintiff Company which were duly allotted to him. By a certain resolution subsequently passed the Company made certain calls upon its members, but the defendant failed to pay either the allotment money or the amount of the calls. The Directors of the plaintiff Company served a notice on the defendant requiring him to pay the allotment money and the amount of the calls together with interest thereon in accordance with the provisions of Articles of Association of the Company and stated that in the event of non-payment within a certain period from the date of the notice, the shares would be forfeited and that the Company would proceed to recover the unpaid amount from the defendant. The defendant failed to comply with the notice whereupon the shares held by the defendant were forfeited by the plaintiff and the plaintiff further brought a suit against the defendant to recover the amount of the allotment money and the calls, together with interest. One of the Articles of Association of the plaintiff Company ran as follows:—"Any member whose shares have been forfeited shall, notwithstanding, be liable to pay and shall forthwith pay to the Company all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of the forfeiture together with interest thereon, from the time of the forfeiture until payment at 9 per cent. per annum and the Directors may enforce the payment thereof if they think fit:

Held, (1) that on the forfeiture of the defendant's shares he ceased to be a member of the Company and that it was only by virtue of the said Article of Association that he became a debtor to the Company for the amount of the calls etc.; [p. 99, col. 1.]

(2) that the said Article of Association created a new obligation giving the Company a fresh cause of action against the defendant and that, therefore, the period of limitation for a suit to enforce the new obligation began to run from the date on which the shares were forfeited and not the respective dates on which the allotment money and the amount of calls became due. [p. 99, col. 2.]

In re Blakely Ordnance Co., Ex parte Stocken, (1868) 3 Ch. App. 412; 37 L. J. Ch. 230; 17 L. T. 554; 16 W. R. 322 and *Ladies Dress Association* v. *Pulbrook*, (1900) 2 Q. B. 376; 66 L. J. Q. B. 705; 49 W. R. 6, referred to.

Mr. *B. J. Desai*, for the Appellant.

Mr. *Kanga*, Advocate-General (with him Sir *Thomas Strangman*), for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs were a Joint Stock Company incorporated on February 27, 1920, under the provisions of the Indian Companies Act VII of 1913, and having their registered office at Thakurdwar without the Fort. The capital of the Company was rupees twenty-five lacs divided into 25,000 ordinary shares of the value of Rs. 100 each. On March 31, 1920, the defendant applied for one hundred shares of the said Company and duly paid the application money thereon *viz.*, Rs. 1,000. Pursuant to the resolution in that behalf the Board of Directors of the plaintiff Company allotted to the defendant one hundred shares, and the necessary allotment letter duly addressed was duly posted to the defendant. By a resolution passed on July 20, 1920, the Board of Directors of the plaintiff Company made a first call of Rs. 15 per share upon the members of the said Company payable on or before August 5, 1920. Due notice of the said resolution was given to the defendant, and he was required to pay the amount of the said call on or before August 5, 1920, at the office of the Company. The defendant was further informed that interest at nine per cent. per annum would be charged on the amount of the said call from August 5, 1920, until payment. A further call of Rs. 15 per share payable on or before February 20, 1921, was made by a resolution passed on January 27, 1921, and due notice was given to the defendant. The defendant did not pay the amount due on the allotment or on the calls made by tha plaintiff Company. Accordingly the Directors served a notice on the defendant dated April 15, 1921, requiring him to pay the same together with interest thereon in accordance with the provisions of the Articles of Association of the Company and stating therein that in the event of non-payment of the said allotment and call money with interest thereon at nine per cent. within twenty days from the date of the notice, that is, on or before May 5, 1921, the Directors would forfeit the shares and proceed to recover the unpaid amount. The defendant failed to comply with the requisitions contained in the notice of April 15, 1921, whereupon by a resolution passed on August 3, 1921, by the Board of Directors the shares held by the defendant were duly forfeited in accordance with the provisions of the Articles of Association of the Company. The plaintiff sought to recover from the defendant the sum of Rs. 5,959-5-0 with interest on Rs. 4,694-12-3 at the rate of nine per cent. per annum from July 29, 1924, till judgment.

The defendant admitted the statements in the plaint but submitted that the suit as against him was barred by the law of limitation in respect not only of the allotment moneys but also in respect of the first and second calls, inasmuch as the same became due and payable more than three years before the filing of the suit.

At the hearing issues were raised whether the claim in respect of the allotment money, the first call and the second call respectively were barred by limitation. The learned Judge held that plaintiffs' claim to recover all the three amounts was not barred by limitation and passed a decree as prayed.

In appeal it has been argued that that decision is wrong, that the suit was in fact a suit for payment of the allotment money and the calls made by the Company on the shares, and that as the suit fell under Art. 112 of the Indian Limitation Act the suit was barred. It was also argued that although under Art. 32 of the Articles of Association the Company was entitled to enforce payment of the allotment money and the calls in spite of the defendant's shares having been forfeited, the cause of action was the same, and the period of limitation for the suit was the same as on the original cause of action.

Article 32 runs as follows :—

"Any member whose shares have been forfeited shall, notwithstanding be liable to pay, and shall forthwith pay to the Company, all calls, instalments, interest and expenses owing upon or in respect of such

shares at the time of the forfeiture together with interest thereon, from the time of forfeiture until payment, at nine per cent. per annum, and the Directors may enforce the payment thereof if they think fit."

It is admitted that but for the provisions of that Article if the shares of any member are forfeited he ceases to be a member of the Company in respect of the forfeited shares, and so would no longer be liable to pay to the Company all moneys which, at the date of forfeiture were presently payable by him to the company in respect of the shares. It follows that if a member's shares are forfeited and he ceases to be a member of the Company, it is only by virtue of Art. 32 that he becomes a debtor to the Company for the amount of calls, instalments, interest and expenses due at the time of forfeiture, and it can be said that on that account a new cause of action arises under that special contract between him and the Company. The question has not arisen in any reported case as to when the period of limitation begins to run for a suit by a Company against a late member for money in respect of calls, instalments and expenses which were due from him at the time his shares were forfeited. The learned Judge has relied upon the decision in *In re Blakely Ordnance Co., Ex parte Stocken* (1). In that case by the Articles of Association of the Company overdue calls were to carry interest at twenty-five per cent., and, by cl. (50), it was provided that the forfeiture of a share should involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the Company in respect of the share, and all other rights incident to the share but that the shareholder should, notwithstanding be liable, "to pay to the Company all calls owing on such share at the time of such forfeiture." An action was brought by the Company to recover from Stocken the amount due on the shares belonging to him which had been forfeited under cl. (50). The Company having gone into liquidation after forfeiture Stocken successfully resisted being placed on the list of contributories, but then received a notice in writing, calling upon him to pay to the official liquidator the amount of the call which was due at the time of forfeiture, "and interest thereon, calculated according to the Articles of Association and the notice of call issued to the shareholders." The question then was whether Stocken was bound to pay not only the amount due to the Company but also "interest thereon." The Master of Rolls decided that no interest was payable. In appeal Lord Cairns, C. J., said (page 414*).

"I think that the 50th clause of the Articles of Association, whether it be called a penal clause or not, must receive a strict construction, and that the rights of the parties on one side and the other must depend upon its construction...But whether that be so or not, the construction of that clause, as it seems to me, is reasonably clear. The first part runs thus:—'The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in and all claims and demands against the Company in respect of the share and all other rights incident to the share.' Now, suppose the clause had stopped there, and there had been nothing more in the articles. I apprehend that clearly no action could, after forfeiture, have been maintained for the recovery of the calls previously due, and that for two reasons. First, I think so in consequence of the words used, namely, that all rights incident to the share are extinguished, which words cannot, in my opinion, be confined to rights against the Company, but must extend to all rights incident to the share. In addition to that, I am strongly disposed to think that the mere fact of a duly authorized forfeiture of shares without anything in the articles defining the effect of forfeiture, would of itself, in the very nature of things, render any proceedings at law for past calls incompetent, because such proceedings must, I apprehend, be on the footing that the person sued was a share-holder in the Company; and if his interest in the Company had been destroyed, it is by no means clear that the action could be maintained. The following part of the 50th clause shows that the construction which I have put upon the first part is the construction put on it by the framer of the articles; for he evidently thought that if he stopped there any right to proceed for calls would be gone, and he, therefore, introduces a provision which seems to me to be in substance and in words the creation of a new right."

Accordingly it was held that no interest was payable, as no demand had been made for payment with interest after forfeiture on

(1) (1868) 3 Ch. App. 412; 37 L. J. Ch. 230; 17 L. T 554; 16 W. R. 322.

(2) (1900) 2 Q. B. 376; 66 L. J. Q. B. 705; 49 W. R. 6

*Page of (1868) 2 Ch. App.—[*Ed.*]

the sum payable under the forfeiture clause. It simply gave an independent right to recover after forfeiture the sum due at the date of forfeiture. That was the sum which appeared to the Court, could be recovered and nothing beyond that.

A reference has also been made to the case of *Ladies Dress Association* v. *Pulbrook* (2) in which the defendant was sued after the Company went into liquidation for the unpaid calls due by him, and it was held that, "notwithstanding the provisions of s. 38 of the Companies Act, 1882, sub-ss. (1), (3), the action was maintainable, inasmuch as the defendant was liable not as a contributory, but as a debtor to the Company."

By analogy a reference may also be made to s. 61 of the Indian Companies Act (VI of 1882) which makes it clear that when a Company has gone into liquidation "every present and past member of such Company shall be liable to contribute to the assets of the Company to an amount sufficient for payment of the debts and liabilities of the Company and the costs, charges and expenses of the winding up." And under sub-cl. (*d*): "In the case of a Company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." So that when a Company goes into liquidation, although as against the members the Company's right to recover the money due on the calls may be barred, the members of the Company are liable to contribute to the assets of the Company to the extent of the amount unpaid on their shares in order that the debts and liabilities of the Company should be paid. It seems to me, therefore, that by Art. 32 of the Articles of Association, there was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the Company all the moneys that were due by him for allotment, calls and further calls made on the shares allotted to him with interest, and it was on that contract that the plaintiffs were suing. The cause of action then arose on August 3, 1921, when the Company forfeited the shares, and, therefore, the suit to recover what was due from the defendant on his shares was within time. The appeal, therefore, fails and must be dismissed with costs.

Coyajee, J.—I concur. The foundation of the suit is the special contract evidenced by Art. 32 of the plaintiff Comyany's articles. On forfeiture of his shares, the defendant ceased to be a member, and the Company could not thereafter sue him for past calls. But although his liability to pay such calls came to an end, he incurred, under the terms of Art. 32, a fresh liability to "forthwith pay to the Company all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon, from the time of forfeiture until payment." This, in my opinion, was a new obligation giving the Company a fresh cause of action against the defendant; and the period of limitation for a suit to enforce this new obligation began to run from the time the shares were forfeited. In this case, the plaintiff Company exercised the power of forfeiture on August 3, 1921, and the suit having been instituted on July 31, 1924, is not barred by limitation.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1075, 1583, 1632, 1649 TO 1653 AND 1744 OF 1922.

November 13, 1924.

Present:—Mr. Justice Devadoss.

MALYALA SURAYYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Rajah Saheb Meharban-i-Dostan Sri Bajah RAVU VENKATA KUMARA MAHIPATI SURYA RAO BAHADUR GARU, SIRDAR, RAJAHMUNDRY SIRCAR, AND RAJA OF PITTAPURAM—DEFENDANT NO. 1—RESPONDENT.

Inam—Despandya inam—*Possession before Permanent Settlement with* despandya—*Abolition of office—Possession continued—Lands, whether included in assets of* zemindari—*Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against two sets of defendants—Appeal by one set—Decree, whether can be set aside as against defendants who have not appealed.*

Where certain *inam* lands in a *zemindari* were enjoyed by *despandyas* before the Permanent Settlement of 1802 and at the time of the Permanent Settlement, the Government abolished the *despandya* office and added the *russoom* payable to the *despandyas* to the *peishcush* of the *zemindari* and the lands continued in possesion of the *inamdars*:

Held, (1) that by the inclusion of the *russoom* in the *peishcush* or permanent *zummah* payable by the *zemindar*, the lands in the possession of the *despandyas* did not become part of the *zemindari*;

(2) that the lands having been held under the Government were in the nature of *raiyatwari* lands.

[p. 101, col 2.]

It is possible that within the ambit of an estate there may be *raiyatwari* holdings, and in such cases the *zemindar* collects the amounts due to the Government only as an agent for the Government. [p. 102, col. 1.]

An *inamdar's* right to both *varams* is not inconsistent with the lands being a part of the *zemindari*. [p. 102, col. 2.]

In a suit by an *inamdar* against a *zemindar* for a declaration that his lands were not part of the estate of the *zemindari* and against the tenants in possession of the land for a declaration that they had no occupancy rights, the Trial Court held that the *inams* were excluded from the assets of the *zemindari* and that the tenants had no occupancy rights. On appeal by the *zemindar* alone, on a finding that the lands were included in the assets of the *zemindari* the Appellate Court reversed the finding as to occupancy rights also and dismissed the plaintiff's suit both as against the *zemindar* and as against the tenants:

Held, that the tenants-defendants not having appealed from the decree of the Trial Court, it was not competent to the Appellate Court to dismiss the plaintiff's suit as against them, inasmuch as the finding of the Appellate Court that the lands were included in the assets of the *zemindari* was not inconsistent with the decree which the plaintiff had obtained in the Trial Court against the tenants-defendants. [*ibid.*]

Appeals against the decrees of the District Court, Godavari, at Rajahmundry, in A. S. No. 103 of 1922, 89 and 102 of 1920, 109 of 1920, 104 to 108 of 1920 and 110 of 1920, preferred against those of the Court of the Temporary Subordinate Judge, Cocanada, in Original Suits Nos. 31 of 1920, 30 of 1919, 37 of 1919, 32 to 36 of 1919 and 38 of 1919 respectively.

Messrs. *C. Rama Rao*, *B. Somayya*, *V. Viyanna*, for the Appellants.

Mr. *A. Krishnaswami Iyer*, for the Respondent.

JUDGMENT.—This is a batch of nine appeals. The same point arises in all the appeals. The plaintiffs' suit is for a declaration that the Record of Rights made under Ch. XI of the Estates Lands Act is incorrect in several particulars. The 1st defendant is the Rajah of Pittapuram, the other defendants are the tenants of the plaintiffs. Several issues were raised in all the cases and they were found by the Subordinate Judge in favour of the plaintiffs. The 1st defendant alone appealed against the decree of the Subordinate Judge. The tenants who were found not to have any occupancy right in the land did not appeal against the decree of the Subordinate Judge. The District Judge has reversed the decree of the Subordinate Judge and dismissed the plaintiffs' suit. The plaintiffs have preferred these second appeals.

The main question in these appeals is whether the suit lands were included in the assets of the Pittapuram *zimindari* at the time of the Permanent Settlement so as to form part of the estate. The suit lands were enjoyed before the Permanent Settlement of 1802 by *despandyas*. "*Despandya*" is described in the Fifth Report, on East India Affairs, Vol. III, page 24, thus: "The next Revenue Officer of rank and of the same class with the *desmook*, though of greater utility and sometimes of more extensive local jurisdiction, was the *despandeah canongoe*, or provincial register, ...To ensure the honest full discharge of an important trust, a *russoom* of two and a half per cent. on the revenue, ascertained by his own vouchers to have been collected throughout the country, was assigned to the public register, his heirs and deputies in perpetuity".

At the time of the Permanent Settlement the Government abolished these offices and added the *russoom* of two and-a-half per cent. of the total collections, to the *peishcush* of the Pittapuram, *zemindari*. The District Judge holds that by including the *russoom* in the *peishcush* or Permanent *zummah* payable by the *zemindar* the lands in the possession of the *despandyas* became part of the *zemindari*. Mr. Rama Rao for the appellant contends that the documents relied upon by the District Judge for his finding Exs. II, III, and IV have been misconstrued by him and they do not bear out the inference drawn from them.

Exhibit II is the *kabuliyat* executed by the *zemindari* of Pittapuram on 6th May 1803. That all *lakheraj* and alienated lands were excluded from the *zemindari* is clear from the following recital, he says "exclusive of *lakheraj* lands, (lands exempt from the payment of public revenue) and of all other alienated lands paying a small quit-rent (which quit-rent unchangeable by me is included in the assets of my *zemindari* or estate"). It is urged for the appellants that the lands in the possession of the plaintiffs are such alienated lands. There is no evidence that these lands were granted as *manyams* by the *zemindar*. It is admitted that the *despandyas* held these lands from long before the date of the Permanent Settlement. An attempt was made by the first defendant to show that these lands were granted by him after the Permanent Settlement but that is found against by the lower Courts and no serious attempt was

made before me to dispute that finding.' Mr. Krishnaswami Iyer attempted to justify the first defendant's contention by showing that the *zemindar* recognized the persons in possession of the lands owned by the *despandyas* as *inamdars* and appropriated the pension paid for the maintenance of the *despandyas* who were thrown out of office. Assuming it was so that would not make the lands, grants by the Pittapur *zemindar*.

The question is whether the Government by including the *russoom* in the amount payable by the *zemindar* to the Government made the lands in the possession of the *despandyas* part of the estate of Pittapuram. What appears from Ex. IV is that the Government added what was payable to the *despandyas* for their collection of the revenue to the amount payable by the *zemindar* and made him collect the revenue, in other words, the Government was entitled only to 97½ per cent. after deducting 2½ per cent. due to the *despandyas* for collection and when their services were dispensed with the 2½ per cent. was added to the amount payable by the *zemindar*.

When the Government dispensed with the services of the *despandyas*, they proposed to give them a pension for life. This is clear from Ex. III, letter to the Collector dated 8th December 1802: "The Governor-in-Council by the recommendation of the Special Commission has been pleased to abolish the office of *despandyas* in the first Division of Masulipatam and to incorporate the *russooms* of that office with the permanent assessment. Considerations of indulgence to the individuals filling the office of *despandyas* induced the commission to recommend that pensions for life should be granted to those individuals, that recommendation having been approved, the commission desire you will furnish them with a list of *despandyas* and the amount of the annual pension you will propose should be granted to each." The contention of the first defendant is that the pension was received by the *zemindar* and he allowed the *despandyas* whose services were dispensed with to be in occupation of the lands in their possession and reliance is placed on a statement contained in Ex. B. "But the *zemindar* did not resume the *despandya inams*. He entered into a compromise with the holder of the *inams*, and agreed to take their pensions and allow them to enjoy their lands as usual." There is no evidence as to what really happened at the time. No accounts have been produced by the first defendant to show how much wes received in respect of the pension and what arrangements were made with the persons in occupation of the lands. It appears that *despandya inams* were mixed up with the *karnam inams* and Mr. Chentsal Rao separated the *karnam inams* from the *despandyas inams*, but did not make any Settlement as regards the *despandya inams*. The concluding sentence in his report is "of course by deducting it from our accounts we do not confer any new power on the *zemindar* to resume their land without their consent or the decree of any Judicial Tribunal." It is clear that nothing was done with regard to them at the time of the *inam* Settlement.

The contention of Mr. Krishnaswami Iyer is that when the *russooms* or *manyams* were included in the assets of *peshkush* of the *zemindari*, it must be considered that the lands became part of the *zemindari*. If the lands were originally granted by the *zemindar* to the *despandyas* and were resumable by him no doubt this argument would be of considerable force. But from the Fifth Report, Vol. III, page 24, it is clear that *despandyas* were in unauthorized occupation of lands and enjoyed their income. "In lieu of this commission, however, at present there are a number of inferior *despandyas*, claiming a right to free *mirassi* hereditable villages, or to others held by a tenure called *bilmokta* or *tatoodarry*, at a low unalterable rent, but all these, we apprehend to be improper, unauthorized alienations made by the *desmooks* or other officers of Government in power to purchase greater defalcations in their own favour from the stated dues of the exchequer". In the absence of definite evidence that the *zemindar* granted these lands, it must be held that the lands were occupied by *despandyas* improperly and the then Government of the country were either unable or unwilling to disturb their possession, and at the time of the Permanent Settlement they were not dispossessed of their lands but were evidently allowed to be in possession and the *despandyas* whose services were dispensed with were further remunerated by pensions. In the absence of any evidence as to resumption by the Government, it cannot be said that the Government added these lands to the *zemindari* or made them part of it. These lands having been held under the Government were in the nature of *raiyatwari* lands,

and it is difficult to understand how the Government could by entering into an arrangement with the *zemindar* convert a *raiyatwari* holder into a *raiyat* without his consent. It was, no doubt, open to the Government to dispossess the *despandyas* of the lands in their possession and to hand them over to the *zemindar*. But in this case there is no evidence that they were dispossessed by the Government or that the *zemindar* entered into any relations with them after the date of the Permanent Settlement. It is open to the Government to enter into an arrangement with the *zemindar* to keep the *raiyatwari* tenure as such and to give him the right to collect the revenue payable to Government, but in the absence of clear evidence it should not be lightly held that the Government made a *raiyatwari* tenant a *raiyat* under a *zemindar*. The Government have no power in the absence of Legislative sanction to convert a *raiyatwari* tenure into a *raiyati* tenure in an estate.

The appellant relies upon the decisions of this Court in support of his contention, in C. R. P. No. 199 of 1918 and S. A. No. 1826 of 1917. These two cases arose out of a dispute between *despandya inam* holders and their tenants, in the *zemindari* of Pittapuram. Sir William Ayling in disposing of C. R. P. No. 199 of 1918 observed "The *inam* was granted by Government prior to the Permanent Settlement and the arrangement effected between Government, *inamdars* and the *zemindars* at the time of the Permanent Settlement was a private arrangement which did not make the land a portion of the estate." I respectfully agree with this observation. In S. A. No. 1826 of 1917 Ayling and Krishnan, JJ., approved of the view of the Subordinate Judge that the *inams* could not be brought under the category of 'estate' within the meaning of the Estates Land Act. It follows that within the ambit of an estate there could be *raiyatwari* holdings, and in such cases the *zemindar* collects the amounts due to the Government, as observed by the Subordinate Judge, as only an agent for the Government.

The absence of any evidence to show what was done after the Settlement by the *zemindar* in respect of these lands is strong proof of the fact that these lands were not included and made part of the estate. Exhibits II, III and IV do not bear out the construction placed upon them by the District Judge. There is no evidence that any amount was paid to the *zemindar* by the holders of these lands for their being in possession of them. Granting for argument's sake that the *zemindar* did receive the pension payable to the *despandyas* during their lifetime the mere fact that he received it could not have changed the character of the tenure of these lands. I hold that the finding of the District Judge that the suit lands were included in the Pittapuram *zemindari* at the time of the Permanent Settlement so as to form a part of the Pittapuram estate is not warranted by the recitals in Exs. II, III and IV and I hold there is no evidence to show that these lands became part of the Pittapuram estate.

The next point urged for the appellant is that the District Judge ought not to have dismissed the plaintiffs' suit inasmuch as the other defendants had not appealed against the decree of the Subordinate Judge. Mr. Krishnaswami Iyer for the respondent contends that the Court has power to give a decree in favour of the persons who have not appealed under O. XLI, r. 33, of the C. P. C. In this case the first defendant's contention is that the lands form part of the *zemindari*. The contention of the other defendants is that they have got permanent occupancy right in the lands. Even though the lands form part of the *zemindari* the plaintiffs may have a right to the *kudivaram* as well as the plaintiffs' right to have both *varams* is not inconsistent with their lands being a part of the *zemindari*. There is no law against a person having a *raiyatwari* tenure within the ambit of a *zemindari*. It does not necessarily, therefore, follow that simply because the plaintiffs' lands are in the *zemindari* the tenants have occupancy right. Inasmuch as the Subordinate Judge found on the evidence that the tenants had no occupancy right and inasmuch as they did not choose to appeal against his decree it was not proper for the District Judge to have dismissed the suits.

The upholding of the contention of the first defendant would not in any way militate against disallowing the contention of the tenants who are the other defendants. That being so, in any view of the case I think the District Judge's judgment as regards the relief claimed by the plaintiffs against their tenants cannot be upheld.

In the result the appeals are allowed and the decree of the District Judge is set aside

and that of the Subordinate Judge restored with costs in this Court as well as in the lower Appellate Court.

V. N. V. *Appeals allowed.*

Z. K.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

January 30, 1925.

Present:—Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

TILAKDHARI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharaja KESHO PRASAD SINGH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92—Settlement of lands—Antecedent documents and maps, whether can be referred to for defining boundaries—Appeal to His Majesty in Council—Findings of fact, concurrent, whether can be examined—Practice.

If in an appeal to His Majesty in Council it appears that underlying findings of fact there are questions of law on which the findings proceeded or that there is a case that the Judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal to the Privy Council does not apply to the examination of such grounds of law. [p. 103, col. 2.]

It is not open to a Court to admit antecedent documents and maps for the purposes of contradicting the terms of a Settlement. Such documents and maps may, however, be referred to for the purpose of identifying the thing demised. [p. 104, col. 1.]

Appeal against the judgment and decree of the Patna High Court (Das and Foster, JJ.), dated the 8th December 1919, and confirmed on review, dated the 11th May 1920, affirming that of the Sub-Judge, Shahabad, dated the 22nd January 1916.

Sir *George Lowndes, K. C.*, and Mr. *G. D. McNair*, for the Appellants.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Respondent.

JUDGMENT.

Lord Shaw.—This is an appeal from a decree of the High Court at Patna which affirmed a decree of the Subordinate Judge of Arrah. The question involved in the appeal relates to the extent or area of a *mahal* called Naubarar.

The judgments below, in so far as they are judgments of fact, were concurrent judgments, and Mr. De Gruyther very properly, on behalf of the respondent, intimated that he would object to the competency of the appeal on that ground.

Their Lordships allowed the case to be opened, and it has been opened with great clearness and fulness by Sir George Lowndes. He has explained the point bearing upon what is the true nature of the deliverance pronounced by the High Court and the Court below, and he has maintained that, notwithstanding an apparent concurrence in findings of fact, there still remains as after explained a case which can legitimately be brought, as matter of law, under the well-known Indian practice, before their Lordships.

Their Lordships, before entering upon the merits of the question, desire to express their satisfaction with the judgment of the High Court as expressed by Mr. Justice Das in the High Court, which, for fulness of statement, for clear articulation of points in issue, could not be excelled.

Their Lordships note from that judgment exactly what was the nature of the duty which the learned Judges considered to be cast upon themselves in the construction of the title which is in issue in this case

It is to be further noted that not only are there two concurrent judgments, but there was also an application for review, and a third judgment was pronounced thereon confirmatory of the preceding judgments.

If it appears that underlying findings in fact there are questions of law on which the findings proceeded or that there is a case that the Judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal does not apply —to the examination of such grounds of law as are alluded to.

It is important to see whether any case has emerged of this character. It is accordingly necessary to quote the following passage, which covers the question as to the ambit of their duty as they considered it in the construction of the title to this landed estate:—

"I took the view," says the learned Judge "that in order to understand what was actually settled" (that is to say, the extent of the land actually contained within the title as such) "it was necessary to deal with certain documents on which the Settlement was based, not to contradict any of the terms of the Settlement, but to identify the thing demised. I considered all these documents" (and then he names them) "and came to the conclusion that what was actually demised was the tract of land bound-

ed on the north by the plot No. 920 as shown in the *kistwar* map of 1840, which formed the southern boundary of Gangabarar. As regards the southern boundary, there is no dispute that it consists of certain villages mentioned in the plaint."

It was not disputed in the argument before their Lordships that what had been scrupulously in view of the Judges, according to their statement, was a correct appreciation of the limits and functions of a Court in construing a document of title submitted for its consideration. The learned Judges properly said that it was not the duty of the Court, and would have been contrary to their duty, to admit any antecedent documents for the purpose of contradicting the terms of the Settlement made. What they had to do was, what the learned Judge says they did, use any antecedent documents and maps solely for the purpose of identifying the thing demised.

In their Lordships' opinion there is no ground for the suggestion that the Judges of the Courts below failed in this duty or introduced illegitimate considerations into their view upon the titles and the facts. They having done that which was strictly their duty, their Lordships are of opinion that what remained was a question of fact, and upon that question of fact the following is the finding as expressed by Mr. Justice Das:—

"I find no good reason for holding that the lands comprised in the Settlement of 1862 were not, and much in the antecedent documents starting from Ex. U and ending with Exs. 91, 32 and 33 to indicate that they were, well-defined and well-ascertained, bounded on the north by the black line of 1851 which corresponds with the southern boundary of plot No. 920 in the *kistwar* map of 1840, and on the south by the plaintiffs' villages mentioned in the plaint," and in a further passage of his judgment the same learned Judge declared:—

"On a consideration of all the evidence in the case, I am clearly of opinion that the plaintiff has proved that the entire block of land bounded on the north by the southern boundary of plot No. 920 in the *kistwar* map of 1840 or the black line in the map of 1851 and on the south by the plaintiffs' villages mentioned in the plaint was settled as Sheopur Diar Naubarar with the predecessors-in-title of the defendants."

It is admitted—it must, of course, be admitted—that that entire block so taken is not limited by any measure as descriptive of the block. It must be further admitted, that, upon the antecedent documents thus legitimately taken into view, that entire block, subject to the matter of the boundaries mentioned, was settled as the new *mahal* of Naubarar.

In those circumstances their Lordships are of opinion that the point as to competency is well taken and that this appeal is incompetent.

A point was mentioned with regard to the revenue assessable from the neighbouring *mahal* of Gangabarar by the Revenue Authority. Their Lordships enter in no way whatsoever upon that matter and make no pronouncement which would be either limitative or regulative of the rights of parties with regard to revenue proceedings. Such a point is not before their Lordships.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed on the ground of incompetency and to allow against the appellants to the respondent the costs of these proceedings.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Watkins & Hunter.*

Solicitor for the Respondent:—Mr. *E. Dalgado.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 141 OF 1924.

April 8, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

ASKARAN BAID—APPELLANT

versus

RAGHUNATH PRASAD AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 97, 98—Mortgage-decree—Sale—Obstruction to possession—Order on application of decree-holder—Appeal, whether lies—Construction of decree—Property mortgaged, determination of.

Proceedings connected with the delivery of possession referred to in r. 94 of O. XXI of the C. P. C. and the subsequent rules are proceedings relating to the execution of the decree. [p. 106, col. 1.]

Where the decree-holder is himself the auction-purchaser and is resisted by the judgment-debtor, an order made under r. 98 of O. XXI of the C. P.

C. on his application is appealable as a decree under s. 47 of the Code. [*ibid.*]

A mortgage-decree described the mortgaged property as one house with appurtenant rights bearing a certain number in the Municipal Registers. The decree did not give the boundaries of the house nor the area of the site occupied by it. The mortgaged property was sold in execution of the decree and was purchased by the decree-holder himself. In the application for execution and the sale proclamation and the sale certificate the area of the site was variously described as 2 *kathas*, 2 *kathas* and 2 *dhurs* and 2 *kathas* 7 *dhurs*. When the decree-holder attempted to take possession it was found that at the time of the mortgage there was a piece of waste land near the house and that another house had since been built upon this piece of waste land, and that the area of the sites upon which the two houses respectively stood was 2 *kathas* 7 *dhurs* and 2 *kathas*. The decree-holder auction-purchaser was resisted in taking possession of the houses in execution of the decree by the judgment-debtor and made an application under O. XXI, r. 97 of the C. P. C. The Execution Court held that the second house was never mortgaged or sold and dismissed the application. The decree-holder filed an appeal:

Held, (1) that the objection of the judgment-debtor to the decree-holder's application fell within the purview of s. 47 of the C P. C. and that the order of the Court in favour of the judgment-debtor was appealable; [p. 107, col. 1.]

(2) that the second house which had been built at the time of the institution of the mortgage suit not having been mentioned in the plaint or in the decree and no boundaries of the mortgaged property having been given and the area of the property sold in execution being given in the application for execution, the sale proclamation and the sale certificate as varying from 2 *kathas* to 2 *kathas* and 7 *dhurs*, it must be held that what was mortgaged was only the house which was existing at the time of the mortgage and the site upon which it stood and that the second house was not included in the mortgage or in the sale which followed upon the mortgage-decree and that consequently the decree-holder was not entitled to possession of it. [p. 105, col. 2; p. 106, col. 1.]

Appeal from an order of the Subordinate Judge, Gaya, dated the 30th April 1924.

Mr. *Khurshaid Hussain*, for Mr. *Kailaspati*, for the Appellant.

Mr. *Murari Prasad* for Mr. *Brij Kishore Prasad*, for the Respondents.

JUDGMENT.

Mullick, J.—This appeal arises out of an application made under O. XXI, r. 97 of the C. P. C., against a judgment-debtor in a mortgage-decree who is alleged to have resisted the delivery of possession to the decree-holder. The decree has not been printed, but the Subordinate Judge states that the property is described as "one *kita makan* with the land, *hak sakunati* and *choukath* and *kewar* and other *lawazimat* appertaining to the house." He also states that the house is described as "within the Gaya Municipality bearing No. 49 in Ward No. 10." He further states that the decree gives no boundaries nor any area. In the execution petition which was filed on the 20th February 1923, the area is given as 2 *kathas* and the description is as above. In the first sale proclamation, which was published shortly afterwards, the description is substantially the same but the area is given as 2 *kathas* 2 *dhurs*. In the second sale proclamation the area is further altered to 2 *kathas* 7 *dhurs* and the sale-certificate which has been printed shows that what was sold was "one two-storeyed *pucca* house together with the land and the residential right as also the door frames and door leaves and other materials of the house, holding No. 49, Ward No. 10 paying the annual holding and latrine-tax of Rs. 22-8 0." The sale-certificate states the approximate area as 2 *kathas* 7 *dhurs*.

When the Civil Court peon went to give delivery of possession of this property on the 1st March 1924, he was resisted by the judgment-debtor Raghunath Prasad and others.

It is now found that at the time of mortgage there was a piece of waste land near the house and that another house has been built upon it since then and that the area of the sites upon which the two houses stand are respectively 2 *kathas* 7 *dhurs* and 2 *kathas*. In the summary inquiry, which he has held under O. XXI, r. 97, C. P. C., the Subordinate Judge finds that what was mortgaged and sold was the house standing on the 2 *kathas* 7 *dhurs* inclusive of the land and that it was never intended to mortgage or to sell the other plot of 2 *kathas*.

The decree-holder, however, claims this plot as a part of the property covered by the mortgage and also the house standing on it as an increment thereto.

Having regard to the descriptions given (1) in the execution petition, (2) in the two sale proclamations, and (3) in the sale-certificate, it is difficult to see how the decree-holder can be entitled to delivery of possession of the plot of 2 *kathas* and the house standing thereon. He contends that the ruling description of the property is the holding number and that the area is only a false demonstration. I agree with the Subordinate Judge that this cannot be so. The decree-holder deliberately chose to sell one house standing on a site of 2 *kathas* or 2 *kathas* 7 *dhurs*. At the time of the mortgage-suit the second house had already been built, but he took no trouble to men-

tion that fact in his plaint and he was careful not to give either the area or the boundaries of the mortgaged land. He gave instead the Municipal number which is not a permanent description and may change at any moment. Having regard to the facts of this case, I do not think it can be accepted as the description which identifies the property. In my opinion what was mortgaged was only the house which existed at the time of the mortgage and the site upon which it stood. On the merits, therefore, the learned Subordinate Judge was right.

It is also contended by the respondent that no appeal lies.

It is urged that an order delivering or refusing to deliver possession to a decree-holder is not an order relating to the execution, satisfaction or discharge of the decree and, therefore, is not appealable as an order made under s. 47 of the C. P. C.

Now in one sense it is true that a decree for the enforcement of a mortgage by the sale of the mortgaged property is satisfied as soon as the sale takes place and the decretal amount is deposited to the credit of the decree-holder. But at the same time the Legislature has thought fit to make rules for regulating the procedure for annulling or giving effect to the sale. These rules are included in O. XXI, which deals exclusively with execution and I do not think it will be a straining of language to hold that proceedings connected with the delivery of possession referred to in r. 94 and the subsequent rules are proceedings relating to the execution of the decree. From this point of view an order under r. 98 would, in my opinion, be one relating to execution. Whether an order relating to resistance against delivery of possession, is appealable will depend on whether ss. 2 and 47 apply to it, and I have no doubt that when the decree-holder is the auction-purchaser and is resisted by the judgment-debtor an order made under r. 98 is appealable as a decree.

Indeed in a mortgage-suit it is difficult to conceive anything more vital to the satisfaction of the decree than the delivery of possession to the decree-holder of the property which he has purchased at the auction-sale in part or full payment of his decree. The machinery of the Court sale merely substitutes a contract by the Court for one by the parties themselves. If the contract had been made by the parties the delivery of possession would have been the most important ingredient of the contract for setting off the purchase-money against the decretal sum and I see no reason why it should be otherwise at a Court sale.

I agree, therefore, with the dissenting judgment of Stanley, C. J., in *Bhagwati* v. *Banwari Lal* (1) and with the judgment of the Calcutta High Court in *Hari Charan Dutt* v. *Mon Mohan Nandy* (2). There are observations in *Sasibhushan Mookerjee* v. *Radhanath Bose* (3) to the effect that the decree-holder purchaser has no higher rights than any other auction-purchaser; but the decision of that case did not turn upon those observations. It is difficult to see why the generality of the term "parties to the suit" in s. 47 should be limited and apply only to questions arising before the auction-purchase and why a decree-holder should cease to be a party merely because the Court makes the contract of sale for him.

A reference to r 102 would to some extent seem to support this view. Under this rule the decree holder has, but the judgment-debtor has not the right to challenge a decision under r. 98 by suit and if s. 47 does not apply, then the decree-holder has an unfair advantage. If, however, s. 47 is held to be applicable, this inequality is removed and r. 103 is left to operate between the decree-holder purchaser on the one hand and a third party acting under the instigation of the judgment-debtor on the other. It has to be admitted, however, that the rule still leaves an inequality in so far as it penalises a judgment-debtor who may have made an arrangement with a third party auction-purchaser that he will not take immediate possession (such as was disclosed in *Hari Charan Dutt* v. *Mon Mohan Nandy* (2), but with such a case we are not at present concerned.

But in the majority of cases the judgment-debtor resists on the ground that the property of which delivery of possession is sought, was not in fact sold or that if sold, the sale was illegal or contrary to the terms of the decree. In such an objection the auction-purchaser, whether he be the decree-holder or a third party, would be a necessary party and the order of the Court

(1) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.
(2) 20 Ind. Cas. 874; 18 C. W. N. 27.
(3) 25 Ind. Cas. 267; 19 C. W. N. 835; 20 C. L. J. 433.

disposing of the objection would certainly be a decree under s. 47; but the objection must be made before delivery of possession. In *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (4), an objection was taken after the confirmation of the sale but before delivery of possession that the holding was not saleable and it was held that the Execution Court was competent to investigate it under s. 47 provided the judgment debtor could show that he was ignorant of the processes that led to the sale.

In the present case the objection of the judgment-debtor was that the house on the smaller plot had not been sold and that it was not competent for the Court to sell it. In my opinion the objection was one under s. 47, C. P. C., and the order of the Court in favour of the decree-holder was, in my judgment, appealable.

The appeal, therefore, lies, but as it fails on the merits it is dismissed with costs.

Ross, J.—I agree that the appeal should be dismissed.

Z. K. *Appeal dismissed.*

(4) 26 C. 727; 3 C. W. N. 586; 13 Ind. Dec. (N. S.) 1064.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 22, 1924.

Present:—Viscount Finlay, Lord Atkinson, Lord Phillimore, Sir John Edge and Sir Lawrence Jenkins.

SECRETARY OF STATE FOR INDIA—PLAINTIFF—APPELLANT

versus

GREAT INDIAN PENINSULA RAILWAY—DEFENDANT—RESPONDENTS.

Principal and agent—Agreement, construction of—Agent allowed share of profits, effect of—Sea Customs Act (VIII of 1878), s. 20—Goods belonging to Government—Duty, whether payable.

Under an agreement between the parties the defendant agreed to work the plaintiff's Railway, the ultimate control and supervision of the Railway being vested in the plaintiff. Capital money required for purposes of the undertaking was at his option to be provided by the plaintiff and all moneys received by the defendant in working the undertaking were to be paid to the plaintiff. The plaintiff's sanction was required for all the expenditure and all money required by the defendant for the purposes of the undertaking was to be supplied by the plaintiff. Out of the surplus profits arising from excess of receipts over payments 19/20ths were to belong to the plaintiff and the remaining 1/20th to the defendant. Out of moneys supplied by the plaintiff certain stores were purchased by the defendant Company and imported into India for the use of the undertaking:

Held, that the defendant Company acted merely as the agents of the plaintiff and that the stores at the time of their importation belonged to the plaintiff and not to the defendant Company. [p. 109, col. 1.]

Appeal against the judgment and decree of the Bombay High Court (Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump), dated the 5th April 1923, in Original Civil Jurisdiction Suit No. 875 of 1923, reported as 73 Ind. Cas. 468.

Messrs. *A. M. Dunne* and *Kenworthy Brown*, for the Appellant.

Messrs. *G. Lowndes* and *E. B. Raikes*, for the Respondent.

JUDGMENT.

Sir Lawrence Jenkins.—This appeal is from a decree, dated the 5th April, 1923, of the High Court at Bombay, which followed on a judgment pronounced in a Special Case under O. XXXVI of the C. P. C. The parties to the case are the Secretary of State for India in Council as plaintiff and the Great Indian Peninsula Railway Company as defendant, and the question stated for the opinion of the Court is "Whether stores purchased and imported by the defendant Company into India for the use of the undertaking as mentioned in the case are at the time of the importation, goods belonging to Government." On the decision of this question depends the liability of the defendant Company to pay customs duties under s. 20 of the Sea Customs Act, VIII of 1878. By this section customs duties are imposed which would attach to the stores unless they come within the proviso to the section that no such duties shall be levied on goods belonging to the Government. The answer to the question propounded depends largely on the legal effect to be attributed to the provisions of the agreement attached to the special case; but that this effect may be rightly understood a brief summary of the facts leading up to it is necessary.

The defendant Company was incorporated in 1849 by an Act of the Imperial Parliament 12 & 13 Vict. Ch. 83. On the 18th August, 1899, the Secretary of State in Council in exercise of powers vested in him gave notice to the defendant Company of his intention to purchase the Railway and works that had been constructed together with the telegraphs and the engines, carriages, stock, plant and machinery belonging to the Railway and works. On the 30th July, 1900, an Act of

Parliament 63 & 64 Vict. c. 183 intituled an Act to provide for the vesting of the Railways and other property of the Great Indian Peninsula Railway Company in the Secretary of State in Council of India and for other purposes was passed. After a preamble stating that notice of intention to purchase had been given and that it was expedient that arrangements should be made for the future working of the the Railways of the Company it was enacted that as from 30th June, 1900, the Railways and works should by virtue of the Act be transferred to and vested in the Secretary of State in Council. This then is how matters stood at the date of the agreement attached to the case, and it is to be borne in mind that at its date the Secretary of State in Council had become and was the owner of the Railway undertaking and all that pertained to it. The agreement was made on the 21st December, 1900, between the Secretary of State in Council of the one part and the defendant Company of the other part, and in the opening recital it is stated that it had been agreed between the parties that the defendant Company should maintain, manage and work the Great Indian Peninsula system on the terms thereinafter mentioned. This recital is important; it is the key to the meaning and effect of the elaborate provisions that follow; on examination they will be found to be merely ancillary to the recited agreement.

Thus it is for the purpose of the contract that the plaintiff is to hand over to the defendant Company the Great Indian Peninsula Railway system together with the rolling stock plant and machinery belonging thereto (cl. 5); and for the purpose of the undertaking that he is to deliver to the defendant Company all stores belonging to the Great Indian Peninsula system (cl. 6). There is no derogation here from the property vested in the Secretary of State in Council.

Provisions follow for the maintenance and management of the undertaking which impose on the defendant Company the obligation to keep the undertaking and the rolling stock plant and machinery belonging to the undertaking in good repair and good working condition to the satisfaction of the Secretary of State (cls. 10 and 11). Then there are provisions as to the use and working of the undertaking and the conveyance of traffic throughout which the ultimate control is with the Secretary of State (cls. 15-22).

Capital money required for the purposes of the undertaking is at his option to be provided by the Secretary of State or to be raised by debentures or debenture stock on such terms as he should determine (cl. 22 *a*.) All money received by the defendant Company in respect of the undertaking is to be paid into the Treasury of the Government of Bombay or such other Treasury as the Secretary of State should direct or into the Bank of England to the account of the Secretary of State: all money required by the defendant Company for the purposes of the undertaking is to be supplied by the Secretary of State; and the Secretary of State's sanction is required for all expenditure. (Clauses 23, 24 and 25). The accounts are to be kept in accordance with the Secretary of State's requirements. In all matters relating to the undertaking not specially provided for the defendant Company is subject to the supervision and control of the Secretary of State (cl. 45).

By cls. 49, 51 a ban is placed (*a*) on borrowing by the Company, (*b*) on its engagement in any other business and (*c*) on its acquisition of property in India during the continuance of the contract without the sanction of the Secretary of State. And at the determination of the contract on the 30th June, 1925, the Company is to give to the Secretary of State possession of the undertaking together with the rolling stock plant and machinery belonging thereto and all stores and other articles specified in cl. 60.

These provisions (in their Lordships' opinion) are for the purpose of carrying into effect the recited agreement for the maintenance management and working of the Great Indian Peninsula Railway system, and under them the defendant Company is the agent and no more than the agent of the Secretary of State. In so saying their Lordships do not overlook the terms of cl. 39 (4) under which the surplus arising from excess of receipts over payments is to belong as to nineteen equal twentieth parts thereof to the Secretary of State and as to one equal twentieth part thereof in the defendant Company. In their opinion the contention that this points to the Secretary of State and the defendant Company being co-adventurers or partners is not well-founded; the appropriation of one twentieth to the defendant

Company is not to be ascribed to any proprietary interest in it but is a remuneration for services rendered by it as agent for the Secretary of State.

The money for the purchase of the stores to which this case relates was supplied by the Secretary of State and it was agent for the Secretary of State that the defendant Company purchased and imported the stores into India, for the use of the undertaking. In the circumstances the High Court rightly held that the stores at the time of importation belonged to the Government and their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

There will be no order as to costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellant.—Solicitor, India Office.

Solicitors for the Respondent.—Messrs. *Foyer, White Borrett & Black.*

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 76 OF 1925.

April 14, 1925.

Present:—Mr. Justice Boys and Mr. Justice Banerji.

Musammat RAJA DEVI AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

MUHAMMAD YAQUB AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Registration Act (XVI of 1908), s. 2 (6), (9)—Contract for sale of fruit crop not in existence, whether requires registration—Memorandum of notes of agreement, whether registrable.

A contract for the sale of mango and other fruit crop not in existence at the time of the contract is a contract with regard to moveable property only and as such does not require registeration. [p. 109, col. 2.]

A document containing a memorandum of notes of an agreement of sale of future crops does not require registration. [p. 110, col. 1.]

Reference made by the First Subordinate Judge, Saharanpur.

Dr. *M. L. Agarwala*, for the Applicants.

Mr. *Shiva Prasad Sinha*, for the Opposite Parties.

JUDGMENT.—This is a Reference by the Judge of the Court of Small Causes at Saharanpur, under O. XLVI, r. 1 of the C. P. C., asking this Court to express its opinion in regard to two questions which are set out in the order of reference. The matter is really a very simple one. The plaintiff was the owner of a mango grove of which she gave the crops to the defendants for three years at an annual price of Rs. 400. The defendants took the crops for the first year and paid the price. They took the crops for the second year but did not pay, with the result of a suit by the plaintiff for a sum of Rs. 400 and Rs. 31 interest.

The first question that we are asked is whether a contract for sale of a crop of mango fruit not in existence at the time of the contract is a contract relating to moveable or immoveable property?

We have not the smallest hesitation in holding that it is a contract in reference to moveable property and as such did not require a registered document. Growing crops are excluded by s. 2, sub-s. (6) of the Registration Act from the term "immoveable property" and are similarly included by sub-s. (9) in the term "moveable property." The only suggestion made to us on behalf of the defendants is that the crop was not, in fact, growing at the time the arrangement was entered into. This seems to us a purely artificial distinction. To allow it any force at all would be to create a situation in which no one could ever possibly know whether a particular agreement dealt with moveable property or whether it did not. This is sufficiently plain from the consideration that it is entirely impossible to know exactly at what moment a crop comes into existence or whether it was or was not in existence at any particular moment or on any particular tree. We are quite satisfied that the fact that the crop was not actually in existence at the time does not take it out of the category of a "growing crops" it would of necessity be a growing crop at the time of contract took effect; and, therefore, the subject of the contract was moveable property. We have considered those of the cases quoted by the learned Judge of the Court of Small Causes which are in the least degree relevant. Of these there are only two cases which are really in point. The learned Judge quotes *Mathra Das* v. *Jadubir Thapa* (1), as being a case relied upon by the defendants. It is admitted here that, in fact, no reliance can be placed on it on behalf of the defendants. It is directly in favour of the plaintiff. The other case is *Sukry Kurdeppa* v. *Goondakull Nagi-*

(1) 3 A. L. J. 138; A. W. N. (1906) 4; 28 A. 277.

reddi (2), a case in which the dispute was about an agreement providing for the drawing of toddy from palm trees. We need not deal with that case any further than to say that we are unable to appreciate the distinction between the fruit of a tree and the juice which is drawn from the trunk of that tree. In both cases there is obviously a question of the produce of the tree and in both cases the tree is left standing after the removal of the produce. Further it appears to us that the decision in *Sukry Kurdeppa* v. *Goondakull Nagireddi* (2) was directly in the teeth of the Registration Act (XX of 1866), s. 2 which was then in force and which was not referred to. There again we have moveable property declared to include growing crops and fruit upon trees. We have already said that we fail to see any distinction between the fruit of a tree and the juice of a tree and moreover in sub-s. (9) of s. 2 of the present Registration Act XVI of 1908) the words "juice in trees" have been expressly added to the definition of moveable property. It is not necessary to deal further with either of these cases. We answer the first question of the learned Judge of the Court of Small Causes by saying that a contract for sale of mango and other fruit crop not in existence at the time of contract is indubitably a contract with regard to moveable property only and as such does not require registration.

The second question is whether an agreement in writing, but unregistered, executed by the purchaser of the crop binding himself to pay the price of future crops, which he might have purchased through an oral agreement, is binding on him, and can be proved against him?

We have had the document in question read to us. It is certainly in no sense a formal document at all. There is a complete absence of any words of actual transfer. The nearest approach to those words is that there is a statement that *bag hamare pas rahega*. But reading the document as a whole we have no hesitation in saying that it was no sense a formal agreement but that it merely contains a brief memorandum of notes of what was agreed between the parties.

Under these circumstances we hold that there was no need for the document to be registered and that the contract could be proved *ali unde*. With this answer let the Reference be returned. The costs will be costs in the cause.

Z. K. *Reference returned.*

(2) 6 M. H. C. R. 71.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 11, 1924.

Present:—Lord Dunedin, Lord Atkinson, Mr. Ameer Ali and Lord Salvesen.

Srimati KATYAYANI DEBI—APPELLANT

versus

UDOY KUMAR DAS—RESPONDENT.

Landlord and tenant—Permanent tenancy—Tenant, position and duties of—Trespass, effect of—Suspension of rent, when can be claimed.

Under a permanent and transferable lease held on a fixed rent which is common in Bengal, the tenant virtually becomes the proprietor of the surface of the land subject only to the payment of the stipulated rent, and the lessor and the succeeding landlords have no interest in the lands except in so far as they form a security for payment of the rent. When the rent falls into arrears the landlord's only remedy is to bring the tenure to sale by public auction on the execution of a decree for payment of rent. The purchaser of the tenure in such a case acquires title to the lands on the terms of the original lease unaffected by any encumbrance created by previous tenants. The duty of a tenant under such a lease is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If he fails to do so it cannot prejudice the landlord's claim for rent. In the case of such a lease the landlord cannot in the ordinary case know whether the possession of a particular area of land by a third person is adverse to the tenant or has taken place with his consent. He cannot, therefore, safely sue an action at his own hands for ejectment of a trespasser, as he might always be met with the objection that the apparent trespass was acquiesced in by the tenant who can do with the lands as he pleases under the terms of the lease. [p. 111, cols. 1 & 2; p. 112, col 1.]

The doctrine of suspension of payment of rent, where the tenant has not been put in possession of a part of the subject leased, is applicable only where the rent is a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or *bigha*. [p. 112, col. 2.]

Appeal from the judgment and decree of the Calcutta High Court (Sir John Woodroffe, KT., and Mr. Justice Cuming), dated the 31st May 1921, and printed as 69 Ind. Cas. 117.

Messrs. *L. De Gruyther* and *A. Majid*, for the Appellant.

Messrs. *A. M. Dunne* and *B. Dube*, for the Respondent.

JUDGMENT.

Lord Salvesen.—This is an appeal from the High Court of Judicature in Bengal in two actions for arrears of rent brought by the respondent against the appellant. The respondent is the successor-in-title to

a certain Tagore, who, on the 27th November, 1878, granted a reclamation lease of certain lands which were then lying waste and in a state of jungle, at a rate which fell to be calculated at 13-annas per *bigha* of the area embraced in the lease. Since the date of the lease the greater part of the area has been brought under cultivation and has been in the possession of several successive tenants. The appellant acquired the tenant's rights in the lands as a purchaser at a sale in execution of a decree for arrears of rent due by the prior tenant.

For the purposes of this appeal, in which a single question of importance has been raised, it is only necessary to consider the state of matters at the time of the appellant's purchase, which took place in 1894. The appellant then obtained possession of the whole lands within the boundaries mentioned in the lease with two exceptions —(1) a small area of 61 acres or thereby to which her husband had established a paramount title dating from 1875 against the original lessor, and (2) a much larger area of which her husband had taken possession without any title some six years previously and of which he had continued to hold possession, notwithstanding certain efforts by the previous tenant to eject him.

From 1894 until the first of the two suits now under consideration was raised in 1917 the appellant paid without objection the rent of Rs. 4,300 which had been fixed as between the prior lessee and the then landlord, to be the rent due under the lease in question. In her defence to this suit the appellant contended that she was entitled to an abatement of rent in respect of such portions of the area embraced within the boundaries of the lease of which she was not actually in possession. It was conceded that she is entitled to an abatement of rent applicable to the 61 acres above referred to and this has been allowed by the judgment under appeal. The controversy that still remains to be determined is whether she is entitled to a corresponding abatement in respect of the much larger area which her husband continued to possess and which is now possessed by his representatives.

The lease which is evidenced by the *kabuliyat* of 27th November, 1878, is of a kind which is familiar in the Province of Bengal. As it expressly bears it is permanent and transferable and a fixed rent. The tenant under such a lease virtually becomes the proprietor of the surface of the lands subject only to the payment of the stipulated rent, and the lessor and succeeding landlords have no interest in the lands except in so far as they form a security for payment of the rent. When the rent falls into arrears the landlord's only remedy is to bring the tenure to sale by public-auction on the execution of a decree for payment of rent. The purchaser of the tenure, as has now been settled by a long series of authorities in the Indian Courts, which are enumerated in the learned and exhaustive judgment of Mr. Justice Mookerjee, acquires title to the lands on the terms of the original lease unaffected by any incumbrances created by previous tenants. An incumbrance is defined by s. 161 of the Bengal Tenancy Act, 1885, as any "right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest." There is no question in this case of any protected interest but only of such right as the appellant's late husband may have acquired in respect of his possession of a portion of the lands embraced in the lease for a period exceeding 12 years.

At the date when the appellant acquired the lease by purchase only six years of adverse possession by her husband had run against the former tenant. It is admitted that she could immediately have put an end to this tortious possession by her husband on her purchasing the tenure. She did not do so, but allowed him to continue in possession, so that it may be assumed that he and his heirs have acquired by limitation an absolute right as against the present tenant to continue in possession.

The case for the appellant is that this right which her husband has acquired against her is also good against the respondent as in right of the landlord's interest under the lease. It was argued that the lessor had a title to eject the trespasser and that, if he did not do so, the trespasser obtained a title by limitation against him as well as against the tenant and that, as the latter is now deprived of the possession of the lands, she is entitled, in a question with the landlord, to an abatement of rent. There is a long and consistent body of authority to the opposite effect in India, and although the mater has not been made the subject of direct decision by this Board their Lordships see no ground for doubting the soundness of the decisions referred to in the judgment of the High Court.

The duty of a tenant under a perpetual tenure such as the one in question is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If he fails to do so he cannot prejudice the landlord's claim for rent. The considerations which appear to their Lordships to be conclusive are those stated by Peacock, C. J., in *Womesh Chunder Goopto v. Raj Narain Roy* (1) and connected appeal and which are quoted in the judgment of the High Court. It has also been pointed out in other judgments that the landlord cannot in the ordinary case know whether the possession of a particular area of land is adverse to the tenant or has taken place with his consent. He could not, therefore, safely sue an action at his own hand for ejectment of a trespasser, as he might always be met with the objection that the apparent trespass was acquiesced in by the tenant, who can deal with the lands as he pleases.

On the assumption that the High Court has correctly stated the law applicable, the appellant nevertheless maintained that under the terms of the particular *kabuliyat* she was entitled to succeed. The clause quoted is in the following terms:—

"Should any dispute about the boundaries given below arise with any *malik* we will report it to you and you will investigate it. If through neglect we lose hold of any land we will be answerable and will compensate you for the same."

The latter part of the clause, which in their Lordships' judgment is directly applicable to the present case, is adverse to the appellant's contention. It was entirely through her own neglect that she lost possession of the lands now occupied for more than 12 years of her own tenancy by her husband. So far as these lands were concerned he was a mere trespasser, and it is of no consequence whether a trespasser is a *malik* or holds some inferior position. With regard to the earlier part of the clause it may be held to cover the dispute with regard to the 61 acres of land that have been duly investigated and in respect of which an abatement of rent corresponding to the area has been made. The further contention (which was but faintly maintained) that as this plot of the land was originally embraced within the boundaries of the tenure and that as the appellant has not been put in possession of same, she is entitled to suspend payment of the rent of the remaining area, was decided adversely to the appellant in all the lower Courts, and their Lordships see no reason for differing from their judgments. The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or *bigha*.

So far their Lordships are in entire agreement with the judgment of the High Court, and this is sufficient for the disposal of the case.

An alternative ground of judgment is based upon a Settlement which took place between the former landlord and tenants of the lands in question, under which a compromise was arrived at to the effect that the tenants should not be entitled to apply for abatement of rent on any ground whatever in respect of the area of 4,300 *bighas* then found to be the measurement in their occupation. Their Lordships are not at present, satisfied that such an agreement between the lessor and the former tenants would necessarily be binding on a purchaser of the tenure at an auction-sale, but, as the point is unnecessary to the decision of the case, they refrain from expressing any opinion upon it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Z. K *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Watkin & Hunter.*

Solicitors for the Respondent.—Messrs. *W. W. Bose & Co.*

(1) 10 W. R. 15.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 33 OF 1924.

December 12, 1924.

Present:—Mr. Baker, J. C.

JAGANNATH—DECREE-HOLDER—APPLICANT

versus

SHRINIWAS—JUDGMENT-DEBTOR—NON-APPLICANT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—

Execution of decree—Assignment of decree—Substitution of names, application for, whether step-in-aid of execution—Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 (1)—Review—Wrong exposition of law, whether ground for review.

An application by the transferee of a decree for substitution of his name for that of the decree-holder is an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operates to extend limitation for execution of the decree. [p. 113, col. 2.]

Pitam Singh v. *Tota Singh*, 29 A. 301; 4 A. L. J. 184; A. W. N. (1907) 74, relied on.

A judgment cannot be reviewed under O. XLVII, r. 1 (1) of the C. P. C. on account of some mistake or error apparent on the face of the record; where the alleged mistake or error is a wrong exposition of the law. [p. 114, col. 1.]

Shrimati Garabini Kamarin v. *Surja Narain Singh*, 75 Ind. Cas. 177; 3 Pat. 134; (1923) Pat. 361; 5 P. L. T. 52; (1924) A. I. R. (Pat.) 250, relied on.

Revision application against an order of the Small Cause Court, Nagpur, dated the 26th November 1923, in Miscellaneous Judicial Case No. 87 of 1923.

Mr. *M. D. Khandekar*, for the Applicant.

Mr. *A. V. Vazalwar*, for the Non-Applicant.

ORDER.—This is an application for revision of an order of the Small Cause Court Judge, reviewing the previous order in execution proceedings and holding that the application for execution is barred by time.

The facts are that a minor through his guardian got a money-decree in the Small Cause Court, Nagpur, against the non-applicant on 18th December 1917. The minor decree-holder assigned this decree to the present applicant on 20th December 1917. The assignee applied for substitution of his name on 25th February 1918. The non-applicant objected and the case came in revision to this Court. After the disposal of the application in this Court the assignee presented a fresh application for substitution of his name on 24th March 1919. This application went on till 17th January 1920 when the applicant's name was substituted. The applicant presented another application for execution on 4th November 1922, which was dismissed for default on 21st February 1923. On the 23rd February 1923 the applicant presented another application for execution. The non-applicant objected that it was time barred, but the Judge of the Small Cause Court overruled the objection and found that the application was already held to be in time on 18th November 1922. This order was passed as an *ex parte* order and on 8th August 1923, the non-applicant applied for review and Mr. R. N. Trivedi (successor of the First Judge) allowed the review application and held that the application dated 4th November 1922, was not filed within the three years' period allowed by law, and hence the application for execution was barred.

The applicant applies in revision against the review order. The grounds of application raise several technical objections, but I need not deal with them at great length, as on the merits I am of opinion that the order of the Small Cause Court Judge is wrong. The grounds of his order are that the order of 18th November 1922 held the application dated 4th November 1922 to be within time without notice to the non-applicant and that this order could not operate as *res judicata*, that the application of 4th November 1922 was not filed within 3 years of the date of any application for execution; that notice was ordered to be issued on the 15th October 1919, *i. e.*, more than 3 years before 4th November 1922, so the application of 4th November 1922 was time barred: and that the order dated 7th Jaunary 1920 did not furnish the starting point of any time taken as the Court simply ordered the substitution of names on that day and the decree-holder did not take any application for execution or take any steps-in-aid of execution on the said date. Hence the application for review of the order was allowed and the application for execution was held to be time barred.

The question is whether the execution application dated 4th November 1922, is time barred, and this depends upon the decision whether the application of 3rd January 1920 for substitution of names is a step-in-aid of execution. The Judge of the lower Court is in error in supposing that the application for substitution of names is not a step-in-aid of execution. In *Pitam Singh* v. *Tota Singh* (1) it was held that an application by the transferee of a decree to substitute his name for that of the decree-holder is a step-in-aid of execution. This has been followed by the Madras and Calcutta High Courts and the view of the lower Court that no fresh starting point of limitation commenced from the proceedings substituting the plaintiff's name

(1) 29 A. 301; 4 A. L. J. 184; A. W. N. (1907) 74.

is incorrect. The application of 4th November 1922 is within 3 years of the application of 3rd January 1920, for substitution of names, and the present application for execution dated 23rd February 1923 is, therefore, also in time. The case must go back for disposal on the merits.

Several technical points have also been raised by the applicant. I only think it necessary to deal with one of them and that the most important. It has been recently laid down in *Shrimati Garabini Kamarin* v. *Surja Narain Singh* (2) that a judgment cannot be reviewed under O. XLVII, r. 1 (1), on account of some mistake or error apparent on the face of the record when the alleged mistake or error is a wrong exposition of law.

The order of the lower Court is set aside and the case is sent back for disposal on the merits. Non-applicant will bear the costs in both Courts.

Z. K. *Order set aside.*

(2) 75 Ind. Cas. 177; 3 Pat. 134; (1923) Pat. 361; 5 P. L. T. 52; (1924) A. I. R. (Pat.) 250.

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

December 22, 1924.

Present:—Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

HASHMAT ALI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat NASIB-UL-NISA—PLAINTIFFS—RESPONDENT.

Custom—Succession—Syeds of Kharkhanda in Rohtak District—Exclusion of sisters by brothers—Representation—Ejectment suit—Burden of proof.

Where a person sues to recover property of which he is not in possession he can only recover possession by establishing his own title as against the defendant, regardless of what has been determined in other suits in which the same property was claimed by rival claimants of the plaintiff as against the defendants. Among *Syeds* of Kharkhanda in the Rohtak District custom is followed in matters of inheritance in preference to the Muhammadan Law, and brothers succeed to the property of a deceased brother to the exclusion of sisters, the heirs of a pre-deceased brother being entitled to the share which their father would have taken had he been alive. [p. 115, col. 2; p. 116, col. 1.]

Appeal from a decree of the Lahore High Court, (Mr. Justice Wilberforce and Mr. Justice Martineau) in First Civil Appeal No. 2422 of 1915, dated the 23rd July 1921, and printed as 66 Ind. Cas. 494, varying that of the Senior Subordinate Judge, Rohtak, dated the 28th May 1921.

Messrs. *A. M. Dunne, K. C.*, and *J. M. Parikh*, for the Appellant.

Messrs. *De Gruyther* and *W. Wallach*, for the Respondent.

JUDGMENT.

Sir Lawrence Jenkins.—This is an appeal from a decree, dated the 23rd of July 1921, of the High Court of Judicature at Lahore, varying a decree, dated the 28th of May 1915, of the Court of the Senior Subordinate Judge of Rohtak.

The suit is brought by *Musammat* Nasib-ul-Nisa to recover possession of immoveable property described in the plaint on the ground that it formed part of the inheritance left by her uncle, Mir Barkat Ali and on the death of *Musammat* Bismillah Begam, his last surviving widow, devolved on her as his customary heir.

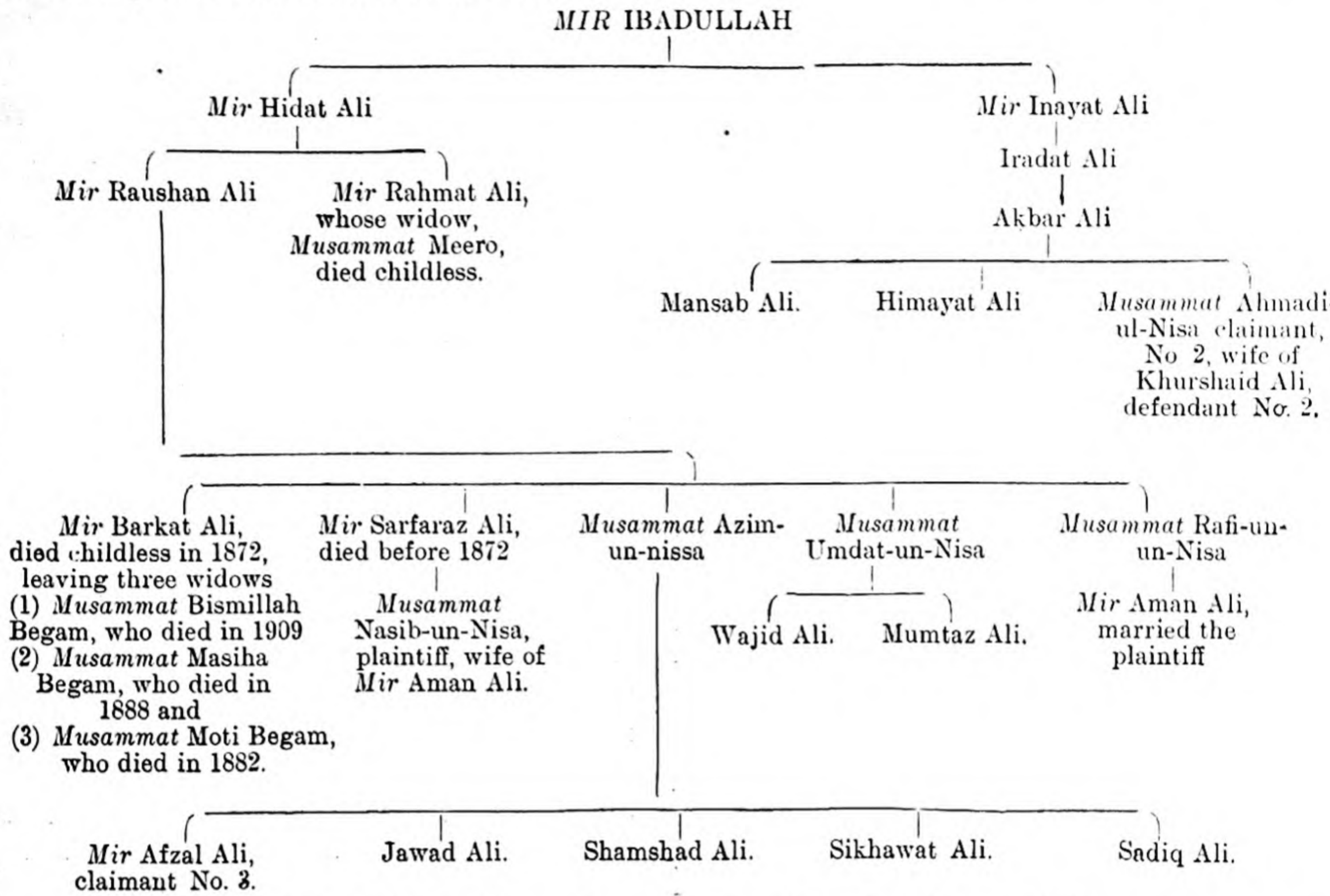
Though the record is voluminous, the points now in issue are narrowed down to two: (*a*) whether the whole of the property claimed formed part of Barkat Ali's estate, and (*b*) whether the plaintiff has established that she is his customary heir. The items claimed include a moiety of the villages of Salakhni and Kanal.

Up to the mutiny the entirety of these villages belonged to Bisharat Ali. They were then confiscated for his alleged default of duty. But on the application of Barkat Ali, whose military service had earned him the good will of the authorities, the villages in 1858 were restored to him and Umrao, Bisharat's son, and their names were entered in the Revenue Records. The Subordinate Judge held that the name of Barkat Ali was included as part owner without any apparent rhyme or reason by Barkat Ali himself when Umrao was a mere boy of 14, that Barkat Ali had never been in actual possession or enjoyment of the villages and that the defendants had so long been in adverse possession of them against Barkat Ali and his successors that the plaintiff was not entitled to lay any claim to them. The High Court, for reasons which appear in its judgment, took a different view and held that the moiety of these villages belonged to Barkat Ali.

Their Lordships agree with this conclusion.

Has then the plaintiff established her claim to be the customary heir of Barkat Ali? The members of his family are Muhammadan Arab-Sayads of Kharkhanda,

and it is among them that the heir to his property is to be found. Their relationship to him is shown in the following pedigree :—



Barkat Ali died in 1872 without issue but survived by the three widows shown in the pedigree. Contrary to the rule of Muhammadan Law, they succeeded to the whole of his estate, for an interest terminable with their lives and with a right of survivorship as between themselves.

Musammat Bismillah Begam was the survivor, and on her death in 1909, three members of the family instituted three separate suits, each claiming as heir of Barkat Ali to recover possession of the property now in suit. One was brought by *Musammat* Nasib-ul-Nisa, one by *Musammat* Ahmad-ul-Nisa, and the third by Mir Afzal Ali. They were consolidated and heard together. The second and third failed, and no appeal has been preferred; in Nasib-ul-Nisa's a decree was passed in her favour on appeal, and it is against that decree that the present appeal has been preferred.

For Nasib-ul-Nisa it has been argued that, as the heirship of her two rival claimants has been negatived, hers must be taken to be established even as against the defendants. But their Lordships cannot assent to this contention. The defendants, though without title, are in possession and the plaintiff can only recover that possession by establishing her own title as against them, regardless of what has been determined in the other two suits.

Appended to the Subordinate Judge's judgment are nine pedigrees, G-I to G-IX, showing the family relationship at the date of the several successions said to support the customary rules of succession on which the plaintiff relies. Their correctness is not questioned and the actual succession in each case is proved, not merely by oral evidence, but by judicial decisions or revenue orders made in mutation proceedings.

The devolutions to which they relate have been accurately investigated by the High Court and it would serve no useful purpose for their Lordships to travel over the same ground.

What has to be determined is the inference to be drawn from them as to the rules of succession relevant to the plaintiff's claim in this suit.

They corroborate the oral evidence that in this family custom is followed in matters of inheritance, and this, in their Lordships'

opinion, is established beyond controversy. So the present enquiry is not whether in relation to the particular succession now in question the ordinary personal law is superseded by a custom, but what is the customary rule that regulates it.

That there is a customary rule which entitled Barkat Ali's widows to succeed as heirs to his estate for limited interests is not disputed; it is equally clear that there is a rule of inheritance in this family which entitles brothers to succeed to the exclusion of sisters. Applying these two rules to the succession on the surviving widow's death, if Sarfaraz Ali had survived, he would have inherited Barkat Ali's property to the exclusion of his sisters. But Sarfaraz Ali was dead, and the plaintiff, his daughter, alleges that by the code of customary rules regulating succession in this family, the principle of representation is sanctioned, and she claims that by virtue of it she, as Sarfaraz Ali's daughter, in the absence of male issue, represents him and stands in his place. Their Lordships agree that representation is a part of the rules of succession in his family. It is settled by judicial decision that a son in matters of inheritance represents his deceased father, and the record discloses instances of succession in which a widow was recognized as the representative of her husband, and a daughter as the representative of a deceased uncle. It is thus shown that sex is not a bar to representation, but that widows and daughters in the absence of sons can claim the right in their favour.

But then it is said that no instance is proved of an actual succession by a brother's daughter, and therefore, it is argued, the necessary custom that precisely covers this case has not been proved. But if there be a rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and their Lordships hold that the High Court rightly decided in Nasib-ul-Nisa's favour. In their opinion, therefore, this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of this appeal.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent.—Messrs. *Rankin Ford & Chester.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 644 OF 1919.

February 1, 1924.

Present:—Mr. Rupchand Bilaram, A.J.C.

LAKHMICHAND ISARDAS—PLAINTIFF

versus

JOINT HINDU FIRM OF KHUSHALDAS-MANGATRAM—DEFENDANTS.

Hindu Law—Joint Hindu family—Ancestral trade—Manager, position of—Minor co-parcener, how far bound by acts of manager—Guardian, authority of—Contract entered into by guardian—Minor, whether can sue for specific performance—Natural guardian, power of.

Where a minor is a member of a joint Hindu family and as such entitled to a share in an ancestral trade, the manager of the family can, so long as it be beneficial to the minor, continue the trade on the minor's behalf. Minor members of the family are bound by acts of the manager which are necessarily incident to, and flowing out of, the carrying out such trade. [p. 118, col. 2.]

Ramlal Thakursidas v. *Lakhmichand Muniram*, 1 B. H. C. R. App. 51 at p. 71 and *Raghunathji Tarachand* v. *Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72 at p. 85; 11 Bom. L. R. 255, followed.

Petumdoss v. *Ramdhone Doss*, Taylor's Reports 279; 2 Ind. Dec. (o. s.) 168 and *Kishen Parshad* v. *Har Narain Singh*, 9 Ind. Cas. 739; 38 I. A. 45 at p. 51; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911) 2 M. W. N. 395 (P. C.), referred to.

Where the family trade is that of dealing in immoveable properties it would undoubtedly be an act necessarily incidental to the carrying on of such trade to sell property which had been purchased for the purpose of sale. Even if the general business of a family be not that of dealing in property but lending money on mortgages and if in the course of such business the family had to purchase properties in satisfaction of their debts in order to avoid loss, it would again be an act incidental to the carrying on of such trade to sell such property and convert it into cash when a favourable opportunity offers itself to the manager. [p. 119, cols. 1 & 2.]

A party filling a fiduciary character like that of a guardian is authorised to perform any act which is manifestly for the infant's benefit. [p. 120, col. 2.]

A manager of a joint Hindu family is competent to alienate property belonging to the joint family for purposes which are not only *necessary* but are *beneficial* to the joint family estate, so as to bind the interest of all co-parceners including minors. [p. 120, col. 1.]

(Case-law on the subject reviewed and discussed.)

Where the Hindu property alienated belongs exclusively to the minor, such alienation should be strictly and manifestly for his benefit alone. Where again the property alienated is co-parcenary property in which the minor is interested, the manifest benefit of the co-parcenary as creating the necessity is the test. [p. 122, col. 2.]

It is competent to a minor surviving co-parcener to enforce specific performance of a contract entered into by the deceased manager of the joint family for the benefit of the family estate. [p. 123, col 1.]

Kosuri Ramaraju v. *Ivalury Ramalingam*, 26 M. 74; 12 M. L. J. 400, *Srinivasa Reddi* v. *Sivarama Reddi*, 4 Ind. Cas. 506; 32 M. 320, *Hari Charan Kuar*

v. *Kaula Rai*, 40 Ind. Cas. 142; 2 P. L. J. 513; 1 P. L. W. 587; (1917) Pat. 201 and *Nochat Kizhakke Madathil Venkateswara Aiyar* v. *Kalloor Illath Raman Nambudri*, 33 Ind. Cas. 696 at p. 700; 3 L. W. 435; 19 M. L. T. 329, relied upon.

Although the appointment of a guardian by the Court supersedes the power of natural and testamentary guardians, the powers of a natural guardian in the absence of such appointment are unaffected by the restrictions which the Guardians and Wards Act places upon the powers of guardians appointed by the Court. The validity of his acts must be determined by the general principles which govern the relations of a minor to the manager of his estate or, in the words of the Guardians and Wards Act, he may do all acts which are reasonable and proper for the realization, protection, or benefit of the property. [p. 123, col. 2.]

It is not competent to the guardian of a minor surviving co-parcener to apply for Letters of Administration to the estate of the deceased co-parcener or to take out a succession certificate, as there would be no estate to administer and no estate to which the minor has succeeded by inheritance. [p. 123, col. 2.]

A minor cannot on attaining majority sue to enforce specific performance of a contract to sell land made on his behalf by his guardian, which is not binding on him. [p. 124, col. 1.]

When a suit has been instituted on the minor's behalf by his mother as his guardian to enforce specific performance of a contract which was binding on him and the minor on attaining majority elects under O. XXXII, r. 12, C. P. C., to continue the suit, it does not amount to instituting a fresh suit and his right to claim specific performance would be determined as on the date on which the suit was originally instituted. [p. 124, col. 1.]

Mr. *Kimatrai Bhojraj*, for the Plaintiff.

Mr. *Nadirshah Naoroji*, for the Defendants.

JUDGMENT.—Issues Nos. 1 and 2 in this case have been decided by me on the 2nd August 1923. Evidence has been led on the remaining issues.

Issue No. 4A is the main issue in the suit. It is contended by Mr. Kimatrai that the "Kulachar" of the family of Seth Issardas was trade and particularly money lending and purchasing and selling properties, and that in the course of such business Seth Isardas as the manager of the family had power to sell the property in suit which was purchased in execution of a mortgage-decree obtained by the family in the ordinary course of their money lending business Seth Assanmal died at the age of 70 years. He died somewhere between 1906 and 1907. There is no evidence to show what business Assanmal's father did or what property he left. Assanmal's books are not available being old and having evidently been destroyed, but several documents relating to the purchase and sale of land during his life time have been put in on behalf of the plaintiff as Exs. 17 to 30. There are also Exs. 5 and 7 relating to the property in suit, Ex. 5 being the Court sale certificate dated 14th October 1902, and Ex. 7 the mortgage-decree obtained by Assanmal and Issardas against their debtor in execution of which decree the property was sold. Exhibits 17, 19 to 23, 25 and 26 are documents of purchase. Exhibit 24 is a rent note and Exs. 27 to 30 are certified copies of sale-deeds. Exhibits 5, 17, 19 to 23 and 25 are purchases made in the names of both Assanmal and Issardas, Ex. 24 is a rent note executed in favour of both of them. Exhibits 27 to 30 are the deeds of sale executed by both of them. In Exs. 17, 19, 22, 25 and 27 both of them are described as Shroffs. In the other documents they have been described as traders or merchants. Besides the property in suit which was purchased by them in satisfaction of their mortgage-decree it would appear from Exs. 19 and 27 that Assanmal and Issardas did purchase other properties in satisfaction of their mortgage-debts or in execution of their mortgage-decrees. Jhamandas Ex. 9 has deposed that Seth Assanmal did business in money lending and buying and selling property and that when there was a slump in the land market, he purchased properties in liquidation of debts. It also appears from Exs. 28 to 30 that Assanmal and Issardas owned properties in partnership with others which they sold along with their partners in 1906. It is urged with some force that one of the ordinary incidents of money lending is to buy properties in satisfaction of debts and to sell such properties when a suitable opportunity offers itself, specially if such properties do not yield a proper return on the money invested. It may be noted that the mortgage-decree Ex. 7 Assanmal and Issardas were entitled to recover Rs. 1,388 costs and interest from the date of the decree to payment. They, however, purchased the property in suit for Rs. 1,260 only towards liquidation of their debt. During the lifetime of his father, Issardas did not confine himself to the business of money lending and buying and selling properties. He worked as a broker of Messrs. Ralli Brothers, as a piece-goods merchant and as a trader in several other lines. At the time of his death the immoveable properties left by Seth Issardas are said to be worth rupees forty lacs, ten of the properties being properties purchased in the name of Seth Assanmal, ten more in the joint names of Seth Assanmal and

Seth Issardas, and the remaining properties in the name of Seth Issardas. It is not disputed that after Seth Assanmal's death Seth Issardas continued the money-lending business of his father. Statements have been put in as Exs. 13 to 16 showing the sales and purchases made by him from 1907 to 1917. Exhibit 4 is a list of the properties purchased by him after his father's death showing that he purchased twenty properties of the value of about Rs. 2,17,800. Exhibit 16 is the list of properties purchased by him and again re-sold by him during his life time. It shows that he invested about Rs. 61,000 in their purchase and realized about Rs. 86,000 by their sale.

Exhibit 13 is the list of the properties purchased by his father and sold by him realizing about Rs. 1,51,000.

Exhibit 15 is the list of the properties purchased by him and his father or by his father alone and sold by him realizing about Rs. 3,04,000.

These lists have been prepared from Seth Issardas's books. They show that he sold two properties, Items Nos. 1 and 2 in Ex. 13 in 1907; two properties in Item No. 3 in Ex. 13 and Item No. 3 in Ex. 15 in 1909; one property Item No. 1 in Ex. 16 in 1910; one property Item No. 3 in Ex. 16 in 1911; three properties Item No. 4 in Ex. 16, Item No. 4 in Ex. 15 and Item No. 2 in Ex. 16 in 1912; one property Item No. 5 in 1916 and eight properties Item No. 5 in Ex. 13, Items Nos. 6 to 9 in Ex. 15, and Items Nos. 4, 5 and 6 in Ex. 16 in 1917, and that he purchased one property Item No. 12 in Ex. 14 in 1909, six properties Item No. 9 in Ex. 14, Item Nos. 1 to 4 and 8 in Ex. 16 in 1910, four properties Items Nos. 10, 11 & 13 in Ex. 14 and Item No. 5 in Ex. 16 in 1911, two properties Items Nos. 1 and 8 in Ex. 14 in 1912, two properties Items Nos. 1 and 15 in Ex. 14 in 1913, six properties Items Nos. 3 to 7 in Ex. 14 and Item No. 7 in Ex. 16 in 1916, and two properties Item No. 16 in Ex. 14 and Item No. 7 in Ex. 16 in 1917. Some of the properties were purchased by him in satisfaction of his claims for money advanced in the same way as the property in suit and other properties were purchased by him and his father in satisfaction of their debts. Even after his death the plaintiff was obliged to purchase three properties of the value of about one lac of rupees in satisfaction of the money advanced by Seth Issardas to his debtors.

The properties purchased and sold by Assanmal and Issardas and after Assanmal's death by Issardas include properties purchased by them in partnership with strangers to family, *e. g.* Items Nos. 1, 7, 9 to 11, 19, 20 in Ex. 14, Item No 9 in Ex. 15, and Items Nos. 2, 3, 4 to 6 in Ex. 10 and Exs. 28 to 30. This fact would also indicate that the properties so purchased were purchased with the intention of alienating them in the ordinary course of business. I am of opinion that Assanmal and Issardas carried on the business of money-lenders and of dealing in immoveable properties and that on the death of Assanmal, Issardas carried on the same business upto the time of his death.

The liability of minor co-parceners in an ancestral trade has been summarized by Travelyan on Minors at page 174, as follows:—

"Where a minor is a member of a joint Hindu family and as such entitled to a share in an ancestral trade, the manager of the family can so long as it be beneficial to the minor continue the trade on the minor's behalf. Minor members of the family are bound by the acts of the manager which are necessarily incident to and flowing out of, the carrying out such trade."

In the leading case of *Ramlal Thakursidas* v. *Lakhmichand Muniram* (1). Sausse, C. J., made the following observation: "The case of *Petumdoss* v. *Ramdhone Doss* (2) before Sir L. Peel, is an authority that an ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family; and we think that such family can by its managers....enter into the co-partnership with a stranger.

"In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the carrying on of that trade.....The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade.....Were such a power not implied, property in a family trade which is recognised by Hindu Law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned, for no one would deal with a manager, if the minors were to be

(1) 1 B. H. C. R. App. 51 at p. 71.
(2) Taylor's Reports 279; 2 Ind. Dec. (o. s.) 168.

at liberty on coming of age to challenge as against third parties the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest, and the recognition of a trade, as inheritable property, renders it necessary for the general benefit of the family that the protection, which the Hindu Law generally extends to the interests of a minor, should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation *of that family property*, but that infringement is not to be carried beyond the actual necessity of the case". As said by Chandarvarkar, J., in *Raghunathji Tarachand* v. *Bank of Bombay* (3), this leading decision by Sausse, C. J., has admittedly been accepted as good law ever since 1861. In *Kishen Parshad* v. *Har Narain Singh* (4) their Lordships while dealing with the right of the managing member of a Mitakshara Joint Hindu family to sue the defendants for the balance of an account which had been stated between the parties observed that "though the Indian decisions as to the powers of the managing members of an undivided Hindu joint family are somewhat conflicting, it is, however, clear that where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all". No doubt it is not easy to draw at once a defined line between what is and what is not an act necessarily incident to the carrying of a trade, but where the family trade is that of dealing in immoveable properties it would undoubtedly be an act necessarily incidental to the carrying on of such trade to sell property which had been purchased for the purpose of sale. Even if the general business of a family be not that of dealing in property but lending money on mortgages and if in the course of such business the family had to purchase properties in satisfaction of their debts in order to avoid loss, it would again be an act incidental to the carrying on of such trade to sell such property and convert it into cash when a favourable opportunity offers itself to the manager.

The business carried on by Assanmal and Issardas became ancestral in the hands of Issardas. If such business was of dealing in property, Issardas undoubtedly had the power to sell the property in suit, even if it was money-lending the property in suit was purchased as an incident of this business and in satisfaction of the decree. It was not a family residential house. It was fetching Rs. 15 per mensem as rent and in a dilapidated condition. The money which could otherwise have been utilized in the money-lending business was locked up yielding a small recent. According to the evidence, Issardas was realizing at the time of the sale nine per cent. interest on mortgage securities and the price of Rs. 8,750 for which it was being sold would fetch over Rs. 60 per month. The reconversion of this property which was a trade asset into money was highly beneficial to the money-lending business and an act within his power.

The defendants themselves did not consider that Issardas was incompetent to sell the property in suit. The defendant Jeyramdas states in clear terms that "if Seth Issardas had been alive at that time and had conveyed the property to us we would have taken it". The reason assigned by him for refusing to accept a conveyance from the guardian of the minor was not that Issardas had no power to sell land, but the advice given to him after Issardas' death that "as Issardas was dead they should not take a conveyance unless a power was obtained from the Court" authorizing the mother to sell the property. Even in their written statement the defendant did not object to the power of Seth Issardas to sell the property. It was on the 19th of July 1923, five years after the death of Seth Issardas, that it dawned on the defendants to dispute the right of Issardas to sell the property.

It is further urged by Mr. Kimatrai that even if Seth Issardas was not competent to sell the property as manager of a family business, the sale by him was highly beneficial to the estate and that he was, therefore, competent to sell the property.

In the case of *Hanoomanpersaud Panday* v.

(3) 2 Ind. Cas. 173; 34 B. 72 at p. 85; 11 Bom. L. R. 255.

(4) 9 Ind. Cas. 739; 38 I. A. 45 at p. 51; 15 C. W. N. 321; 8 A. L J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911) 2 M. W. N. 395 (P. C.).

Babooee Munraj Koonweree (5) the Privy Council held that "the power of the manager for an infant heir to charge an estate not his now, is, under Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate." Commenting on this ruling Trevelyan in his Law of Minors (1916 Edition) states at page 154 as follows: "This would seem to show that the manager can charge or alienate the minor's estate on the ground of benefit in addition to that of necessity. There have been, since the decision of the Privy Council in *Hanoomanpersaud Panday's case* (5), a very large number of decisions of the High Courts in India applying the principles laid down in that case, but, except the recent case of *Krista Chandra Chowdhury* v. *Ratan Ram Pal* (6), so far as the writer is aware there is not any case where the sale of a minor's property has been upheld except on the ground of its being justified by the necessities of the minor or of his estate. Apart from necessity, it is not easy to say what is for the benefit of the minor's estate. It is clearly not intended that this power should authorise the guardian to sell or charge the inheritance for the purpose only of increasing the immediate income of the minor or of his estate, see *Radha Pershad Singh* v. *Talook Raj Kooer* (7), *Kaihur Singh* v. *Roop Singh* (8), or for developing the estate cf *Ganap* v. *Subbi* (9).

And in the Note (1) to that passage he states that:—

"Perhaps the right way of reading the dictum in *Hunoomanpersaud Panday's case* (5) is in the words of the Bengal Sudder Court in the case of *Gooroopersand Jena* v. *Muddunmohun Soor* (10), which was decided shortly after *Hunoomanpersaud Panday's case* (5), but without reference to that case and probably before the Privy Council judgment could have reached Calcutta"....."The benefit of the minor as creating the necessity is the test by which the legality of the transaction must be tried; but setting authority aside and looking only to the reason of the thing, it seems to us that the rule in such cases as that now before us is that a party filling a fiduciary character like that of a guardian is authorized to perform any act which is manifestly for the infant's benefit.

During recent years the validity of an alienation by the manager for the benefit of the minor without absolute necessity has been the subject of several judicial decisions. In *Krista Chandra Chowdhury's case* (6) referred to above, the Calcutta High Court upheld a sale by the father of an infinitesimal share of an infant in the property, it being found as a fact that such share constituted an inconvenient and expensive property and that the transaction was one which a prudent man would have entered into. In *Ishani Dasi* v. *Rajendranath Jash* (11) it was held that the guardian was not limited to making such disposition as he is compelled to make by necessity. *In re Krishnasawami Doss* (12). Sundara Aiyar, J., held that "a Hindu father or manager is competent to sell the joint family lands for the purpose of purchasing other lands if the sale does not injuriously affect the interests of the other members of the family and the issue in such cases should be 'whether the sale was proper and reasonable act' instead of 'whether the sale was for actual necessity.'" In *Ganesa Aiyer* v. *Amirthasamiodayar* (13). Bench of the Madras High Court consisting of Wallis, C. J., and Kumaraswami Sastri, J., held that an alienation of the family property by the manager is justifiable if there is clear benefit to the family, but the starting of a prospective trade is not a justifiable ground whether the family is a trading or non-trading one. In *Pitambar Lal* v. *Sital* (14), the Allahabad High Court upheld a mortgage of family property to raise a loan for the purchase of another property when such purchase was shown to be for the benefit of the family. In *Tula Ram* v. *Tulshi Ram* (15) the same Court upheld a mortgage for the ostensible reason of raising a loan to purchase a *zamindari* for the benefit of the family. In *Manna Lal* v. *Karn Singh.* (16) the ques-

(5) 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.
(6) 35 Ind. Cas. 673; 20 C. W. N. 645; 23 C. L. J. 432.
(7) 20 W. R. 38.
(8) 3 N. W. P. H. C. R. 4.
(9) 32 B. 577; 10 Bom. L. R. 927.
(10) 12 S. D. A. R. 980; 15 Ind. Dec. (o. s.) 371.
(11) 48 Ind. Cas. 303; 23 C. W. N. 858; 28 C. L. J. 250.
(12) 13 Ind. Cas. 648; (1912) M. W. N. 167; 11 M. L. T. 182.
(13) 44 Ind. Cas. 605; 23 M. L. T. 245; (1918) M. W. N. 892.
(14) 25 Ind. Cas. 263; 12 A. L. J. 641.
(15) 60 Ind. Cas. 3; 42 A. 559; 18 A. L. J. 699.
(16) 56 Ind. Cas. 766; 1 P. L. T. 6; 13 L. W. 652; 39 C. L. J. 256 (P. C.).

tion at issue before their Lordships was whether the mortgage executed by the *karta* to raise a loan in order to enable him to pay a premium on a lease which the *karta* had taken for the benefit of family their Lordships held in the affirmative and thereby incidentally affirmed the right of the *karta* to borrow money for the purchase of property. In *Sahu Ram Chandra* v. *Bhup Singh* (17) while dealing with the liability of a son for the debts of his father Lord Shaw has made the following observations:

"The law of Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to affect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *muth*, or in the guardian of an infant. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interest justified, the expenditure, then those entitled to the estate are bound by the transaction."

The ruling in *Sahu Ram's case* (17) has been discussed by Das, J., in *Sheotahal Singh* v. *Arjun Das* (18), and has been distinguished on the grounds firstly that the term deliberately used by Lord Shaw was "necessary purposes" which was wider than the terms necessity, and secondly, that it was not suggested in that case that the joint family was in any way benefited and consequently it was not necessary for the Judicial Committee to discuss the point in question. In this case the manager had raised a loan on a mortgage of the family property to pay the *premia* of a lease for seven years taken by him for the benefit of the family and the mortgage was held to be binding on the minors. In *Ram Bilas Singh* v. *Ramyad Singh* (19), the Patna High Court re-affirmed the *dictum* that actual compelling necessity was not the sole test of the validity of an alienation of the family estate by the manager. In *Kalka Nand Singh* v. *Shiva Nandan Singh* (20), the Patna High Court has again reiterated the same view. In *Nagindas Maneklal* v. *Mahomad Yusuf Mitchela* (21), the Bombay High Court upheld the sale of a family house when there was no necessity for such sale and when the house was not required for the family, would have fetched no rent and being in a ruinous condition had been ordered to be demolished and ordered specific performance of the contract to convey the property though it was objected to by the minor co-parceners. In the course of his judgment, Shah, J., said as follows at page 1097.*

"It is also found that the house was in a dilapidated condition, and the defendants had received notice from the Municipality to pull it down. Under these circumstances two adults members of the joint family agreed to sell this house. I do not desire to attempt to lay down any general rule as to what would constitute necessity, and as to when a Hindu father or the co-parcener may deal with the ancestral estate for the obvious benefit of the family so as to bind the minor members. Even taking it that such power to alienate can be exercised only when a clear case of necessity is made out, I think that the term 'necessity' must not be strictly construed. The benefit to the family may under certain circumstances mean a necessity for the transaction. In construing the expressions used by Vijnanesvara in the Mitakshara to explain the verse which he has quoted with approval on this point, regard must be had to the word used in that verse (see Mitakshara, Ch. I, s. 1, paras. 28 and 29; Stokes' Hindu Law Books, page 370). The expressions used must be interpreted with due regard to the conditions of modern life. I am not at all sure that Vijnanesvara intended to curtail the scope of the word while explaining it. I do not see any reason why a restricted interpretation should be placed upon the word 'necessity' so as to exclude a case like the present in which defendants Nos. 1 and 2 on all the facts proved properly and wisely decided to get rid of

(17) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.).

(18) 56 Ind. Cas. 879; 1 P. L. T. 136; (1920) Pat. 155.

(19) 58 Ind. Cas. 303; 1 P. L. T. 535; 5 P. L. J. 622; 2 U. P. L. R. (Pat.) 228.

(20) 63 Ind. Cas. 625: 3 P. L. T. 149; (1922) A. I. R. (Pat.) 122.

(21) 64 Ind. Cas. 923; 23 Bom. L. R. 1094; 46 B. 312; (1922) A. I. R. (B.) 122.

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the property which was in such a state as to be a burden to the family".

In the recent ruling of *Brij Narain Rai* v. *Mangla Prasad Rai* (22) their Lordships while reviewing the case law on the subject of the liability of the son for the debts of his father have laid down *inter alia* the proposition that the managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity. It may be noted that this *dictum* applies equally to the non-consenting adults and to the minor co-parceners, and purposes of necessity have not been defined nor limited to purposes specifically mentioned in the Mitakshara.

I venture to submit that the expression "for purposes of necessity" used by their Lordships does not purport to overrule the various decisions of the High Courts in India or the decision of the Judicial Committee in *Manna Lal* v. *Karu Singh* (16), which have upheld alienations by managers for objects which are beneficial to the family as a whole and thereby incidentally to the minors, and not such as are limited to warding off a calamity on the family for the maintenance of the family or for performing indispensable duties such as obsequies of the father, expenses of marriage and the like which are considered unavoidable under the Hindu Law.

In my opinion the expressions "for need or for benefit of the family" in *Hunoomanpersaud Panday's case* (5), "for necessary purposes" in *Sahu Ram's case* (17) and "for purposes of necessity" in *Brij Narain's case* (22), do not purport to lay down any different rule of law. In *A. G.* v. *Walker* (23), Pollock, C. B., has said that "it may probably as a general rule be stated that those things are 'necessary' to the doing of a thing which are reasonably required or legally ancillary to its accomplishment, where the object of the act is the proper management of the estate of the minor or of the joint family as the case may be, all acts which are reasonably required or legally ancillary to such object would be necessary. In the words of the decision of the Sudder Dewani Adault in 1856 in *Gooroopersaud's case* (10), the benefit of the minor as creating the necessity is the test by which the legality of the transaction must be tried. Where the Hindu property alienated belongs exclusively to the minor, such alienation should be strictly and manifestly for his benefit alone. Where again the property alienated is co-parcenary property in which the minor is interested, the manifest benefit of the co-parcenary as creating the necessity is the test. In applying this test to an alienation by a managing co-parcener the Court would not apply the same strict test as in the case of an alienation by the guardian of an infant and would no doubt take into account the fact that the managing co-parcener is himself a joint owner of the property and as a prudent owner has considered it necessary to alienate the property. To hold otherwise would be to strike a heavy blow at the root of the joint family system. It is not open to the manager of a co-parcenary to apply under the Guardian and Wards Act VIII of 1890, to be appointed guardian of the property of minor co-parceners. Cf. *Re Jhiram Lukmon* (24), *In re Jagannath Ramji* (25), *In re Manilal Hurgovan* (26), *Gharib-ullah* v. *Khalak Singh* (27). Though it may perhaps be open to the managers in a Presidency Town to apply to a Chartered High Court under its extraordinary jurisdiction to sanction an intended sale, see *In re Manilal Hurgovan* (26), *In re Shirinbai* (28), and to sell the property under the anthority of such sanction, it would not be possible for them to sell or otherwise alienate any single item of the co-parcenary property in the *moffusil* unless they come to a partition with the minor co-parceners and have such item allotted to their share at such partition.

I am of opinion that it was open to Seth Issardas to alienate the property in suit so as to bind the plaintiff even if the family was a non-trading family. There can be no allegation that Seth Issardas who expanded and developed the joint family property did not act as a prudent man for the sale of the property in suit and that the sale was not beneficial to the estate.

(22) 77 Ind. Cas. 689; 46 M. L. J. 23; 21 A. L. J. 934; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

(23) (1849) 18 L. J. Ex. 179.

(24) 16 B. 634; 8 Ind. Dec. (N. S.) 901.

(25) 19 B. 96 at p. 97; 10 Ind. Dec. (N. S.) 64.

(26) 25 B. 353; 3 Bom. L. R. 411.

(27) 25 A. 407; 30 I. A. 165; 7 C. W. N. 681; 5 Bom. L. R. 478; 8 Sar. P. C. J. 483 (P. C.).

(28) 49 Ind. Cas. 882; 43 B. 519; 21 Bom. L. R. 41.

This case may also be looked at from another aspect. If Seth Issardas had conveyed the property in suit, the plaintiff could not have got the sale set aside, as the purchaser could enforce a partition between the father and the son, and have the property in suit allocated to Seth Issardas. If it suited the defendants to sue for specific performance of the contract to convey the property in suit during the life time of Seth Issardas, he having agreed to sell the whole of it as its ostensible owner and not as manager on behalf of himself and the plaintiff, the defendant could get a decree for specific performance of the contract as against him, it being left open to the minor plaintiff to dispute the validity of the transaction. See *Kosuri Ramaraju* v. *Ivalury Ramalingam* (29), *Srinivasa Reddi* v. *Sivarama Reddi* (30), *Hari Charan Kuar* v. *Kaula Rai* (31). It would equally be open to the defendants to enforce specific performance of this contract after the death of Seth Issardas. "There is no justification in reason or authority for the proposition that the liability of a Hindu co-parcener as regards executory contracts (*e. g.*, to sell land) is different from his liability as to executed contract" per Sheshagiri Aiyar, J., in *Nochat Kizhakke Madathil Venkateswara Aiyar* v. *Kalloor Illath Raman Nambudri* (32). Seth Issardas himself could if alive have enforced the contract, the property purported to be alienated being infinitesimally small in comparison to his share. Is there any reason why the plaintiff cannot enforce specific performance of the contract in suit which is highly beneficial to him unless he shows that Seth Issardas was in debt and alienated it in order to discharge such debt?

I hold on Issue No. 4A that the property in suit was acquired by the joint family in the course of the family business; that it was joint family property; and that Seth Issardas was competent to sell the same so as to bind the plaintiff.

Issue No. 3. Either the contract in suit was binding on the minor plaintiff or it was not. If the former, then according to Hindu Law the guardian of the minor, had every right to execute the deed of conveyance in favour of the defendants.

"Although the appointment of a guardian by the Court supersedes the powers of natural and testamentary guardians, the powers of a natural guardian in the absence of such appointment are unaffected by the restrictions which the Guardians and Wards Act places upon the powers of guardians appointed by the Court. The validity of his acts must be determined by the general principles which govern the relations of a minor to the manager of his estate or, in the words of the Guardians and Wards Act, he may do all acts which are reasonable and proper for the realization, protection, or benefit of the property" See Trevelyan on Minors page 151. There was no obligation on the guardian to obtain the alleged "letters of representation" or obtain a sanction from the Court. The plaintiff had become entitled to the whole property by right of survivorship. It was not possible for the guardian to apply for Letters of Administration of the estate of Seth Issardas or to take out a succession certificate, as there was no estate to administer and no estate to which the minor had succeeded by inheritance. Even if such letters or certificates could be obtained, it would be imprudent for the guardian to pay heavy Court-fees on the value of the estate in order to enforce a contract for specific performance of land valued at Rs. 8,750. An application for guardianship of the minor plaintiff under the Guardians and Wards Act, would also not serve the required purpose. The Court could not sanction the sale on behalf of the minor plaintiff as the guardian was not entering into a contract of sale on behalf of the minor. He would only be conveying the property which the father had validly contracted to sell. In guardianship proceedings the Court could not inquire into the validity of an agreement which had been made by the father. If on the other hand the contract of the father was not binding on the minor, there was no occasion for the guardian if appointed under the Act to apply for sanction to sell the property, and if the land market was rising the Court could not grant such sanction.

I hold on this issue against the defendants.

Additional Issue No. 1. If Seth Issardas had no power to sell the interest of the plaintiff in the properties, it would follow

(29) 26 M. 74; 12 M. L. J. 400.
(30) 4 Ind. Cas. 506; 32 M. 320.
(31) 40 Ind. Cas. 142; 2 P. L. J. 513; 1 P. L. W. 587; (1917) Pat. 201.
(32) 33 Ind. Cas. 696 at p. 700; 3 L. W. 435; 19 M. L. T. 329.

that the plaintiff could not ratify the contract on attaining majority or obtain specific performance of such contract. In *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (33), Lord Macnaughten in delivering the judgment of their Lordships of the Privy Council made the following observations:—"They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract." The same reasoning should, in my opinion, apply to a suit by a minor who has attained majority, to enforce specific performance of a contract to sell land made on his behalf by his guardian which is not binding on him the minor in this case is not enforcing the contract which was not binding on him, nor is he for the first time enforcing it after a lapse of three years. The suit was instituted on his behalf by his mother as his guardian to enforce specific performance of a contract which was binding on him. By electing under O. XXXII, r. 12, C. P. C., to continue the suit instituted on his behalf by his next friend, the plaintiff is not instituting a fresh suit. His right to claim specific performance would be determined as on the date on which the suit was originally instituted. I hold on this issue against the defendants.

Additional Issue No. 2. According to the evidence of Jhamandas Ex. 9 and Jethanand Ex. 10, Changomal the then manager of the joint family of the defendants refused to take a conveyance of the property till the claim of the defendants in respect of certain sugar transactions against the firm of Jhamandas Issardas in which Seth Issardas was a partner was settled and paid up. The defendant Jeyramdas Ex. 31 admits that Jamandas did ask Changomal to pay the balance of the purchase-money and to take conveyance of the property (lines 50 to 60) and that Jhamandas made a similar request to him after the death of Changomal (line 100). He further admits that their firm had a claim against the firm of Jhamandas Issardas in respect of certain sugar dealings. He asserts that the refusal of the defendant to complete the transaction was due to the fact that he was advised not to take a conveyance from the guardian of the minor plaintiff till the Letters of Administration or a guardianship certificate was obtained, but he does not remember whether he consulted the Pleader from whom he got this advice before or after the institution of this suit (line 85). He admits that he did speak to Jhamandas to settle their claim of sugar, but with regard to his refusal to complete the sale till his sugar claim was settled, he gives an evasive reply (lines 120 to 130).

I see no reason to disbelieve the evidence of Jhamandas and Jehhanand. I am of opinion that the defendants put off taking a conveyance from the minor in the hope of compelling the plaintiff to settle and pay the claim in respect of sugar which was not being settled owing to the quarrel between Lakhmichand a partner of the firm of Jhamandas-Issardas and the guardian of the minor. The defendants had no justification to refuse to complete the transaction which had nothing to do with their sugar dealings. I hold that the defendant are not entitled to the return of the earnest money.

Additional Issue No. 3. In his cross-examination the defendant Jeyramdas had made the following admission :—

"We made the contract and we were personally bound to carry out the contract in suit. The plaintiff had nothing to do with Pamanmal".

In view of this admission, I hold on this issue against the defendants.

Issue No. 5. According to the contract the balance of the purchase-money was to be paid by 7th April 1918, Seth Issardas died on the 28th February 1918, within twenty one days of entering into this contract. This suit was instituted on the 1st May 1919 within thirteen months of the date on which the purchase-money was payable. During this interval the defendants did not give any notice to the plaintiff's guardian calling upon him to complete the sale. According to their own story they kept the contract open.

According to the plaintiff's witnesses the defendants did not refuse to complete the

(33) 13 Ind. Cas. 331; 39 I. A. 1 at p. 6; 16 C. W. N. 74; 5 M. L. T. (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 L. J. 232 (P. C.); 10 C. L. J. 232; 21 M. L. J. 1156; 11 M. L. T.

(23) (1849) 18 L. J. P

sale, but put off completing it in the hope that their claim in respect of sugar may be settled and paid. It is the case of the defendants that the market was rising during this period and that they did not refuse to complete the bargain, but requested the plaintiff's guardian to obtain a Court certificate to convey a good title to them. The defendants do not urge that they were prejudiced by the delay in the institution of the suit. Jeyramdas states that in 1919, the land market had a rising tendency (line 10). If Jeyramdas is to be believed and if since the institution of the suit the land market has gone down by 60 to 75 per cent. the delay of the Court in the disposal of the suit should not prejudice the plaintiff. I am of opinion that is fit case for decreeing specific performance. I hold that the plaintiff is entitled to specific performance.

Issue General. Mr. Nadirshah has strenuously urged that as there was a possibility of the minor plaintiff disputing the contract in suit, the right of Seth Issardas to convey the property was not free from reasonable doubt and the defendants were, therefore, justified in refusing to take a conveyanance. He has quoted a number of English and Indian rulings dealing with the question of what is marketable title. It is not necessary for me to discuss the various rulings, but to refer to the decision in *Haji Oosman Haji Ismail* v. *Haroon Salleh Mahomed* (34) where the defendant resisted a suit for specific performance of a contract to purchase land on the ground that his vendor was a Kutchi Memon and that his son might on attaining majority dispute the right of the father to convey the property relying on an alleged custom that Kutchi Memons were governed by the rules of Hindu Law relating to joint family property, Shah, Ag. C. J. observed at page 985* as under.

"But the test in all these matters is, as pointed out in Fry on Specific Performance, whether the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable or, as it was put by.....*Cattell* v. *Corrall* (35) whether there is 'a reasonable, decent probability of litigation. The question is whether there is a reasonable and decent probability of litigation on that point against the purchaser or whether it is of such a remote character that it should not be considered to create any reasonable doubt. While I concede that it is possible that the son of a Kutchi Memon may hereafter seek to establish such a custom as would give him a vested interest by birth in the property of his father, I am not prepared to hold that there is any decent and reasonable probability of such a claim being made."

The question whether there was "a reasonable, decent probability of litigation in the present case" can only be answered in the negative. Seth Issardas has undoubtedly a marketable title to the property, he was a trader and a money-lender to the knowledge of the plaintiff and not a speculator or a gambler, his estate was extensive and the property in suit could easily be allocated to his share. The defendants were prepared to take a conveyance from him; they were not advised to raise an objection as to the right of Seth Issardas to covey the property and did not raise it till 1923. It is impossible to hold that there was any reasonable, decent probability of the plaintiff disputing the conveyance. I hold that the plaintiff is entitled to specific performance of the contract. As the plaintiff is enjoying the rents of the property, I disallow his claim for interest up to the date of the decree in this suit. I hold that he is entitled to interest from the date of the decree in this suit to payment, and that he in his turn should render an account of the rents realized from this date to delivery of possession.

I, therefore, decree that the defendant do pay to the plaintiff Rs. 8,250-0-0 (rupees eight thousand two hundred and fifty only) with interest from this date to payment, and costs of this suit, and that the plaintiff do convey the property in suit to the defendants and do account to them for rents after this date.

K. S. D. *Order accordingly.*

(34) 68 Ind. Cas. 862; 24 Bom. L. R. 978; (1923) A. I. R. (B.) 148; 47 B. 369.

(35) (1840) 4 Y. & C. 228 at p. 237; 9 L. J. (N. S.) Ex. Eq. 37; 54 R. R. 483; 160 E. R. 989.

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NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 82 OF 1922.

October 24, 1924.

Present:—Mr. Hallifax, A. J. C.

D. B. BALLABHDAS AND OTHERS —DEFENDANTS—APPELLANTS

versus

PUNA BAI—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), ss. 100, 105, Sch. II, Arts. 5, 9 –Lease of sir *land—Subsequent sale of proprietary rights—Assignment of rights of lessee in favour of purchaser of proprietary rights—Occupancy rights, creation of—Suit to recover possession by occupancy tenant on expiry of period of lease—Limitation—Jurisdiction of Civil Courts.*

Plaintiff, who was the owner of a certain area of *sir* land, gave a lease of the cultivating rights therein to one *N* for twenty years. During the term of that lease the defendant purchased from the plaintiff the proprietary rights in the land without the cultivating rights in the *sir*, and he subsequently obtained an assignment of the remnant of the rights of *N* in the lease. Within two years of the expiry of the period of the lease plaintiff sued to recover possession of the land from the defendant on the ground that she was entitled to possession as an occupancy tenant in the land:

Held, (1) that when the defendant purchased the proprietary rights the plaintiff became an occupancy tenant and *N* became a lessee of the plaintiff:

(2) that by the assignment of *N*'s rights in favour of the defendant the latter became the lessee of the occupancy rights under the plaintiff;

(3) that on the expiry of the period of the lease the plaintiff was entitled to resume possession of the land as occupancy tenant, and that her suit having been brought within two years of the expiry of the period of the lease, it was not barred by time;

(4) that the suit was triable by a Civil Court.

Section 100 of the C. P. Tenancy Act, I of 1920, provides only a substitute in the case of a tenant for a suit under s. 9 of the Specific Relief Act, that is to say, it provides an alternative remedy which the tenant may pursue or not at his option. In an application under that section the Revenue Officer, like the Civil Court in a suit under s. 9 of the Speceific Relief Act, does not go into the questions of title and all that he is empowered to determine is the right to immediate possession. [p. 127, col. 1.]

Appeal against the decree of the Additional District Judge, Jubbulpore, dated the 20th June 1922, in Civil Suit No. 92 of 1922.

Sir *B. K. Bose*, Messrs. *M. Gupta*, *V. Bose*, and *W. R. Puranik*, for the Appellants.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—The plaintiff Puna Bai was the owner of an eight-anna share in the village of Natwara, including about 140 acres of *sir*. On the 23rd of October 1896 she gave a lease for twenty-one years of the proprietary share and the cultivating rights in the *sir* to Nabi Ahmad and Naqi Ahmad. In 1901 during the term of that lease the proprietary share without the cultivating rights in the *sir* was bought by Raja Gokuldas the defendants' predecessor-in-title, and on the 6th of April 1906 he obtained also an assigment of the remnant of the rights of the Nabi Ahmad and Naqi Ahmad in the lease to which his own rights by purchase in 1901 were naturally and expressly subject.

The position of the parties seems simple. When Raja Gokuldas bought the proprietary share in 1901 Puna Bai became an occupancy tenant of all the *sir* land and Nabi Ahmad and Naqi Ahmad were thereafter lessees from the Raja of the proprietary share and lessees from Puna Bai, the occupancy tenant of the land, which continued to be recorded as *sir*. Whether it should have been so recorded or not is a matter with which we are not concerned. Then in 1901 when Raja Gokuldas stepped into the shoes of Nabi Ahmad and Naqi Ahmad he became his own lessee of the proprietary right and the merger of which so much has been said in this case came into operation in respect of the proprietary right.

But Raja Gokuldas did not become his own lessee of the *sir* he became what Nabi Ahmad and Naqi Ahmad were before him, lessee of the occupancy tenant Puna Bai. There could, therefore, be no merger of the occupancy rights. That can happen only when the term and the immediate reversion are in the same person, as they were in respect of the proprietary share; but in respect of the occupancy rights in the *sir* though the term was in Raja Gokuldas the immediate reversion was not in him but in Puna Bai. Confusion of thought is apt to arise from the fact that the lessee is the lessor's lessor, but that makes no difference. Puna Bai was the owner of the occupancy rights which were leased, and ownership of other rights in the same land could not make Raja Gokuldas owner of those rights or anything but a lessee of them.

The lease of the occupancy rights granted by Puna Bai to Nabi Ahmad and Naqi Ahmad and transferred by them to Raja Gokuldas expired on the 1st of June 1917, and it was only on the expiry of that lease that she became entitled to resume possession as occupancy tenant. This possession she claimed in the present suit on the 6th of January 1919, that is, well within two years of the time at which she first became entitled to do so. The suit is, therefore, within time.

The suit is also triable by a Civil Court unless s. 100 of the Tenancy Act puts the matter within the jurisdiction of a Revenue Officer, in that case s. 105 of the same Act would put it outside that of a Civil Court. The words of the first proviso of s. 100 seem to suggest that the tenant must first apply to a Revenue Officer and, therefore, cannot because of s. 105, go to a Civil Court till his application has been rejected. It seems clear, however, from proviso (2) of s. 100 and also from the Schedule of periods of limitation attached to the Act, that s. 100 provides only a substitute in the case of a tenant for a suit under s. 9 of the Specific Relief Act, that is to say, an alternative remedy which he may pursue or not at his option.

Article 5 of the Schedule states the period within which the landlord must file a regular suit to establish his title if the Revenue Officer's decision is against him, but the Schedule does not mention a similar suit by the tenant. On the contrary Art. 1 gives the tenant a starting point for his regular suit which is the same as that given him by Art. 9 for his application under s. 100. In an application under that section the Revenue Officer like the Civil Court in a suit under s. 9 of the Specific Relief Act does not go into questions of title and all that he is empowered to determine is the right to immediate possession. It is manifest then that the jurisdiction of the Civil Court in the present suit is not ousted by ss. 100 and 105 of the Tenancy Act.

The decree of the lower Court is correct and must be confirmed. The appeal, therefore, fails and will be dismissed. The appellants must pay all the costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 9 OF 1924.

April 3, 1925.

Present :—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Musammat KALKA DEVI—PLAINTIFF—APPELLANT

versus

Chaudhri GANGA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by manager—Consent of co-parceners, effect of—Debt incurred for purpose of prosecuting litigation—Necessity—Pious duty of sons to pay their father's debts, whether arises during the lifetime of father—Appeal—Point of law raised on earliest possible opportunity, whether can be entertained.

A debt contracted by the managing member of a joint Hindu family for the purpose of prosecuting a litigation cannot be regarded as having been incurred for a necessary purpose. [p. 128, col. 2.]

The assent of a member of a joint Hindu family to an alienation made by the managing member of the family is only evidence of justifiable family necessity and is of no avail except by way of estoppel when admittedly there was no family necessity. [p. 129, col. 1.]

It is the pious duty of Hindu sons to pay their father's debts, and the duty arises even during the lifetime of the father. [p. 129, col. 2.]

A plea relating to a point of law raised by an appellant before an Appellate Court at the earliest possible opportunity should be entertained. [p. 130, col. 1.]

Appeal from a decree of the Subordinate Judge, Sitapur, dated the 25th October 1923.

Messrs. *Niamat Ullah*, *Ishri Prasad* and *Gokal Prasad*, for the Appellant.

Messrs. *A. P. Sen*, *Bisheshwar Nath Srivastava* and *Chand Narain Harkauli*, for Respondents Nos. 2 to 7.

JUDGMENT.—*Musammat* Kalka Devi wife of Babu Ishri Prasad a local Pleader, sued in the Court of the Subordinate Judge of Sitapur for sale on foot of a mortgage dated 4th March 1915. The deed was executed by the defendant Ganga Bakhsh Singh, defendant No. 1, whose sons are Dwarka Nath Singh, Ajodhya Nath Singh, Tribhuwan Nath Singh and Janki Nath Singh, defendants Nos. 2 to 5. *Musammat* Rani Bitiya, wife of Ganga Bakhsh Singh was also impleaded as a defendant because subsequent to the mortgage there had been a partition and Ganga Bakhsh Singh's wife had been allotted $\frac{1}{6}$th share. The other parties to the suit were a daughter, two subsequent transferees and a Receiver of the property of Ganga Bakhsh Singh, who had been declared an insolvent by the District Court. The lower Court passed a decree for sale against $\frac{1}{6}$th share at present belonging to Ganga Bakhsh Singh subsequent to the partition. The suit was dismissed as against the sons, wife and daughter, and the plaintiff has appealed in consequence.

The grounds of appeal were :—

(1) that the property at the time of the mortgage was the absolute property of Ganga Bakhsh Singh, in which his sons had no interest :

(2) that there was legal necessity for the debt;

(3) that the defendants Dwarka Nath Singh and Ajodhya Nath Singh had consented to the transfer;

(4) that the defence of the sons was barred by the principles of s. 41 of the Transfer of Property Act;

(5) that the share of the wife of Ganga Bakhsh Singh was in any case liable to be sold;

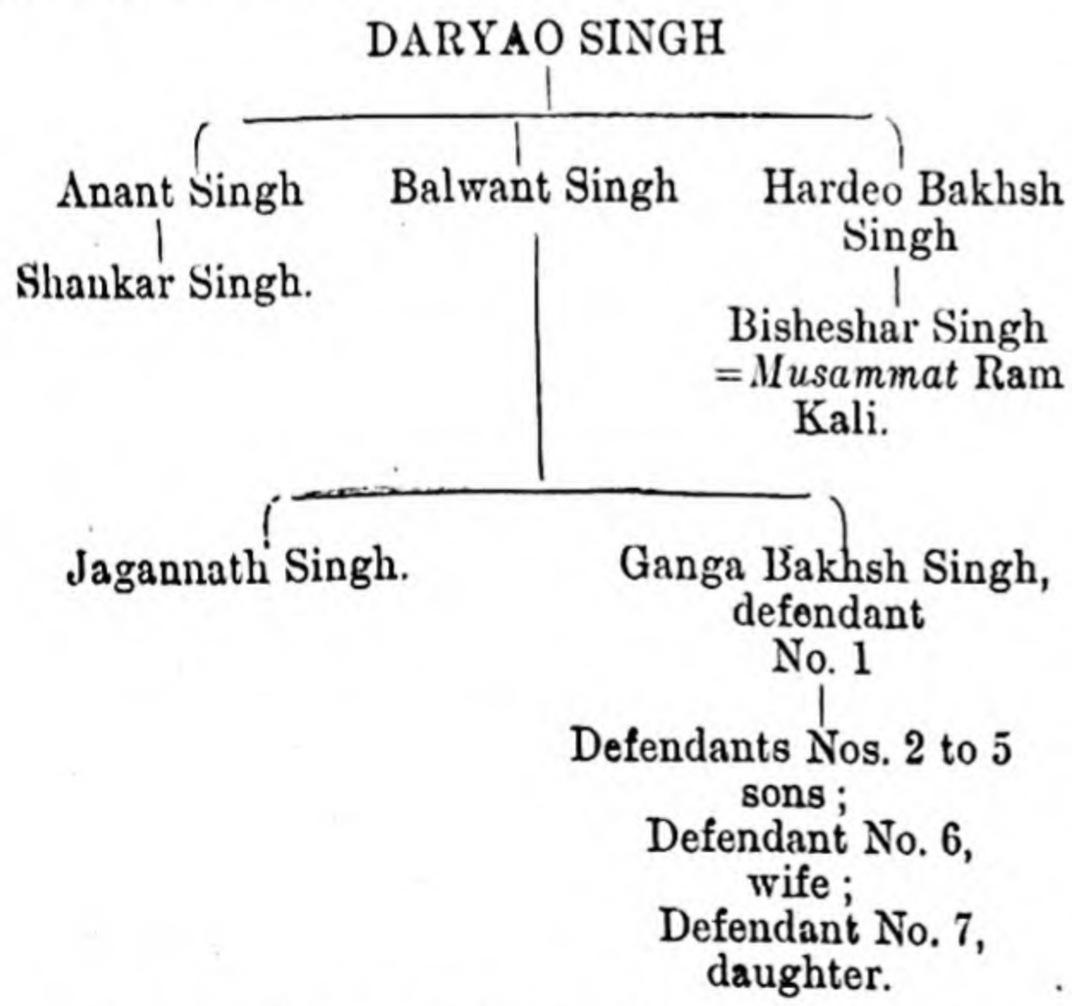
(6) that even if the property in suit was not an estate under the Oudh Estates Act I of 1869 it was governed by the Punjab Code and not by the Law of the Mitakshara and that, therefore, Ganga Bakhsh Singh was absolute owner thereof;

(7) that the interest in the lower Court's decree was incorrectly calculated.

On 17th March last the learned Counsel for the appellant put in a further ground that she was entitled to at least a money-decree against all the defendants.

The period of payment under the mortgage was one year, so the cause of action for a money-decree arose on 4th March 1916 and the suit was instituted within a period of six years on 28th February 1922.

In our opinion none of the grounds originally urged has force. The following is the pedigree of the defendants :—



In another suit brought by another mortgagee of Ganga Bakhsh Singh the same plea was raised before a Bench of this Court that Ganga Bakhsh Singh was absolute owner of the property and, therefore, competent to make the mortgage. One of us was a party to the judgment delivered in that case. Reasons were given in great detail in that judgment in support of the finding that Ganga Bakhsh Singh held the property as manager of a Hindu joint family under the Mitakshara and that his sons had a share in the property. The case is reported as *Ram Ratan* v. *Ganga Bakhsh Singh* (1). We need not repeat the arguments here. We have heard nothing from the learned Counsel of the plaintiff-appellant to induce us to disagree with the opinion of the Bench in the former suit. We did not call upon the respondents learned Counsel to answer this plea.

As regards legal necessity the debt was contracted by the managing members of the joint family for the purpose of prosecuting a litigation, and admittedly such a purpose is not one of legal necessity. In fact this point was not argued independently of consent by the sons to the transfer.

As to consent there is no evidence that the sons consented to this particular transaction; nor is there any such allegations. It was urged that Dwarka Nath Singh attested other deeds, of which the consideration was spent wholly or in part in prosecuting this particular litigation. Ganga Bakhsh Singh sued for the possession of property which was transferred by *Musammat* Ram Kali, widow of Bisheshar Bakhsh Singh, to the Kayasthya Pathshala. A mortgage (Ex. 28, page 73) in favour of a third person was attested by Dwarka Nath Singh. The money was borrowed at the time to conduct an appeal with respect to this particular litigation in this Court. Similarly another mortgage-deed (Ex. 26, page 42) was attested by Dwarka Nath Singh. Dwarka Nath Singh's consent to other transactions cannot make him liable to the transaction in suit to which he did not consent. As regards Ajodhya Nath Singh there is evidence of a Pleader that he once saw him present in Court while the case of his father against the Kayasthya Pathshala was being tried. Such presence is not evidence of consent either to the document in suit or generally to the incurring of expenses in this particular litigation. One Chandu Lal, a former servant of Ganga Bakhsh Singh, was examined on behalf of the plaintiff. He deposed vaguely that Ganga Bakhsh Singh's sons also asked him to

(1) 71 Ind. Cas. 581; 10 O. L. J. 193; 9 O. & A. L. R. 2; 26 O. C. 245; (1923) A. I. R. (O.) 265.

arrange for this particular loan of the transaction in suit. Obviously Janki Nath Singh, a minor, at the time, could not have made any such request. As pointed out by the lower Court, a mere arrangment for the loan did not imply consent to a mortgage of joint family property. We are also not prepared to believe the statement of a former servant who could easily be bribed to depose against defendants who are no longer his masters. He is at present in service of a person who gave evidence against Ganga Bakhsh Singh in Ganga Bakhsh Singh's suit against the Kayasthya Pathshala. A theory of consent was sough to be built up on the statement of one Radhe Lal (P. W. No. 7), who is a clerk of Babu Ishri Prasad, husband of the plaintiff. He took a letter of demand to Ganga Bakhsh Singh and states that the answer was written at the instance of Dwarka Nath Singh and Tribhuwan Nath Singh. There is no substance in it. To begin with, the sons' conduct in 1918 cannot amount to consent to a transaction which took place in 1915. Further, there is nothing in the letter itself (Ex. 2, page 88) to indicate that the sons dictated it or took any part in the writing thereof. It may also be mentioned that at the time of the mortgage all the sons of Ganga Bakhsh Singh except Dwarka Nath Singh were minors who would not be capable under the law to give consent (see statement of Ganga Bakhsh Singh, page 12). After all, assent is only evidence of justifiable family necessity and is of no avail except by way of estoppel when admittedly there was no family necessity. There was no act of Dwarka Nath Singh at the time of the mortgage which would estop him from raising the present defence: [see *Kandasami Asari* v. *Somaskanta Ela Nidhi Ltd.* (2).] We hold that none of the sons of Ganga Bakhsh Singh consented to the transfer.

It was difficult to understand how the principles of s. 41 of the Transfer of Property Act applied. No indication was given to us as to how Ganga Bakhsh Singh and his sons would have behaved otherwise than they did as members of a joint Hindu family. The reference to a judgment of this Court in the *Bhilwal case* [*Zarif-un-nisa* v. *Shafiq-uz-Zaman* (3)] was not to the point. No such circumstances as are referred to in that judgment on pages 188* and 189* exist here.

As to liability of the wife's share under the mortgage it is sufficient to state that the mortgage made by the manager of the joint family was void and could not be enforced against any portion of the property except the one which came to the possession of the mortgagor on partition. It was argued that the wife's share would revert to Ganga Bakhsh Singh on her death. This contingency however has not arisen and need not be considered.

The Punjab Code had no operation in Oudh subsequent to the Oudh Laws Act of 1876. Under s. 3 of Act XVIII of 1876 the Hindu Law was made applicable in cases where the parties were Hindus except in so far as such law had been by this or any other enactment altered or abolished or had been modified by custom. At the time of the mortgage the property in suit was governed by the Mitakshara Law.

Interest, Rs. 566 6-8, from the date of suit to 25th April 1924 entered in the lower Court's decree is incorrect. The amount shall be corrected in the decree prepared in this Court. Up to the date of the institution of the suit the amount due comes to Rs. 19,183-1.

Finally, there remains to consider the additional ground of appeal. It is the pious duty of the sons to pay their father's debt. There was no prayer for a money-decree against the defendants other than defendant No. 1, Ganga Bakhsh Singh, because the principle of law laid down by their Lordships of the Privy Council prevailed at the time that no such pious duty arose during the life-time of the father. This observation of their Lordships was not followed in the case of *Brij Narain Rai* v. *Manglal Prasad Rai* (4). It was represented by the respondents' learned Counsel that the judgment of their Lordships in *Brij Narain's case* (4) was delivered on 14th November 1923 and this appeal was filed on 6th February 1924 and that, therefore, the prayer ought to have been made a ground of appeal. Volume LI, Part I, of the Indian Appeals containing the judgment did not

(2) 5 Ind. Cas. 922; 35 M. 177; 7 M. L. T. 165; 20 M. L. J. 371; (1910) M. W. N. 580.

(3) 75 Ind. Cas. 626; 26 O. C. 133; (1923) A. I. R. (O.) 185; 1 O. L. J. 535.

(4) 77 Ind. Cas. 689; 51 I. A. 129; 11 O. L. J. 107; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

*Pages of 26 O. C.- [*Ed.*]

arrive here till the 31st of March 1923 and the part of the Allahabad Law Reports of February containing the same judgment arrived here about the same time. It is true that a report of the judgment was printed in unauthorised law reports but simultaneously there was a rumour that the report was incorrect. This rumour was subsequently confirmed with respect to another proposition of law enunciated in the judgment. In February 1924, therefore, a legal practitioner was not in a position to know definitely what observations their Lordships of the Privy Council had made in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (4). Taking all these circumstances into consideration we are of opinion that the plea has been raised by the appellant at the earliest possible opportunity. She is entitled to a money-decree against all the defendants except *Musammat* Rani Bitiya and *Musammat* Suphal Kumari who are under no pious duty to pay the debt. The mortgagees of the property, Manohar Lal and Madho Ram, will also be exempted from the money-decree. We shall, however, save the sons in costs and interest as the plea was not available to the plaintiff until after the judgment of the lower Court was delivered. We shall fix the amount of the money-decree at Rs. 19,183-1 and grant interest at the simple rate of 6 per cent. per annum from the date of the institution of the suit.

In the result we set aside the decree dismissing the suit as against the sons and pass a money-decree against Dwarka Nath Singh, Ajodhya Nath Singh, Tribhuwan Nath Singh and Janki Nath Singh for Rs. 19, 183-1 with simple interest at 6 per cent. per annum from the 28th February 1922 to date of realization and direct parties to bear their own costs. This decree shall be executed only against the family property in the hands of these sons.

The decree of the lower Court against Ganga Bakhsh Singh is maintained, but it shall be noted that in no case shall the plaintiff be entitled to recover more than the amount of the decree passed against Ganga Bakhsh Singh all together from him and his sons. The amount of the decree as against Ganga Bakhsh Singh for sale shall be maintained by substituting in place of Rs. 566-6-8 the proper amount of interest at bond rate from the 28th February 1922 to 26th April 1924 on a sum of Rs 19,183-1.

Z. K. *Decree modified.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 6 OF 1924.

April 21, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

MAHIP NARAIN PANDEY—DEFENDANT—APPELLANT

versus

Babu MANNU SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata *between co-defendants—Conditions necessary for application of rule.*

In order that a decision might operate as *res judicata* between co-defendants there must have been a conflict of interests between the co-defendants and it must have been necessary for the decision of the suit for the Court to decide the question on which they are at issue. If the issue was one the decision of which was sufficient for the decision of the suit, and the issue was raised and the suit was actually in fact decided upon it, then, if that issue was one which was raised not only between the plaintiff and the defendants but between the co-defendants as well the rule of *res judicata* applies between the co-defendants.

Plaintiff purchased certain property from the defendant. Defendant's son brought a suit to set aside the sale on the ground that the sale was without consideration and that there was no legal necessity for it. Both the plaintiff and the defendant were made parties to the suit, and the suit was decreed *ex parte* on the finding that there was no consideration and consequently no legal necessity for the sale. Plaintiff then filed the present suit to recover from the defendant the alleged consideration for the sale-deed:

Held, that the finding in the previous suit that there was no consideration for the sale operated as *res judicata* between the parties.

First appeal from an order of the Second Additional District Judge, Gorakhpur, dated the 1st December 1923.

Dr. *S. N. Sen*, for the Appellant.

Messrs. *P. L. Banerji* and *Sankar Sarn*, for the Respondent.

JUDGMENT.—The decision of this appeal depends on a question of *res judicata*. The plaintiff-respondent, Mannu Singh together with one Jang Bahadur Singh purchased certain property from the defendant-appellant, Mahip Narain Pande. Mahip Narain's sons brought a suit to set

aside the sale on two grounds. The first ground was that the sale was without consideration, and the second ground was that even if there was consideration there was no legal necessity. The suit was decided *ex parte* and the Court which tried it, on the evidence tendered by one of the plaintiffs before it, found in favour of the plaintiffs on both questions. It found that the sale was without consideration, and, therefore, there was no legal necessity for it. The vendees then filed the present suit to recover from Mahip Narain Pande the alleged consideration of the sale-deed. The Trial Court held that it was *res judicata* between the parties, and that no consideration had passed. The lower Appellate Court has taken a different view, and has remanded the case for decision on the merits. The defendant appeals.

The principles which govern the question of *res judicata* between co-defendants have been laid down in a number of cases of which we may instance *Mohammad Ahmad* v. *Zahur Ahmad* (1). The rule is that there must have been a conflict of interest between the co defendants, and it must have been necessary for the decision of the suit for the Court to decide the question on which they are at issue. In this case there certainly was a conflict of interest between the co-defendants in the former suit for the appellant Mahip Narain made common cause with his sons and pleaded that the sale-deed was without consideration. The issue was also one which, having been raised before it, the Court was bound to enter into and decide. If there was no consideration for the sale-deed, the suit of Mahip Narain's sons was bound to succeed. The learned Vakil for the respondent contends that for an issue to operate as *res judicata* between co-defendants it must have been the only ground on which the Court could have decided the case. In this case he urges that as the previous suit might have succeeded on either of two grounds, namely, because there was no consideration, or because there was no legal necessity, therefore, the decision on the former point, though logically it comes first in order could not operate as *res judicata*. We think that this is giving too narrow a scope to the rule. If the issue was one the decision of which was sufficient for the decision of the suit and the issue was raised and the suit was actually in fact decided upon it, then, if that issue was one which was raised, not only between the plaintiff and the defendants, but between the co-defendants as well, the rule of *res judicata* applies. The case of *Kunjman* v. *Jagannath* (2) is an illustration. There a suit was brought by the managing member of a joint Hindu family against a third party for an injunction. The plaintiff's brother, a member of the joint family was joined as a *pro forma* defendant. His interest was identical with that of the plaintiff. The suit having been dismissed, it was held that the matter was *res judicata* as between the plaintiff's brother and the defendant.

For the reasons which we have given we consider that the view taken by the learned Subordinate Judge was right. We accordingly set aside the order of the District Judge and restore the decreee of the Trial Court with costs in all Courts including in this Court fees on the higher scale.

Order set aside;
Decree restored.

Z.K.

(1) 67 Ind. Cas. 523; 44 A. 334; 20 A. L. J. 193; 4 U. P. L. R. (A.) 55; (1922) A. I. R. (A.) 19.

(2) 55 Ind. Cas. 846; 42 A. 359; 2 U. P. L. R. (A.) 74, 18 A. L. J. 326.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 58 OF 1924.

January 28, 1925.

Present:—Mr. Deniels, J. C.

ANGNU—PURCHASER—APPELLANT

versus

Nawab Mirza MOHAMMAD SAJJAD ALI KHAN—DECREE-HOLDER, DATA RAM AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 71, 84—Oudh Civil Courts Act (XIII of 1879), s. 18—Execution of decree—Sale—Default by auction-purchaser—Re-sale—Order directing auction-purchaser to make good loss incurred on re-sale, whether decree—Appeal, whether lies—*Forum *of appeal—Re-sale held after long interval—Auction-purchaser, liability of.*

An order under r. 71 of O. XXI of the C. P. C., directing a defaulting auction-purchaser to make good the loss occurring on the re-sale of the property, is a decree within the meaning of s. 47 of the C. P. C. and is appealable. [p. 132, col. 2.]

Mathura Prasad v. *Bahadur Singh*, 87 Ind. Cas. 284 2 O. W. N. 141; 12 O. L. J. 80; (1925) A. I. R. (O.) 360 followed.

Where such an order is made in the course of execution of a decree passed in a suit of the value of more than Rs. 5,000 an appeal against the order lies under s. 18 of the Oudh Civil Courts Act to the Judicial Commissioner and not to the District Judge, irrespective of the amount which the auction-purchaser is directed to pay. [*ibid.*]

The re-sale resulting in loss for which a defaulting auction-purchaser is responsible must be a re-sale held in accordance with the law, that is to say, it must be a re-sale held forthwith in accordance with the provisions of r. 84 of O. XXI of the C. P. C. It may be that if the delay which occurs is so slight that it cannot possibly prejudice the defaulter he would still be liable for the loss on the re-sale, but if the re-sale takes place after a considerable delay, the provisions of the rule are not complied with and the defaulting purchaser cannot be called upon to make good the deficiency resulting from the re-sale. [*ibid.*]

Sita Ram v. *Janki Ram*, 65 Ind. Cas. 813; 44 A. 266; 20 A. L. J. 105; (1922) A. I. R. (A.) 200, referred to.

Appeal against an order of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 28th May 1924.

Mr. *Ram Bharosey Lal*, for the Appellant.

Mr. *Zahur Ahmad*, for Respondent No. 1.

JUDGMENT.—This is an appeal against an order passed, under O. XXI, r. 71 of the C. P. C. directing a defaulting auction-purchaser to make good the loss which occurred on re sale of the property. The question for decision is whether he is liable although the re-sale was not held forthwith as required by r. 84 of the same Order.

The facts are these. The property was originally put up to sale on the 20th April 1923 and purchased by the appellant Angnu for a sum of Rs. 2,350. Th two previous bids had been Rs. 2,200 and Rs. 2,300. The appellant failed to make the 25 per cent. deposit required under O. XXI, r. 84. It was, therefore, the duty of the sale officer under that rule to re-sell the property forthwith. Instead of doing this the sale officer postponed the matter till the 25th April. He then cancelled the sale and sent the papers back to the Civil Court (the sale was being held by the Collector). On 23rd May the matter was put up before the Civil Court and a fresh date for sale fixed. The sale took place on 20th June and the property was purchased by Raza Husain for Rs. 2,050. Curiously enough default was also made by the purchaser at this sale. He deposited the 25 per cent. immediately but was one day late in depositing the balance of the purchase money, which he deposited only on the sixteenth day after the sale. This sale was, therefore, also set aside and a fresh sale held on 20th September 1923. At this sale the property was again purchased by Raza Husain for the same sum which he had previouly bid, namely, Rs. 2,050.

The respondent raises two preliminary objections to the hearing of the appeal. First he says that the order passed is not a decree and is not appealable. This matter is settled against him by the recent decision of a Bench of this Court in *Mathura Prasad* v. *Bahadur Singh* (1). It was there held that an order under O. XXI, r. 71, is a decree within the meaning of s. 47 of C. P. C. His second objection is that even if an appeal lies it lies to the District Judge inasmuch as a proceeding under O. XXI, r. 71, is a separate proceeding and the amount involved is only Rs. 300. The matter has to be decided with reference to the language of s. 18 of the Oudh Civil Courts Act, 1879, and in view of the language of that section it appears to me impossible to sustain the objection. The section lays down that the appeal shall lie to the District Judge in two cases, firstly where the decree is passed in any suit the value of which does not exceed Rs. 5,000 and secondly where the decree is passed in any proceedings arising out of a suit the value of which does not exceed Rs. 5,000. In any other case the appeal lies to the Judicial Commissioner. The proceeding which is here in question clearly arises out of a suit. The suit resulted in a decree. In execution of that decree sale proceedings were held and in the course of these sale proceedings the order now complained of was passed. The preliminary objections, therefore, fail.

On the merits the order of the Court below is, in my opinion, wrong. The re-sale resulting in loss for which the defaulting purchaser is responsible must be a re-sale held in accordance with the law, that is to say, it must be re-sale held forthwith in accordance with r. 84. It may be that if the delay which occurred was so slight that it could not possibly prejudice the defaulter he would still be liable. A case of this kind occurred in *Sita Ram* v. *Janki Ram* (2). In that cass a sale held on the following morning was held to constitute a substantial compliance with the rule. Here, however, there was a delay of nearly two months before the first re-sale and nearly five months before the second re-sale. In

(1) 87 Ind. Cas. 284; 2 O. W. N. 141; 12 O. L. J. 80; (1925) A. I. R. (O.) 360.

(2) 65 Ind. Cas. 813; 44 A. 266; 20 A. L. J. 105; (1922) A. I. R. (A.) 200.

view of the fact that at the original sale there were two bids higher than the price at which the property was eventually sold it cannot be said that the appellant was not prejudiced. I, therefore, set aside the order of the Court below and dismiss the application for recovery of the balance of the purchase-money. As the appellant is lucky to escape liability altogether owing to the failure of the sale officer to comply with the rules I make no order as to costs.

Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 627 OF 1924.
February 2, 1925.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.
JAGAT NARAIN DUBE—PLAINTIFF—APPELLANT
versus
NAGESHAR PRASAD TIWARI—DEFENDANT—RESPONDENT.

Custom—Pre-emption—Wajib-ul-arz, *entries in, construction of—Custom, proof of.*

The *wajib-ul-arz* of a village prepared in 1820 allowed a right of pre-emption in the first instance to the co-sharers of the village. The *wajib-ul-arz* prepared in 1862 gave a right of pre-emption to near co-sharers and in case of their refusal to the other co-sharers of the village. The *wajib-ul-arz* prepared in 1890 laid down that the right of pre-emption shall belong in the first instance to a co-sharer who was a near relation, after him to a co-sharer who was a more distant relation, and after the latter to a co-sharer in the *patti* and in case of his refusal to the co-sharers of other *pattis*:

Held, (1) that the entries afforded evidence of the existence of a custom of pre-emption in the village; [p. 133, col. 2.]

(2) that a co-sharer in the *patti* in which the land sold was situate was entitled to preference over a vendee who though a blood relation to the vendor was a co-sharer in another *patti*. [*ibid.*]

Second appeal from a decree of the Additional Subordinate Judge, Basti.

Mr. *Kashi Narain Malaviya*, for the Appellant.

Mr. *N. Upadhiya*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption brought in respect of certain property situated in the village Ajgara. The plaintiff is a co-sharer in the *patti* in which the share sold is situated. The defendant vendee is a co-sharer in another *patti*, but claims to be related by blood to the vendor. The Court of first instance found that no custom of pre-emption was established and did not proceed to try the other issues raised in the case. The lower Appellate Court, however, contented itself by holding that even if there was a custom of pre-emption, the plaintiff was not entitled to preference because the defendant-vendee was related to the vendor and was consequently entitled to preference.

The *wajib-ul-arz* of the village Ajgara prepared in 1820, allows a right of pre-emption in the first instance to the co-sharers of the village. The *wajib-ul-arz* prepared in 1862 is more specific. It gives a right of pre-emption to near co-sharers (*hissedar qaribi*) and in case of their refusal to the co-sharers of the village. The *wajib-ul-arz* prepared in 1890 describes more fully how the right of pre-emption between the near co-sharers (*hissedar qaribi*) was to be regulated. It lays down that the right of pre-emption shall belong in the first instance to a co-sharer who was a near relation *sharik aziz qaribi* after him to a co-sharer who was a more distant relation (*sharik baeed*), and after the latter to a co sharer in the *patti*, and in case of his refusal to the co-sharers of other *pattis*. In the connected First Appeal No. 24 of 1921, decided to-day we have held that these entries afford evidence of the existence of a custom of pre-emption in that village, and the only question left for consideration in this case, therefore, is whether under that custom the plaintiff Jagat Narain Dube is entitled to preference as against the defendant-vendee Nageshar Prasad Tiwari. It appears from the record of First Appeal No. 328 of 1921, which has been decided to-day, that this *wajib-ul-arz* has been subject of interpretation in previous suits, to one of which both Nageshar Prasad Tiwari and Jagat Narain Dube were parties. They were rival pre-emptors and the finding of the Court which decided that suit was that the only person who could claim, in the first instance, a right of pre-emption as against the others was a co-sharer of the *patti* related to the vendor, and that the right of the co-sharers of the other *pattis* related to the vendor would be postponed to a co sharer in the *patti* though not related. The result of that decision, which is final between the parties to the present appeal, is that the plaintiff Jagat Narain Dube, who is a co sharer in the same *patti*, is entitled to preference

over the defendant vendee who, though a blood relation, is not entitled to preference over him because he is a co-sharer in another *patti*. The other points arising in the suit have not been dealt with by the Courts below. The appeal is, therefore, allowed and the case is remanded to the Court of first instance through the lower Appellate Court for disposal after the determination of the other points raised in the suit in the manner prescribed by law. Costs here and hitherto will abid the result.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 3 OF 1924.

April 20, 1925.

Present:—Mr. Ashworth, A. J. C.

GHANI AHMAD KHAN—DEFENDANT—APPELLANT

versus

Musammat AZIZ BEGAM—PLAINTIFF

NABI AHMAD KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Profits, suit for—Expenses, allowance for—Grove planted by lambardar*—Co-sharer, whether can claim share of profits—Costs, basis of.*

In a suit for profits the *lambardar* claimed a certain sum as expenses incurred in collection of profits. He attempted to prove the expenditure of the particular sum claimed by him but failed and was awarded a sum equal to 5 per cent. on the collections in lieu of expenses. In second appeal he claimed that he should be allowed expenses at least at the rate of 10 per cent. on the collections:

Held, that the *lambardar* having failed to prove any actual expenditure and not having tendered evidence to justify any specific percentage could not be heard to say in appeal that the sum allowed by the lower Courts was insufficient. [p. 134, col. 2.]

In the absence of clear evidence of an agreement amongst the co-sharers that the *lambardar* who has planted some *usar* with groves should reimburse himself for any expense in planting the *usar* by taking the whole profits arising therefrom, the *lambardar* cannot claim to appropriate the whole of the profits arising from the *usar* and the other co-sharers are entitled to their shares in the profits. [*ibid.*]

In a suit for profits a plaintiff is entitled to get costs on what he is eventually allowed and not merely on the nominal sum which he orginally claimed. [p. 135, col. 1.]

Appeal from a decree of the Fourth Additional District Judge, Lucknow, dated the 3rd December 1923, modifying that of the Honorary Assistant Collector, First Class, Kakori (Lucknow), dated the 18th September 1922.

Mr. *Zahur Ahmad*, for the Appellant.

Mr. *Pyare Lal Varma*, for Respondent No. 1.

JUDGMENT.—This second rent appeal arises out of a suit for profits between co-sharers. The first question is whether the lower Courts were wrong in refusing to allow the defendant-appellant, *lambardar*, a sum of Rs. 216 claimed as expenses incurred in collection of profits. The appellant attempted to prove the expenditure of this sum but failed in the opinion of the lower Courts. He was awarded 5 per cent. but maintains that he should have been awarded 10 per cent. which would amount about to the sum of Rs. 216 claimed. Reliance is placed on a ruling, *Grish Chundar Lahiri* v. *Shoshi Shikhareswar Roy* (1), where 10 per cent. was allowed for collection in the case of a trespasser sued for mesne profits. I hold that this ruling is no authority, as the 10 per cent. in the case referred to was claimed "as a matter of ordinary practice, and supported by the evidence in the case." The defendant having failed to prove any actual expenditure and not having tendered evidence to justify any specific percentage cannot, in my opinion, be heard to say in appeal that the 5 per cent. allowed by the lower Court was insufficient.

The second point is whether the lower Courts were justified in allowing the plaintiff-respondent a share in the profits of some *usar* planted in the year 1327 *Fasli* with groves. It is maintained that as the *lambardar* took the trouble of planting this *usar* he should not be called upon to pay the co-sharers any profits. In the absence of clear evidence of an agreement amongst the other co-sharers that the *lambardar* shoud re-imburse himself for any expense in planting the *usar* by taking the whole profits I am of the opinion that this plea is not maintainable.

The third point is that the lower Courts should have credited the *lambardar* with the expenditure of Rs. 500 on wells. The lower Courts were not satisfied with the evidence as to this expenditure. A *thekedar* deposed to having been paid this sum by the *lambardar* for making the wells but he would not swear to two receipts tendered because he said he had lost his eyesight. It suffices to say that the lower Courts

(1) 27 C. 951 at p. 955; 27 I. A. 110; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar P. C. J. 687; 14 Ind. Dec. (N. S.) 622 (P. C.)

have given reasons for distrusting the allegation of the appellant that he paid Rs. 500 in this way or paid any other sum for the wells. Indeed the *amin* appears to have stated the wells to have been in existence for 10 or 12 years, in which case it would be impossible that the money for their sinking was spent within the period of suit. In second appeal I am not disposed to hold that the lower Courts were wrong in their finding of fact that the expenditure of Rs. 500 on wells was not proved.

The fourth point is the Pleader's fee. The lower Appellate Court has allowed Rs. 100 on the claim of the plaintiff as decreed by the Court. It is urged by the appellant's Counsel that this is higher than the scale allowed by the Board's Circular. The respondent's Counsel admits that the sum of Rs. 100 should be reduced to Rs. 45 on this ground. This would be at the rate of 5 per cent. on the sum decreed by the lower Court. The appellant's Counsel, however, pressed that only Rs. 300 was originally claimed in the plaint and that the fee should be on this sum claimed and not on the sum awarded. I am not disposed to accept this view. The plaintiff is entitled to get costs on what he was allowed and not merely on the nominal sum which he originally claimed.

The result is that this appeal is dismissed except that the costs awarded shall be reduced from Rs. 100 to Rs. 45. The costs of this appeal will be borne by the appellant.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 30 OF 1924.

November 6, 1924.

Present:—Mr. Baker, J. C.

GANGARAM—JUDGMENT-DEBTOR—APPELLANT

versus

GANPAT RAO—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 96, O. XXIII, r. 3—Decree passed on award of Debt Conciliation Board, nature of—Forfeiture clause—Court, power of, to grant relief—Consent-decree, whether can be varied.

A decree passed on an award by the Debt Conciliation Board is not a consent-decree but a decree based on an award, and an Executing Court cannot go behind it in order to grant equitable relief to the judgment-debtor against a forfeiture clause in the decree. [p. 136, col. 1.]

Nagappa v. *Venkat Rao*, 24 M. 265, referred to.

Raja Komal Singh v. *Jagannath*, 49 Ind. Cas. 840, 15 N. L. R. 39, followed.

Krishnabai v. *Hari Govind*, 31 B. 15; 8 Bom. L. R. 813; 1 M. L. T. 370, and *Balambhat* v. *Vinayak*, 10 Ind. Cas. 746; 35 B. 239; 13 Bom. L. R. 154, distinguished.

Lachiram Dagduran Marwadi v. *Jana Yesu Mang*, 27 Ind. Cas. 830; 16 Bom. L. R. 668, followed.

A consent-decree cannot be varied except by consent of the parties. [p. 136, col. 2.]

Appeal against an order of the District Judge, Bhandara, dated the 9th April 1924, in Civil Appeal No. 9 of 1924.

FACTS.—The dispute in this case is as regards execution of a decree dated 15th December 1903 in Suit No. 112 of 1903 and which was passed upon an application under s. 525, C. P. C., to file an award of the Debt Conciliation Board based on a preliminary mortgage-decree dated 25th September 1919 in Suit No. 11 of 1914 of the Court of Mr. Ranade, E.A.C., Bhandara. In accordance with the terms of the award the said decree of 1903 made the sum of Rs. 838 decreed against the judgment-debtor-respondent payable in 17 instalments until 1st of May 1919. It was further directed under the said decree that in case of default in payment of any instalment interest shall be paid on such defaulted instalment on 6 per cent. per annum and in case of default in payment of any two instalments possession of the mortgaged property specified in the decree shall be delivered by the judgment-debtor to the decree-holder. There was a further condition regarding suspension of payment of the whole or a part of any instalment upon similar suspension of rent and revenue of the land which was to pass by the decree in case of the above mentioned defaults.

Upon the application of the decree-holder-appellant, the said decree was made final in 1920, as a decree for foreclosure of the mortgage and for possession of the mortgaged property for the balance of Rs. 247-9 left unpaid under the decree of 1903. Possession of the property was then delivered through Court in execution of the said final decree on 18th September 1921. The judgment-debtor-respondent then filed an application on 7th October 1921 for getting the final decree set aside on the ground

that he was not served with notice of the application for the final decree and came to know of it when possession was delivered through Court. On appeal by the judgment-debtor respondent my learned predecessor-in-office held that the final decree was illegal and it was accordingly set aside and the case was remanded to the lower Court for being proceeded with upon the decree-holder's application dated 5th April 1919 so far as it asked for delivery of possession of the property specified in the decree in default of payment of two instalments on due dates leaving thereby the said balance of Rs. 247-9 unpaid. The lower Court found that the condition in the award delivering possession in default of payment of two instalments was penal and it made no difference in the penal nature of that condition by its being embodied in the decree of 1903. The Court, therefore, considered that the defendant should be equitably relieved against this penal condition and accordingly refused to enforce that condition allowing only 1 per cent. per mensem interest on the unpaid balance from the date of default of two instalments as fair compensation to the decree-holder-appellant. After the case was remanded by this Court and on 5th February 1923 the judgment-debtor respondent deposited the further sum of Rs. 251-5 in Court for payment to the decree-holder and after giving credit for this sum the lower Court found a further sum of Rs. 118-14-6 and costs of the proceedings amounting to Rs. 54-5 as payable by the judgment-debtor respondent to the decree-holder appellant and ordered such payment on 18th December 1923 (*vide* order dated 18th December 1923). This order has now been appealed against.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *P. S. Deva*, for the Respondent.

JUDGMENT.—The facts are set out in the judgment of the lower Appellate Court. The judgment-debtor appeals against the decree of the lower Appellate Court ordering the decree-holder to be put into possession of the property, and it is urged on his behalf that the Court had power to grant equitable relief against the forfeiture clause in the decree. The appellant relies on the cases quoted in the lower Appellate Court, *viz.*

Krishanbai v. *Hari Govind* (1), *Nagappa* v. *Venkat Rao* (2), *Balambhat* v. *Vinayak* (3).

The cases were distinguished by this Court in *Raja Komalsingh* v. *Jagannath* (4), the case relied on by the lower Appellate Court.

The learned District Judge is correct in stating that the present decree which was passed on an award by the Debt Conciliation Board is not a consent-decree. It is a decree based upon an award and, therefore, the cases quoted will not apply as explained at page 41 of the ruling in 15 Nagpur [*Raja Komal Singh* v. *Jagannath* (4).]

Moreover, in a later case than the Bombay decisions above quoted the Bombay High Court has held in *Lachiram Dagduran Marwadi* v. *Jana Yesu Mang* (5) that a consent-decree cannot be varied except by consent and that *Krishnabai* v. *Hari Govind* (1) and *Balambhat* v. *Vinayak* (3) are inapplicable where the relation of landlord and tenant is not created by the decree. Even if this were a consent-decree, it could not be varied. But as a decree based on an award the Executing Court cannot go behind it.

I agree with the view of the District Judge that the case is governed by *Raja Komalsingh* v. *Jagannath* (4).

The appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

Z. K.

(1) 31 B. 15; 8 Bom. L. R. 813; 1 M. L. T. 370.

(2) 24 M. 265.

(3) 10 Ind. Cas. 746; 35 B. 239; 13 Bom. L. R. 154.

(4) 49 Ind. Cas. 840, 15 N. R. 39.

(5) 27 Ind. Cas. 830; 16 Bom. L. R. 668.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1619 OF 1923.

February 27, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SAGAR SINGH—PLAINTIFF—APPELLANT

versus

SIRI RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Custom—Pre-emption—*Wajib-ul-arz, *entry in, construction of—Partition of village into* mahals, *effect of—*Sir *rights, relinquishment of, whether liable to pre-emption.*

A *wajib-ul-arz* of a village conferred the right of pre-emption first on own brothers, next on near brothers and finally on co-sharers in the *patti* or the

village. At the time when the *wajib-ul-arz* was prepared the village was undivided but it was subsequently divided into several *mahals*. Certain property in *mahal* S was sold to the defendant who was a co-sharer in *mahal* Q. Plaintiff who was a co-sharer in *mahal* S brought a suit to pre-empt the sale:

Held, (1) that for the purposes of pre-emption the *wajib-ul-arz* placed ico-sharers in the *patti* and co-sharers n the village upon the same footing, inasmuch as such co-sharers were united by bonds of common interest and common liability;

(2) that the provisions of the *waijb-ul-arz* must be interpreted in the light of the existing circumstances and that the bonds of common interest and common liability having been severed by the partition of the village into *mahals*, the defendant whose property was situated in *mahal* Q had no community of interest or liability with any of the co-sharers in *mahal* ;

(3) that under the circumstances the defendant must for purposes of pre-emption be treated as a stranger to the co-sharers in *mahal* S in which the property sold was situated and that consequently the plaintiff's suit must be decreed.

The relinquishment of *sir* rights cannot form the subject of pre-emption.

Second appeal from a decree of the Additional Judge, Meerut, dated the 19th July 1923.

Mr. *P. L. Banerji*, for the Appellant.
Mr. *S. N. Gupta*, for the Respondent.

JUDGMENT.—We have heard the learned Counsel in this case and we think the decree of the lower Appellate Court ought not to stand. In our opinion on the terms of the *waijb-ul-arz* the plaintiff was entitled to pre-emption. We cannot agree with the opinion of the two Courts below in this matter.

The *wajib-ul-arz* was one which was prepared at the settlement of M. Nasir Ali which took place about the year 1870.

Under the term "Custom" as recorded in that document the first class of pre emptors consists of own brothers the second class of near brothers, and the third class consists of *hissadaran patti aur gaon ke*.

The village in which the property in dispute is situated is Kharkhauda, and it would appear from the evidence that this village which was undivided at the time the *wajib-ul-arz* was prepared, has been devided into several *mahals*. One of these *mahals* is *mahal* Sagar Singh which is named after the plaintiff, and it is admitted that the property sought to be pre-empted is included in this *mahal* in which Sagar Singh himself is a co-sharer.

It is further clear that the purchaser is a co-sharer in another *mahal* of the same *mauza* which is named *mahal* Qaim.

The plaintiff has no claim to be brought within either the first or the second category of pre-emptors. The question is whether he can bring himself within the third category. We agree with the Courts below so far in holding that for purposes of pre-emption the co-sharers in the *patti* and the co-sharers in the village (*gaon*) were placed upon the same footing. But these words have to be interpreted in the light of existing circumstances. It seems clear enough that the third class of pre-emptors consisted of co-sharers who were united by bonds of common interest and liability. In the new constitution of the village those bonds have been severed, and the purchaser here whose property is situated in *mahal* Qaim, has no community of interest or liability with any of the co-sharers in the other *mahal*, namely, *mahal* Sagar Singh.

Applying the language of the *wajib-ul-arz* to the altered constitution of the village arising out of partition it seems to us quite clear that the defendant must, for purposes of pre-emption, be treated as a stranger to the co-sharers in *mahal* Sagar Singh, in which the property sought to be pre-empted is situated.

We agree, therefore, with the argeement put before us on behalf of the plaintiff-appellant that in these circumstances the plaintiff is entitled to pre-emption, and we find accordingly.

The result is that we allow the plaintiff a decree for pre-emption.

As regards the sum which the plaintiff must pay we notice that according to the finding of the First Court the sale price of the property was Rs. 1,500 and it was stated that a further sum of Rs. 100 was given by the purchaser to the vendor in consideration of the relinquishment of *sir* rights.

The relinquishment of *sir* rights cannot form the subject of pre-emption and in the circumsatnces we think the proper order to pass is that the plaintiff shall pay into Court a sum of Rs 1,500 within two months from the date of this Court's decree. If the sum is deposited in Court within the time limit then the plaintiff will get his costs in all three Courts including in this Court fees on the higher scale. On the other hand if he fails to deposit the sum of Rs. 1,500 within the time fixed, then his suit will stand dismissed in all three Courts with costs including fees in this Court on the higher scale.

Z. K. *Order accordingly.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 164 OF 1923.

November 26, 1923.

Present:—Mr. Justice Beasley.

IRRAWADDY FLOTILLA Co. LTD. —PETITIONERS

versus

THE MERGUI TIN DREDGING Co. LTD. AND OTHERS—RESPONDENTS.

Companies Act (VII of 1913), ss. 162, 170, 174—Winding up, petition for, by creditor—Advantage of creditors and share-holders—Adjournment.

An application for compulsory winding up of a Company by one of the creditors of the Company was opposed by the Company and by other creditors of the Company to whom large sums were due from the Company on the ground that the Company had entered into a contract for the sale of its property to another Company and that if an order were made for the winding up of the Company it would cause loss to the creditors and the share-holders. It was found that it would be more to the advantage of the share-holders and of the creditors if an opportunity were given to the Company to complete the sale of their properties:

Held, that under the circumstances the petition for winding up ought to be adjourned and the Company should be given an opportunity to carry out the agreement of sale.

Mr. *Glifton*, for the Petitioners.

Messrs. *Young* and *Robertson*, for the Respondents.

ORDER.—This is a petition presented by the Irrawaddy Flotilla Company, Limited, praying that the respondent Company may be wound up by the Court. The petitioners are creditors of the respondent Company to the amount of Rs. 4,094-7-1. This debt arises out of a decree obtained by the petitioners against respondents in the Chief Court of Lower Burma in July 1922, and represents the sum claimed, the taxed costs of the said suit and interest thereon.

On the 10th July 1923, the petitioners served on the respondents a notice requiring them to pay the said sum of Rs. 4,094-7-1 but the respondents failed to comply with this demand and, accordingly, this petition has been presented by the petitioners.

The respondents object to the petition for winding up of the Company and in addition to themselves the Ellerman Rice Mills Burma, Limited, who are a creditor of the respondent Company, appear to oppose by Mr. Young by powerof-attorney dated 20th November 1923. In addition Mr. A. C. Martin and Mr. DePaulsen also oppose and the two latter, together with Mr. Joakim of the firm of Balthaza & Son, have made affidavits. All three are large creditors of the respondent Company. The grounds of their opposition are that they themselves are large creditors and also that the Company has entered into an agreement to sell the whole of its property to C. H. Robertson of No. 435th street, Rangoon, as trustee on behalf of the Company which is being formed and which is to be called, The Burma Alluvial Tin Limited. A copy of the agreement is attached to the affidavit of Mr. Martin and Mr. DePaulsen. They say that a winding up will cause a loss to the creditors and share-holders and say that an opportunity should be given to the Company to sell itself in accordance with the above-mentioned agreement. According to the agreement Rs. 55,000 in cash is to be paid to the Company by their purchasers on or before the 1st of March 1924, and they will, therefore, have money in hand with which to satisfy the claim of the petitioners. I have got to consider whether there are sufficient grounds advanced for not granting to the petitioners what they are in the ordinary course entitled to and make an order for winding up by the Court, and in considering this matter I have to say whether on the whole it will be more to the advantage of the creditors that there should be a winding up now or whether it would not be more to the advantage of the share-holders and to the creditors for an opportunity to be given for this agreement to be carried out. There is no doubt whatever that the respondent Company is insolvent, a Company that cannot pay the small amount which is owing by them to the petitioners and has been owing by them for over a year, is obviously insolvent, but I do not think it would be right to order the Company to be wound up at the present moment. In my view, the petition ought to be adjourned until March next to see whether The Burma Allubial Tin Limited is able to raise the necessary capital and is able to pay to the respondent, Company the agreed sum, or any of it, by March the 1st. I accordingly order the petition to stand over until March 13th 1924, upon the respondent Company undertaking not to part with any portion of the purchase money, save and except for the preliminary expenses. They will in the meantime complete the sale. There will be liberty to apply in the meantime.

Z. K. *Proceedings stayed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 279 OF 1924.
April 22, 1925.
Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

JOGI PERSHAD—PLAINTIFF—PETITIONER
versus
AMIR BAKHSH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24—Provincial Small Cause Courts Act (IX of 1887), s. 35—Transfer of Small Cause Court Judge—Successor not empowered to try suits of certain value—Suit transferred to Court of Subordinate Judge—Procedure—Subordinate Judge, whether empowered to try suit as Small Cause Court.

A suit instituted in a Small Cause Court was dismissed after trial but the dismissal was set aside in revision and the suit was remanded to the Small Cause Court for fresh trial. In the meantime the Judge of the Small Cause Court who had tried the suit originally had been transferred and his successor was not empowered to try suits of the value of this particular suit. The District Judge thereupon transferred this suit to the Court of a Subordinate Judge who tried it as a Small Cause Court and eventually dismissed it. On revision:

Held, that after remand from the High Court the suit was a suit in a Small Cause Court and had been withdrawn from that Court by the District Judge under s. 24 (1) (*b*) of the C. P. C., and, consequently, the Court to which it was transferred was by virtue of cl. (4) of s. 24 invested with Small Cause Court powers with regard to that suit. [p. 140, col. 1.]

Under the Provincial Small Cause Courts Act a Small Cause Court is established first and the Judge of that Court is appointed afterwards. The Court, therefore, does not cease to exist if, at any time, there is no Judge to preside over it, and suits can be instituted in the Court even if there be no Judge appointed for the time being and suits so instituted would remain in the Small Cause Court until they are withdrawn from it. [p. 139, col. 2; p. 140, col. 1.]

Petition, under s. 25 of Act IX of 1887, for revision of the decree of the Subordinate Judge Fourth Class, with powers of Judge, Small Cause Court, Multan, dated the 20th February 1924.

Mr. *Shamair Chand*, for the Petitioner.
Babu *S. K. Mukerji*, for the Respondent.

JUDGMENT.

Zafar Ali, J.—The suit out of which this application for revision has arisen was originally instituted in the Small Causes Court, Multan Cantonment and was dismissed after trial by Major Reynolds, the Judge of the Court. The plaintiff then applied to the High Court for revision of Major Reynolds' order with the result that the order was set aside and the suit was remanded to be re-entered at its original number in the register of suits of that Court and to be tried and decided afresh. Major Reynolds had in the meantime been succeeded by an officer who was invested with powers to try small cause suits not exceeding Rs. 250 in value, and as the suit in question was of the value of Rs. 364-13-6 he was not competent to try it. The District Judge, therefore, transferred this suit to the Court of Lala Manohar Lal, Subordinate Judge, Multan and when that Subordinate Judge was transferred, the case went to Sheikh Laiq Ali, Subordinate Judge. Before the latter Counsel for both parties agreed that he possessed the jurisdiction of a Small Cause Court Judge with regard to the suit by virtue of cl. (4) of s. 24, C. P. C, as it had been transferred to his Court from a Small Cause Court. Sheikh Laiq Ali accordingly tried the suit as Judge Small Cause Court, and eventually dismissed it.

The plaintiff again appears in this Court with an application in revision, contending that Sheikh Laiq Ali had not the jurisdiction of a Court of Small Causes in respect of the suit. The application was admitted to a hearing by a Judge in Chambers, who finally referred it to a Division Bench in view of the importance of the question of jurisdiction raised therein.

The learned Counsel for the petitioner argues that the transfer of the case from the Small Cause Court, Multan, did not fall within the purview of s. 24, C. P. C., because that Court had ceased to have jurisdiction with respect to the suit before it was received back by it from the High Court on remand, that, therefore, the suit was not pending in that Court when it was transferred to another Court, and that in accordance with the provisions of s. 35 of the Provincial Small Cause Courts Act, which governed the case, the Court to which the suit was sent should have tried it as a regular suit. This argument will not bear the test of scrutiny.

A reference to ss. 5 and 6 of the Provincial Small Cause Courts Act would show that a Small Cause Court is established first and the Judge of that Court is appointed afterwards. It follows, therefore, that the Court does not cease to exist if at any time there should be no Judge to preside over it, that suits can be instituted in the Court even if there should be no Judge appointed for the time being, and that the suits so instituted would remain

in the Court until they are withdrawn therefrom. It is under s. 24 (*i*) (*b*), C. P. C., that a District Court can "withdraw any suit, appeal or other proceeding in any Court subordinate to it" and "transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same," and it was obviously under s. 24 (*i*) (*b*) that the District Judge withdrew the suit in question from the Small Cause Court and transferred it to the Court of the Subordinate Judge. The suit was at that time nowhere else than in the Small Cause Court, and it did not cease to be there because it was not triable by the Judge of that Court who succeded Major Reynolds. As the suit was withdrawn from a Small Cause Court the Court to which it was transferred was by virtue of cl. (4) of s. 24 invested with Small Cause Court powers with regard to that suit. The argument that the suit was not pending in the Small Cause Court and could not be transferred therefrom is untenable, because in the first place the word "pending" is not used at all in s. 24 (*i*) (*b*) and secondly all that the section enacts is that the District Judge may withdraw any suit in any Court Subordinate to him. If the suit could be withdrawn, it could also be transferred.

But it is contended that cl. (4) of s. 24 was rendered inoperative by s. 35 of the Provincial Small Cause Courts Act because the Small Cause Court had ceased to have jurisdiction with respect to the suit. The circumstance that the new Judge of the Small Cause Court could not try the suit has no hearing on the application of cl. (4) of s. 24. The suit might have been withdrawn and transferred even before the appointment of a successor to Major Reynolds and if it had been transferred before that, it could not have been objected that the transfer was not valid or that cl. (4) of s. 24 was inapplicable.

No reported case on all fours with the present has been cited before us, but *Sukha* v. *Raghunath Das* (1) and *Chaturi Singh* v. *Ramia* (2), may be referred to. In the former, a suit of a Small Cause Court nature was instituted in the Court of a Subordinate Judge who was invested with the jurisdiction of a Court of Small Causes. It was subsequently transferred by the District Judge to a Court of a Munsif not possessing the powers of a Small Cause Court. It was held that by reason of the provisions of s. 24 (4) the Munsif had the jurisdiction of a Court of Small Causes for the purposes of that suit. In *Chaturi Singh* v. *Ramia* (2) Small Cause Court suit valued at Rs. 273 was pending in the Court of a Subordinate Judge who had Small Cause Court Jurisdiction up to Rs. 500 The Subordinate Judge went on leave and was succeeded by an officer whose Small Cause Court Jurisdiction was limited to Rs. 250, Subsequently by order of the District Judge all Small Cause Court suits exceeding Rs. 250 in value were transferred to the Court of a Munsif. It was held that in reference to s. 24, C. P. C., the suit so transferred must be deemed to have been tried by the Munsif as a Court of Small Causes.

With regard to the construction of s. 35 of the Provincial Small Cause Courts Act, the rulings are conflicting. The most important ruling on the point is reported as *Mangalsen* v. *Rup Chand* (3). The learned Judges Sir John Edge, Chief Justice, and Mr. Justice Knox after reproducing clause (1) of s. 35 in their judgment observed as below:—

"The suit in the section referred to is a Small Cause Court suit, and the proceeding in the section is a proceeding in the Small Cause Court suit. The result is, according to our construction of the section, that when, by reason of a Small Cause Court ceasing to exist a suit is transferred to another Court, the proceedings still continue to be Small Cause Court proceedings, and for this purpose the Court to which the transfer is made must be treated as if it was a Court of Small Causes having jurisdiction to hear the suit transferred to it. In other words, whatever the intention of the Legislature was we read s. 35 of Act IX of 1887, in the same sense that we read the concluding paragraph s. 25 of the C. P. C."

The above view was dissented from in *Sarju Prasad* v. *Mahadeo Pande* (4), *Zamirul Hasan Khan* v. *Imdad Ali Khan* (5), and *Dulal Chandra Deb* v. *Ram Narain Deb* (6), but was approved of in *Sankara-*

(1) 37 Ind. Cas. 809; 39 A. 214; 15 A. L. J. 69.
(2) 46 Ind. Cas. 893; 40 A. 525; 16 A. L. J. 548.
(3) 13 A. 324; A. W. N. (1891) 96; 7 Ind. Dec. (N. S.) 205.
(4) 29 Ind. Cas. 996; 37 A. 450; 13 A. L. J. 639.
(5) 64 Ind. Cas. 573; 44 A. 59; 19 A. L. L. J. 838; (1922) A. I. R. (A.) 161.
(6) 31 C. 1057.

rama Aiyar v. *Padmanabba Aiyar* (7), and the view taken by the Calcutta High Court of clause (4) of s. 24 was adversely criticised in *Sukha* v. *Raghunath Das* (1).

As already stated the question of the applicability of s. 35 does not arise in this case because the withdrawal of the case from the Small Cause Court and its transfer to another Court was properly made under s. 24, C. P. C. I would, therefore, dismiss the application with costs.

Martineau, J.—I agree with my learned brother that the District Judge withdrew the suit from the Court of Small Causes under the provisions of s. 24 (*i*) (*b*) of the C. P. C. Although Major Reynolds' successor was not competent to try the suit the Court did not cease to be a Court of Small Causes, and s. 24 (4) consequently applies. I concur in dismissing the application with costs.

Z. K. *Application dismissed.*

(7) 17 Ind. Cas. 425; 38 M. 25; 23 M. L. J. 373; (1912) M. W. N. 1086.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 75 OF 1924.

February 13, 1925.

Present:—Mr. Daniels, J. C.

SWAMI DAYAL AND OTHERS—OPPOSITE PARTY—APPELLANTS

versus

MAQSOOD HUSEN AND ANOTHER—OBJECTORS—RESPONDENTS.

Oudh Civil Digest, para. 272 (v)—Fee, whether covers execution proceedings.

The intention of the rule contained in para. 272 (*v*) of the Oudh Civil Digest is that the fee fixed for the case should cover execution proceedings also, whether an objection is filed by the judgment-debtor or not.

Second appeal against an order of the Third Additional District Judge, Lucknow at Hardoi, dated the 16th September 1924, upholding that of the Additional Subordinate Judge, Hardoi, dated the 8th March 1924.

Mr. *Raj Narayan Shukla*, for the Appellants.

Mr. *H. N. Das*, for the Respondent.

JUDGMENT.—It appears to me that the interpretation put by the learned Additional Judge, on para. 272 (*v*) of the Oudh Civil Digest is correct and that the intention of the rule is that the fee fixed for the case should cover execution proceedings also whether an objection is filed by the judgment-debtor or not. This is the only question raised in the appeal and holding this view I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 206 OF 1920.

January 27, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Das and Mr. Justice Foster.

Babu HITENDRA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Maharajahdihraj SIR RAMESHWAR SINGH BAHADUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Gift—Heba-bil-ewaz—*Principles applicable—Intention of parties—Hindu Law*—Mithila *School—Gift by husband to wife—Estate conferred—Execution of decree—Mortgage-decree—Executing Court, whether can question jurisdiction of Court to direct sale of property—Representatives of judgment-debtor, whether can object to sale—Remedy.*

There is nothing in the Hindu Law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred even where an estate of inheritance is granted. Where ambiguity exists in the document itself or where the words are not of sufficient amplitude to confer full powers of alienation it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu Law attaches to a woman's rights over property and this may be considered in determining the intention even where an estate of inheritance is granted. But where words are used which in their context express an intention of transferring full rights of ownership, the other principles of interpretation are of minor importance and should not be allowed to restrict the natural meaning of the words. [p. 144, col. 2; p. 145, col. 1.]

A deed described as a deed of *heba-bil-ewaz* recited that the donor was the proprietor of the gifted property, that a decree had been obtained against him by his creditor for a certain sum of money and was in course of execution, that the gifted property and another property belonging to the donor had been advertised for sale on the following day, that the donor had tried and had failed to raise the necessary amount to satisfy the decree and that as the sale

would entail the loss of both the properties, the donor had taken the necessary amount from his wife and had made *heba-bil-ewaz* to her of the property mentioned in the deed "with trees fruit-bearing and non-fruit-bearing and *ahar* and *pokhar* and reservoir and tank and *kacha* and *pucca* wells and *sair* and salt *sair* and houses occupied by tenants and all my *zamindari* rights which up to now have been in my possession without the co-partnership of any one". The deed then recited that the donor had paid off the sum due under the decree and got the property released from sale and had put his wife in possession and directed that by becoming possessed of the property she should spend the produce "with sons generation after generation" and that the donor, his heirs and representatives would have no concern in demanding the subject of the gift or the consideration money from the donee or her heirs and representatives. The donor was governed by the *Mithila* School of Hindu Law:

Held, that the deed transferred to the donee full rights of ownership in the property gifted including the right of alienation. [p. 146, col. 1.]

An Executing Court is bound to execute the decree and cannot, apart from fraud, consider whether a decree ordering sale of certain property was one which the Trial Court ought rightly to have passed. [p. 148, col. 1.]

The representatives of a deceased mortgagor judgment-debtor cannot, in execution of a mortgage decree, agitate the question that the mortgagor had no power to execute the mortgage and that consequently the mortgaged property could not be sold in execution of the decree. Any such contention must be raised in a separate suit brought for the purpose of challenging the mortgage, the mortgage-decree and the sale held thereunder. [p. 148, col. 1.]

Case-law discussed.

Appeal from a decision of the District Judge, Darbhanga, dated the 23rd June 1920.

Sir *B. C. Mitter*, Messrs. *K. B. Dutt*, *A. Sen*, *L. K. Jha*, *S. M. Mullick* and *Kali Prasad Sukul*, for the Appellants.

Messrs. Syed *Hasan Imam*, *S. Jaffar Imam*, *S. Sultan Ahmad*, *S. M. Gupta*, *Murari Prasad*, *Sambhu Saran*, *Anirudhji Burman* and *Laksman Prasad*, for the Respondents.

JUDGMENT.—This appeal has been referred to me under s. 98, of the C. P. C. for determination upon the two points of law upon which the learned Judges before whom the appeal came originally have differed in opinion.*

The points as formulated in the judgment of Mr. Justice Das are:—first whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation, and secondly, whether on the interpretation of the *heba-bil-ewaz*, the fullest rights of ownership including the power to alienate the property were conveyed by Babu Durga Dutt Singh to his wife.

The facts are fully recorded in the judgment of Mr. Justice Das and it is unnecessary to repeat them.

The argument before me was mainly directed towards the second point, and it will be convenient to deal with it first. It was conceded at the outset by Sir Benode Mitter who appeared on behalf of the appellants that if the *heba-bil-ewaz* passed all rights of ownership to the grantee, the suit is not maintainable. Again it is not disputed that the instrument of 1876 conveyes an estate of inheritance which would, after the death of the grantee, devolve upon her own heirs and not upon those of her husband as in the case of property inherited by a Hindu widow from her husband. It is further conceded that if the grantee had been made a male or even a female under any personal disability there is nothing in the Hindu Law which would exclude the right of alienation incident to a grant of an estate of inheritance.

It is contended, however, that in determining the intentions of the grantor it must be taken that Durga Dutt Singh was well aware that a Hindu wife governed by the *Mithila* Law could not alienate immoveable property, the gift of her husband, and that presumbly his intention would be to transfer only such powers as the ordinary law recognized, and even if he erroneously supposed that the grantee might alienate the property with his consent, this can make no difference in the present case if in fact, as now found, his consent did not validate the transaction.

The proposition contended for is stated in the judgment of the Judicial Committee in *Moulvie Mohamed Shumsool Hooda* v *Shewukram* (1) in these words: "In construing the Will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property of Hindus. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." Bearing that in mind and having regard to all the expressions in the Will which must be taken together, their Lordships held in

*See 87 Ind. Cas. 849.—[*Ed.*]

(1) 22 W. R. 409; 14 B. L. R. 226; 2 I. A. 7; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43 (P. C.).

that case that the testator's intention was to grant to his deceased son's wife a life interest only with remainder to her two daughters who were also mentioned in the Will as heirs and *maliks*. This principle was again recognized by the Judicial Committee in *Radha Prasad Mullick* v. *Ranee Mani Dassee* (2). There is no doubt that the principle is one which must be given due weight. In both the cases cited, there were, however, indications in the Will itself that an interest for life only was intended to be given to the daughters with remainder over to other persons named. So clearly was this intention expressed in the later case that notwithstanding the provisions of s. 82 of the Indian Succession Act of 1865 which was applicable under s. 2 of the Hindu Wills Act of 1870 to the case in question, their Lordships were satisfied that only a restricted interest was intended to pass.

A somewhat similar principle is sometime expressed by saying that the law of the place where the contract is made is *prima facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention: see *Lloyd* v. *Guibert* (3).

But after all the intention is primarily to be gathered from the words of the instrument itself and the application of this and similar doctrines although they must be given due weight must not be allowed to overrule the clear indications of intention to be gathered from the words of the document. Perhaps it may not be out of place to repeat here what was said by Lord Justice Turner in delivering the judgment of the Judicial Committee in *Sreemutty Soorjeemoney Dassee* v. *Denobundoo Mullick* (4). The case was one of the construction of Will. "In determining that construction" said the learned Lord Justice "what we must look to, is the intention of the testator. The Hindu Law, no less than the English Law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the Will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption."

In applying these principles to testamentary and other forms of gift, the Courts of India appear to have inclined from time to time towards two extremes, one view being that a gift of an estate of inheritance to a Hindu wife did not pass the right of alienation except when conferred by express words, the other that such a gift always gave the right of alienation except when expressly excluded.

I think it may be gathered from the decisions of the Judicial Committee that neither of these views quite correctly expresses the proper rule of construction in such cases. In *Surajmani* v. *Rabi Nath* (5) the High Court at Allahabad following earlier decisions of the same Court had held that under the Hindu Law a testamentary gift of immoveable property by a husband to his wife although made in terms creating an heritable estate did not confer upon her any power of alienation unless such power was given by express words in the instrument. The High Court considered that in the absence of such express power it must be presumed that as regards her power of alienation the testator intended that she should be under the same restrictions as the Hindu Law imposes upon a widow in the case of property inherited from her husband. On appeal to His Majesty in Council, their Lordships overruled the decision and held that where full proprietary rights are clearly granted over the pro-

(2) 35 C. 896; 10 Bom. L. R. 604; 12 C. W. N. 729; 18 M. L. J. 287; 5 A. L. J. 460; 8 C. L. J. 48 (P. C.).

(3) (1866) 1 Q. B. 115 at p. 122; 6 B. & S. 100; 35 L. J. Q. B. 74; 13 L. T. 602.

(4) 6 M. I. A. 526 at p. 550; 1 Ind. Jur. (N. S.) 37; 4 W. R. P. C. 114; 1 Boulr. Rep. 228; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 19 R. R. 198.

(5) 25 A. 361; A. W. N. (1903) 66.

perty this conferred the power of alienation unless there was something in the context or the surrounding circumstances showing a different intention, and the fact that the donee was a woman was not in that case sufficient in itself to impute a different intention: see *Surajmani* v. *Rabi Nath Ojha* (6). It is important to remember that that case, although it applied to a Will made after the year 1870, did not come within the operation of s. 2 of the Hindu Wills Act of that year and s. 82 of the Indian Succession Act had, therefore, no application. In that case also the decision of Mitter, J., in *Kollany Koer* v. *Luchmee Pershad* (7) was cited with approval.

The High Court at Madras on the other hand appears in more recent decisions to have inclined towards the opposite extreme. In *Ramachandra Rao* v. *Ramachandra Rao* (8), a case of a testamentary gift to a Hindu wife, it was held by Seshagiri Ayyar, J., that the earlier decisions of the same High Court in *Bhujanga Ram* v. *Ramayamma* (9) and *Nunnu Meah* v. *Krishnasami* (10), must be deemed to have been overruled by the decision of the Judicial Committee in *Surajmani's case* (6), and that unless there is an express or implied qualification to the contrary the donor must be deemed to have conveyed all that he was possessed of in the property granted, including the power of alienation. The words of the grant in that case were:—"Out of the remaining property my adopted son shall be entitled to enjoy one half of the property. Out of the remaining half my two wives shall take half-and-half". I do not wish to be understood either as questioning the propriety of that decision or expressing concurrence with it, I merely wish to point out that on appeal to the Judicial Committee where the decision was overruled upon another point, their Lordships, although it was not necessary for them to determine the effect of the deed of gift, at the same time thought it expedient to issue a note of warning as some misapprehension appeared to them to exist in the High Courts in India as to the effect of certain decisions of the Board and notably that of *Surajmani* v. *Rabi Nath Ojha* (6). Lord Buckmaster in delivering the judgment of the Judicial Committee says: "In the case referred to, [*Surajmani's case* (6),] when originally heard before the High Court, it had been stated that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case it is true some comparison is drawn between the gift to a widow and the gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning to attributed the words in which the gift to the widow was clothed. More recent decisions of this Board [in *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (11) and *Bhaidas Shivdas* v. *Bai Gulab* (12)] do nothing but repeat this same proposition in other words." See *Ramachandra Rao* v. *Ramachandra Rao* (13).

The effect of these decisions appears to me be that there is nothing in the Hindu Law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred, even where an estate of inheritance is granted. Where ambiguity exists in the document itself or where the words are not of sufficient amplitude to confer full powers

(6) 35 I. A. 17; 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144 (P. C.).

(7) 24 W. R. 395.

(8) 52 Ind. Cas. 94; 42 M. 283; 36 M. L. J. 306.

(9) 7 M. 387; 8 Ind. Jur. 238; 2 Ind. Dec. (N. S.) 853.

(10) 14 M. 274; 5 Ind. Dec. (N. S.) 192.

(11) 66 Ind. Cas. 193; 26 C. W. N. 425; 15 L. W. 434; 42 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; (1922) M. W. N. 368; 49 I. A. 25; (1922) A. I. R. (P. C.) 63; 1 Pat. 36[illegible]; 3 P. L. T. 133 (P. C.).

(12) 65 Ind. Cas. 974; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 49 I. A. 1; 35 C. L. J. 314; 24 Bom. L. R. 551; 46 B. 153; (1922) A. I. R. (P. C.) 193 (P. C.).

(13) 67 Ind. Cas. 408; 49 I. A. 129; 30 M. L. T. 154; 26 C. W. N. 713; 45 M. 320; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. (P. C.) 80; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 963 (P. C.).

of alienation it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu Law attaches to a woman's rights over property and this may be considered in determining the intention even where an estate of inheritance is granted.

But where words are used which in their context express an intention of transferring full rights of ownership, it seems to me that the other principles of interpretation relied on are of minor importance and should not be allowed to restrict the natural meaning of the words.

Before considering the interpretation of the document, I desire to point out that I am bound by the findings already come to by the learned Judges who heard the appeal, in so far as they are agreed. I do not, therefore, propose to discuss the question whether under the *Mithila* Law as expounded in the Vivada Chintamani, the property was alienable during the husband's lifetime and with his consent. Whether the learned Judges were agreed that the *heba-bil-ewaz* was a gift or a sale is perhaps not altogether free from doubt. Mr. Justice Das held a clear view that the transaction was a gift. Mr. Justice Foster thought that it was rather an act of gratitude than a sale for value and says: "In spite of its form it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (*dattam*) within the meaning of the Hindu Texts" but he adds "unless of course it is an absolute grant".

I have some difficulty in seeing how the nature of the transaction could depend upon whether it was an absolute or a restricted grant. I think what the learned Judge probably had in mind was that the ordinary Hindu Law would not prevail over absolute grant carrying a power of alienation, and not that the quality of the estate granted would affect the nature of the transaction. If full rights of ownership were transferred it would not matter whether the transfer was effected by gift or by sale. In either case the right of alienation would subsist. I think, however, I ought to assume that the learned Judges were agreed that the transaction was one of gift, and, whatever my own views on the subject may be, I must hold that on the terms of the reference I am precluded from re-opening the point. This question arose in argument in discussing the intention of the grantor in connection with what may be called the surrounding circumstances. It was urged by Mr. Hasan Imam on behalf of the respondents that Durga Dutt Singh would never have transferred the property to his wife in the form of a *heba-bil-ewaz*, which text book writers appear to agree carries with it, the incidents of a sale, if he really intended the Hindu Law restraining alienation in the case of a gift to a wife to apply. Mr. Justice Foster appears to accede to this argument, although, as I have stated, he eventually agreed that it was a gift. It was also argued that although it has now been decided that the instrument is one of gift it does not follow that Durga Dutt Singh took the same view some 50 years ago when he transferred the property to his wife, and, therefore, the presumption which would arise in the case of a gift either disappears or is materially weakened.

In the same connection it was also argued on behalf of the respondents that in all the cases in which the principle enunciated in *Shamsool Hooda's case* (1), has been applied, the Hindu Law applicable was well-known and established, and knowledge thereof might well be imputed to the person making a disposition of his property, whereas in the present case it does not follow that the law now laid down after a critical examination of the texts was so universally acknowledged in 1876 as to carry any presumption that the grantor was then aware of it. It is argued that even if it be clearly stated in the Vivada Chintamani, and it appears to be so, that a wife cannot at her pleasure alienate immoveable property given to her by her husband, the finding that she cannot do so even with his consent during his lifetime and in order to pay his creditors is arrived at rather as an inference drawn from the text of Bachaspati Misra than from any direct prohibition therein contained, and that there has hitherto been no decided case in which the *Mithila* Law has been so expounded. The question then arises how far it would be safe in the present case to presume that Durga Dutt Singh in effecting the transfer was aware of the restraint on alienation imposed by the *Mithila* Law, as now expounded, upon a wife during her husband's life-time with his consent and for the purpose of satisfying his creditors. I am not sure that it would be safe to presume more than this, namely, that the grantor was

aware that in the Mithila country a wife could not at pleasure dispose of the property given to her by her husband. Sir Binode Mitter contended that, even then, the husband's consent would not make the alienation valid if in fact the law prohibits it even with his consent. I quite agree but the question is not, for this purpose, what the law is, but how far it can be presumed that the grantor was aware of it and intended the transaction to be governed by it.

It was also argued by Mr. Hasan Imam for the respondents that the subsequent action of Durga Dutt Singh in joining in the mortgage transaction was in itself a strong indication that when he made the gift in 1876, he did not intend the property to be inalienable even with his consent. I think, however, it would be highly dangerous and hardly legitimate to interpret his intentions in 1876, by reference to his conduct 14 years later when the considerations which then influenced him may have been entirely different. He has not been charged and no question of estoppel by his conduct arises. I have referred to these matters somewhat fully out of respect to the learned Counsel who argued them at some length, but in the view I take of the meaning of the *heba-bil-ewaz* it is not necessary to determine how far the presumption of intention contended for by the appellants is affected by the considerations mentioned. I should be prepared to hold, if necessary, that there are circumstances present in this case which tend to weaken the presumption which, speaking generally, arises in such cases. I refer more particularly to the form in which the transfer took place and the fact that a substantial consideration passed from the donee to the donor as indications that Durga Dutt Singh may, after all, not have had in mind the restraint on alienation in the case of gifts to a wife when he transferred the property. I do not, however, wish to base my decision upon the strength or weakness of the presumption in the present case and it is unnecessary to discuss it further, for giving full weight to the principle enunciated in the cases already cited, there was, in my opinion, in the *heba-bil-ewaz* a clearly expressed intention to transfer full rights of ownership including the right of alienation.

The document begins by describing Durga Dutt Singh as the proprietor (*malik*) of the Laheri property. It then recites that a decree obtained against him by his creditor for Rs. 51,582 is in course of execution in the Court of the District Judge and that the property in suit and another property of his have been advertised for sale on the following day; that he has tried and failed to raise the money and as the sale will entail loss of both the *milkiat* properties, having taken the sum stated above from his wife, he makes *heba-bil-ewaz* to her of his share in *Taluka* Laheri "with trees fruit bearing and non fruit bearing and *ahar* and *pokhar* and reservoir and tank and *kutcha* and *pucca* wells and *sair* and salt *sairs* and houses occupied by tenants and all my *zemindari* rights which upto now have (or has) been in my possession without the co-partnership of any one". It then recites that he has paid off the sum due under the decree and got the property released from sale and put the *Musammat* in possession and directs that by becoming possessed of the property she should spend the produce with sons generation after generation, and the declarant, his heirs and representatives shall have no concern in demanding the subject of the *heba* or the consideration money from the *Musammat* or her heirs and representatives. It is admitted that the words "with sons generation after generation" used in their context convey an estate inheritance. There is no restrain either express or implied on alienation but on the contrary all the *zemindari* rights are transferred by the donor. The *zemindar* is the proprietor and the *zemindari* rights are proprietary rights. I cannot accept the view of my brother Das that the words "and all my *zemindari* rights add nothing to the words immediately preceding them or that they must be construed by reference to the *ejusdem generis* rule. The preceding words, as he truly observes, appear to be specific items of property but they are of a corporeal nature such as trees, wells, etc. whereas the *zemindari* rights are intangible or incorporeal and not of the same *genus*. I can hardly believe that such words would have been used had they been intended merely as descriptive of the preceding category. It would have been sufficient to say "and other things" or similar words if that were the meaning. The learned Judge appears to have had a difficulty in holding that abstract rights could be the subject of gift or could be possessed. I

confess I do not share the difficulty. In connection with this point some discussion arose before me in argument as to the word which is rendered "have" in the expression "which up to now have been in my possession without the co-partnership of any one". Mr. Hasan Imam said the word in the original document which was translated by him in Court and taken down by the learned Judge was "has" and not "have" and that either he had made a slip in dictating the translation or he had not been properly understood. I do not think the question is one of material importance; but to set the matter at rest I sent for the translator who originally translated document as it appears at page 7 of Part III of the record. It seems that in the original the word is "has" and as matter of syntax it must be governed by the earlier words "my share etc. in *Taluka* Laheri" and not to the *zemindari* rights and other matters mentioned. This reading would no doubt obviate the difficulty felt by Mr. Justice Das. It was further argued on behalf of the respondents that the reference to the heirs and representatives of the grantee indicated an intention to grant an alienable estate as the word "representatives" would include assigns who were not heirs. The word translated "representatives" is *qaim-moqaimian* which literally means "those who stand in another's place" and is correctly translated "representatives". I believe the word "representatives" when used in an English conveyance has a technical meaning and includes executors or administrators but not assigns. However, this may be, I am not aware that the word *qaim-moqaimian* is a term of art in such a document in India. But it is clear that the expression coming as it does in what amounts to a covenant for quiet enjoyment cannot add anything to the extent of the grant. It might possibly throw some light upon the earlier part of the document if there were any ambiguity; but even assuming that it includes "assigns" the use of such a word would not indicate an absolute power of alienation, for it is admitted that in certain events, such as legal necessity the grantee might alienate. I do not think any importance can be attached to the use of the word.

It was argued on behalf of the appellants that the words directing the grantee to spend the produce indicated that she was given the usufruct only. These words are coupled with the word "with sons generation after generation" which admittedly passed an estate of inheritance. But it is not suggested that the sons who followed after would be in any way restrained from alienating the property. Moreover although the grantee was directed to spend or enjoy the produce the enjoyment was that of a person having full rights of ownership which were also conferred. Such words are not uncommonly used in India in conveyances which transfer an heritable and alienable estate. An instance will be found in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (14). The words used there were "my nephew.....becoming on my death my *sthalabhishikta* and becoming owner (*malik*) of all my estates and properties etc., shall.....enjoy with son, grandson, and so on in succession the proceeds of my estate".

Lord Davey in delivering the judgment of the Board said:— "Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner (*malik*) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words "enjoy with son, grandson and so on in succession", which latter words are frequently used in Hindu Wills and have acquired the force of technical words conveying an heritable and alienable estate". So far as I am aware such words have never been interpreted as restricting the full rights of ownership conferred in an earlier part of the instrument of grant.

In my opinion the *heba-bil-ewaz* was intended to and did pass an heritable and alienable estate and the words used were of sufficient amplitude for that purpose.

If this view of the meaning of the document is accepted it is admitted that the suit is not maintainable. But as this case may go before a higher Tribunal I propose to express shortly my opinion on the question of maintainability and limitation on the assumption that an unrestricted power of alienation was not conferred.

The plaintiff who obtained possession of the property after their mother's death in 1904 and remained in possession until the 14th December 1906, when they were

(14) 24 I. A. 76; 24 C. 834; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.).

dispossessed by the Maharaja, would in the ordinary course have 12 years from that date in which to sue for recovery of possession under Art. 142 of the Schedule to the Limitation Act. The suit was instituted in July 1918, within the period of limitation. But it is contended that they were barred by s. 47 of the C. P. C. as they ought to have raised the question of their mother's right to alienate when they were substituted in her place in the execution proceedings. As pointed out by Mr. Justice Das the application made by them to set aside the sale on the ground of irregularity under s. 311 of the old Code although purporting to be an application under s. 244 also, did not in fact raise any question coming under the latter section and did not cover the point now raised. In my opinion it was not open to the appellants to raise the question in those proceedings. The Executing Court is bound to execute the decree and could not apart from fraud consider whether the decree ordering sale of the property was one which the Trial Court ought rightly to have passed. The representatives of the mortgagor could not successfully re-open the question which if it were open at all should have been urged before the Trial Court.

Next it was contended that the suit was barred by s. 11 of the C. P. C. It is pointed out that the appellants claim under their mother as her heirs. They are not reversioners taking as heirs of their father subject to the life interest in their mother, nor are they remainder men taking under their father's Will. Primarily, therefore, they would be bound by the acts of their predecessor-in-title as well as by any decree obtained against her. But in truth it can hardly be said that the mother in this case represented the estate for all purposes so as to bind those who succeeded her. *Ex-hypothesi* she had no power of alienation. In this respect her question is very like that of a Hindu widow taking by inheritance. She could no more bind the estate in the hands of the heirs by an alienation than a Hindu widow inheriting from her husband could bind the reversioners. She assumed a power which the law denied her. She could not transfer a good title to the mortgagee. If the mortgage was not binding upon the heirs, then as long as their possession was not disturbed they could, I think, ignore it and treat it as non-existent. Being in possession they were under no obligation to assert their title by a declaratory suit or to sue for possession. Does it then make any difference that a mortgage-decree was passed in favour of the mortgagee. I think not. The mortgagor did not and could not in that suit plead her disability, she could not degroate from her grant, and the question was neither substantially or at all in issue within the meaning of s. 11 of the C. P. C., nor could the inalienability be made a ground of defence in that suit within the meaning of Explanation IV of the section.

It is contended, however, that a decree against a Hindu widow can bind even the reversioners taking as heirs of her husband and *a fortiori* her own heirs must be bound. *Katama Natchiar* v. *Raja of Shivagunga* (15) and *Risal Singh* v. *Balwant Singh* (16) were relied on in support of the argument. But in both those cases the question for decision had arisen and been determined in the previous suit to which the widow was a party and all the pleas available to the reversioners had been taken by her and after a fair trial had been determined against her.

In the present case I think the principle followed by their Lordships of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (17) is applicable. That case, it is true, was a case of alienation by lease by a Hindu widow followed by a suit by the reversioners after her death to recover the property; but the ground of the decision was that the alienation was not binding on the reversioners who could, therefore, treat it as a nullity without first seeking the intervention of the Court to set it aside and I think the same principle is applicable to the heirs whom the alienation did not bind. Nor do I consider that the fact that a decree has been passed against the mortgagor in the present case can give the transaction any more binding force if the mortgagor's power of alienation was not in question before the Court which passed the decree.

(15) 9 M. I. A. 539 at p. 604; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.

(16) 48 Ind. Cas. 553; 45 I. A. 168; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511 (P. C.).

(17) 34 C. 329; 34 I. A. 87; 5 C. L. J. 334; 11 C. W. N. 424; 9 Bom. L. R. 602; 17 M. L. J. 154; 2 M. L. T. 133; 4 A. L. J. 329 (P. C.).

I agree, however, that if contrary to the view just expressed, it is necessary to set aside the decree before the present suit is maintainable, the period within which the decree could be set aside has long since passed and the suit in that case could not proceed. In my opinion, however, on the assumption that the right of alienation did not exist the suit is maintainable and is not barred by limitation.

The result of my findings is that the suit fails and the appeal should be dismissed.

Let the matter be referred to the Bench who originally tried the appeal for final disposal on the question of costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 358 OF 1924.

October 31, 1923.

Present:—Mr. Baker, Offg. J. C.

IBRAHIM—APPELLANT

versus

Musammat SUGRABAI—RESPONDENT.

Registration Act (XVI of 1908), ss. 72, 73, 74, 77—Suit to compel registration, maintainability of—Procedure—Appeal under s. 72, whether can be treated as application under s. 73.

A document which purports to be an appeal under s. 72 of the Registration Act and is not verified as required by sub-s. (2) of s. 73 of the Act cannot be treated as an application under s. 73 of the Act.

An enquiry by the Registrar under s. 74 of the Registration Act is a necessary preliminary to a suit under s. 77 of the Act. A suit under the latter section is not maintainable in the absence of such an enquiry having been made and in the absence of an application under s. 73 of the Act.

Appeal against a decree of the District Judge, Nimar, dated the 22nd April 1922.

Mr. *M. Gupta*, for the Appellant.

Messrs. *H. S. Gour* and *S. B. Gokhale*, for the Respondent.

JUDGMENT.—This case was remanded for a finding whether the plaintiff had complied with the provisions of s. 73, Registration Act, before instituting his suit under s. 77 of the Act. The finding is that the application did not comply with the provisions of s. 73 because it was not verified. The original application is on record. It purports to be an appeal under s. 72 and not an application under s. 73. It is not verified as required by para. 2 of s. 73.

It is argued for the appellant that this is a mere technical defect, but this is not so. The case is on all fours with *Lakhimoni Chowdhrain* v. *Akroomoni Chowdhrain* (1) in which it was held following *Edun* v. *Mahomed Siddik* (2) that an enquiry by the Registrar under s. 74 was a necessary preliminary to a suit under s. 77.

Section 74 contemplates a separate enquiry by the Registrar and there is no question of any such enquiry being made here. This distinguishes such an application from an appeal. In these circumstances I am of opinion that the suit will not lie. The appeal consequently fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 9 C. 851; 12 C. L. R. 527; 4 Ind. Dec. (N. S.) 1217.

(2) 9 C. 150; 11 C. L. R. 440; 5 Shome L. R. 35; 4 Ind. Dec. (N. S.) 752.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 5, 1924.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge and Sir Lawrence Jenkins.

KARIMUNNESSA KHATUN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

MAHOMED FAZLUL KARIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Compromise—Agreement, provisional, effect of—Adverse possession.

One of several heirs of a deceased Muhammadan sued the others for recovery of her share of the property left by the deceased. Her suit was decreed by the Trial Court but was dismissed by the High Court on appeal. She preferred an appeal to the Privy Council and during the pendency of this appeal an agreement was executed which purported to be an agreement between all the heirs of the deceased but was actually signed by only some of them, which began by describing the shares to which the different heirs of the deceased were entitled, including the share of the appellant, and then proceeded to submit certain questions to the decision of certain named arbitrators, one of the questions submitted being with regard to the relinquishment of the share of the appellant in her favour. No reference to arbitration was actually made, although for several years subsequent to the agreement a certain fixed sum out of the profits of the estate continued to be paid to the appellant:

Held, (1) that the agreement being merely provisional no title was thereby conferred on the appellant with regard to her alleged share in the estate of the deceased; [p. 153, col. 1.]

(2) that the subsequent payments to the appellant

were not sufficient to make out a case of adverse possession by the appellant of her share in the estate of the deceased. [p. 153, col. 1.]

Mr. A. *Majid*, for the Appellants.

Mr. S. *Hyam*, for the Respondents.

JUDGMENT.

Lord Sumner.—Mia Golam Ali Chowdhury Sahib, of Ghatakhan, in the District of Faridpur, married three wives according to Muhammadan Law of the Hanafi School. By the first, Aijunnessa Khatun, he had a son, Ali Ahmed, and two daughters; by the second, Ijjatunnessa, who was the widow of his own younger brother and uterine sister of his first wife, he had two sons, Amjad Ali and Tazammul Ali, and six daughters, of whom Karimunnessa Khatun who preferred the present appeal from the judgment of the High Court at Calcutta, was the eldest, and by the third, Jamidunnessa, two daughters, of whom the younger, Majidunnessa, a posthumous child, is the plaintiff in the partition Suit No. 137 of 1912, in which the present appeal arises. On 7th January, 1888, he died, possessed of the Haturia Estate, the subject of the present litigation, to which the persons above-mentioned were the apparent heirs. He purported to have duly made his Will, of which his eldest son subsequently obtained Probate.

Thereupon in 1892, a suit was brought to have the Will set aside and to obtain possession of the respective plaintiffs' separate shares. The plaintiffs were Karimunnessa Khatun, three of her sisters, and one of the widows, while the other members of the family were joined as defendants. Those who supported the Will alleged, among other things, that Golam Chowdhury's second marriage was wholly invalid and that the offspring of it were not entitled to share. This litigation was soon compromised, but Karimunnessa Khatun, not joining in the compromise, proceeded successfully to a decree in the Court of the Subordinate Judge. On appeal the High Court decided [*Aizunnissa Khatoon* v. *Karimunnissa Khatoon* (1)] that the second marriage was invalid, and that she was illegitimate and took no share. From this decision she preferred an appeal to their Lordships' Board, No. 28 of 1895. So far as the present case is concerned this was the last step taken in the suit of 1892.

The position, then, at the beginning of 1896 was this. As against Karimunnessa Khatun it was *res judicata* in favour of the children of the first and third marriages, that she had no right to share in her father's property while her full brothers, Amjad Ali and Tazammul Ali, had made their peace with their half brothers and sisters, and had been admitted to share. If Karimunnessa Khatun prosecuted her appeal with success, she would share according to her full legal rights, undiminished by compromise; if she failed, she would be wholly excluded. As long as her appeal was pending she took no share.

Their Lordships express no opinion on the question of law, which would have been involved in that appeal, or as to its prospects of success. Her abandonment of it might well be consideration sufficient to support an agreement for a new compromise of the subject-matter of the appeal, and, according to the views taken of its merits by the legal advisers on either side, she might be in a position to insist on favourable terms or find herself at an arm's length with her opponents. The position was favourable to negotiation and it is not necessary to inquire where the balance of advantage lay.

Accordingly an *ekrarnama*, dated 24th March, 1896, was prepared, on the true effect of which the decree now appealed against was rested. On it, as their Lordships think, the whole rights involved in this appeal must principally depend. It was followed, it is true, on 20th April, 1896, by an *amalnama* for the appointment of common managers of the estate, but this merely refers to the provisions of the *ekrarnama*, and, as the High Court rightly held, carries them no further.

The instrument began by stating that certain named parties "execute this *ekrarnama* to the following effect." These parties were the three widows and all their respective children then living, the widow of the first wife's son joining on her own account and on account of her infant son. There then follow eleven paragraphs of recitals relating to the initiation of the suit of 1892, and its compromise among parties other than Karimunnessa Khatun, and to certain mesne transactions, not now material, between Ali Ahmad and Tazammul Ali and between them and sundry ladies of the family for the lease of the latter parties' shares apparently in return for fixed annuities. Next comes a recital of the success of Karimunnessa Khatun in

(1) 23 C. 130; 12 Ind Dec. (N. S.) 67.

the First Court and of her defeat in the second, and a statement that, owing to disputes which arose subsequent to the compromises, the management of the estates fell into disorder and rents were not paid, so much so that an auction-sale in execution of creditors' decrees was on the point of taking place in respect of the shares of Tazammul Ali, Bafatunnessa Khatun, Jibunnessa Khatun, Aklimunnessa Khatun, Ali Asraf and Aitunnessa Khatun.

The document then goes on, "so we make an *ekrar* to the following effect, for settling all our disputes and misunderstandings." Then follow four so-called "Conditions." The first runs thus:—

"That we are in possession and ownership of the properties left by the late Mia Golam Ali Chowdhury by right of inheritance and under *pottahs*, etc..... We entrust the entire charge of management of our estate to Babu Kati Krishna Tagore, of Pathuriagata.....We will all jointly execute a deed of trust and get it registered and will thereby put the entire charge of management of the estate in his hands.....If our *zemindar*, Babu Kati Krishna Tagore, does not take the charge of management, then we, all the sharers shall jointly appoint a common manager.....If all the sharers do not join in making the said application then, any of the sharers shall be at liberty to make a petition and have a common manager appointed on the basis of this deed.....If for any of the reasons stated above the charge of management do not remain in the hands of our *zemindar*, Babu Kati Krishna Tagore, or if no common manager can be appointed, then all the sharers jointly or, most of them unanimously, shall be at liberty to appoint a fit person as a manager."

Condition No. 2 is a recital of the shares of those (including the present plaintiff) who, apart from the alleged Will and the subsequent compromises and litigation, appeared to be entitled to inherit in consequence of Golam Ali's death. Sons are stated to have inherited shares of 1 anna 15 *gundas*; daughters, including Karimunnessa Khatun, to shares of 17½ *gundas*; and widows to shares of 13 *gundas* 1 *kara* 1 *krant* each, as *jajiyati* shares. These fractions aggregate the entirety of the estate. Accordingly to the previous recitals the amounts of these shares would appear to have been fixed by the Subordinate Judge in the suit of 1892, in accordance with Muhammadan Law. The paragraph concludes:—

"These shares shall remain fixed. We shall not ever be competent to claim anything in excess of these shares. If we make such a claim the same shall be disallowed by the Court."

The fourth condition contains a submission of nine questions to the decision of certain named arbitrators, of which the seventh is as follows:—

"With regard to the relinquishment by *solehnama* of 17½ *gundas* share in the immoveable properties left by the late Mia Golam Ali Chowdhury Sahib without mesne profits, in favour of Karimunnessa Khatun contrary to the decree of the High Court, and with regard to the costs, exclusive of Rs. 1,200, which the said Khatun has taken on account of cost, with regard to cash money, and with regard to Dewanbati, Gopalpur owned and held by her."

It is to be noticed that the appeal by Karimunnessa Khatun to their Lordships' Board is nowhere mentioned, and its abandonment is not stipulated for; that Karimunnessa Khatun does not appear at this date to have been in possession of any part of the Haturia estate, whatever she may have been later on, being in fact excluded from it by the decree against her, and that only five persons actually execute the *ekrarnama*, namely, Karimunnessa Khatun, Tazammul Ali, Jabidunnessa, Jibunnessa and Bafatunnessa. Even when allowance has been made for the fact that the shares of some of the ladies, who were members of the family, were in the hands of Tazammul Ali, between whom and Karimunnessa Khatun most of the conflict of interest now arose, there remains one important branch of the family, heirs of Amjad Ali, who never executed or became bound by this *ekrarnama*, *viz.*, Akbar, the son, Rokea, the widow, and Ijjatunnesa, the mother. No arbitration ever took place, nor did Babu Kati Krishna Tagore take up the management. In April of the same year an English firm was appointed to manage the estates instead of him. Karimunnessa Khatun did not withdraw her appeal; it was dismissed for want of prosecution in 1897.

This document, no doubt, appears at first sight to have been designed to secure to Karimunnessa Khatun the 17½-*gundas* share from which, as matter then stood,

she was barred by the decree of the High Court. It is, however, evident that if each person signing became thereupon bound to each other person signing to allow this provision to be carried out and to make it effective himself, so far as his own participation was concerned, those who signed might, as against those who did not, be placed in a position of considerable personal liability. The admission of Karimunnessa Khatun to a share in the estate to which, as the decree in the partition suit against her then stood, she was not entitled at all, would, of course, *pro tanto*, diminish all the other participants' shares, and if those who did not sign were to contest her right to admission as a participant with success, they would share in proportion to a greater extent, while those who had signed, would share to a less extent. In this view, as between those who signed and those who did not, the former class must suffer if the latter should insist on the decree as it stood.

If, on the other hand, the article were to be read, as it would be read, say, in a creditors' composition deed, that is, if the consideration upon which each party became bound were the execution of the deed by all the others, so that a mutual obligation of all to all must arise before any particular party could be bound, the working of the article would be simple, and when all had signed a complete settlement would have been provided for. This seems to have been the main issue before the High Court upon the construction of the *ekrarnama*.

Again, among the matters, "with regard to which" the award of the named arbitrators is to be final, is the seventh question, *viz.*, "with regard to the relinquishment," that is to say, by the other heirs of Mia Golam "by *solehnama* of 17½-*gundas* share, without mesne profits, in favour of Karimunnessa Khatun, contrary to the decree of the High Court," and the effect of this provision appears to be that Karimunnessa Khatun is to have a 17½-*gundas* share, if and when the arbitrators award it to her, but that in no event is it to carry mesne profits, nor is there any submission to them of a claim by her for such mesne profits. The difficulties in the way of reconciling this provision with a consensual re-admission of Karimunnessa Khatun forthwith to the circle of the participating heirs, independently of any award, seem to be very great. It is evident that these considerations prevailed with the High Court, whose conclusion as to the *ekrarnama* of 1896 is expressed as follows by Sir Charles Chitty:—

"Of this the learned Judge says that it fixed Karimunnessa's share at 17½ *gundas*, and that its terms are sufficient to confer title on her. In this view I cannot agree. In the first place the document purports to be an agreement between nine people, but it was executed only by five of them. Secondly, and more important, the document is only a provisional agreement .....as a matter of fact no arbitrators were ever appointed."

After very full consideration of the question their Lordships' Board is unable to see its way to differ from this conclusion of the High Court. They are willing to give, if possible, that benevolent construction to the *ekrarnama* which it has often been said that, "family arrangements" deserve, but all depends in the long run on the construction of the written words. The document itself is obscure, and no doubt suffers, as most documents do, by translation. Opposite views as to its nature and effect may well be arrived at by different minds but, on the whole, their Lordships cannot say that the view of the High Court was wrong.

The decision of the other questions in the case follows readily from this conclusion. It is a curious thing that some members of the family, at any rate, seem to have thought for many years that Karimunnessa Khatun was somehow entitled to the same 17½-*gundas* share as her sisters took, for in an *ekrarnama* of 1898, to which Tazammul Ali was a party, though Karimunnessa Khatun was not, the several fractions which make up the total of the estate are recited exactly as they stood in Art. 2 of the *ekrarnama* of 1896, and they are described as being the result of a settlement by "various deeds," some of which are named and some not. For a long time Karimunnessa Khatun continued to receive regular "allowances" from the managers of the Haturia estate, which must have been payments as of right, since her creditors obtained attachment of them for her debts, and there were produced sundry subsequent Settlement Records, filed by the Receiver of the estate, in which Karimunnessa Khatun appears as entitled by inheritance from Mia Golam Ali Chow-

dhury, to the same 17½-*gundas* share as her sisters. These records seem to have been prepared by the manager of the estate under the Court of Wards, at a date and under circumstances, however, which are not stated.

The question, then, is whether these facts, separately or collectively, warrant an inference that Karimunnessa Khatun received from the other heirs, at a date subsequent to 1896, and independently of the *ekrarnama* of that year, by some agreement which is nowhere recorded, the very share in the property left by her father, which the *ekrarnama* was not effectual to give her. Their Lordships think that the High Court rightly answered this question in the negative. The above facts are not interpretative of the true construction of a prior written agreement; at most they show that many members of the family construed it wrongly, or were imperfectly informed as to what had happened. The facts themselves are of dubious import. No account of any share in the Haturia estate was apparently ever rendered to Karimunnessa Khatun; certainly none was produced, and the payments to her, though varying in amount from time to time, were always made in round figures and could not have represented a small fixed share in the net profits of an estate, which consisted of many different kinds of property, fluctuating in annual value. The Settlement Records are, of course, important documents, which must have been carefully prepared, and probably ought to have been challenged, if they were seriously incorrect, but they are not conclusive, and too little is known of them to enable their Lordships to infer that a valid agreement had at some time been entered into after 1896, which conferred the 17½-*gundas* share that the *ekrarnama* failed to give. It was admitted that Karimunnessa Khatun had had possession, but this is a possession referable to her title, and must be possession of that only which her title gave her. Their Lordships dismissed, in the course of the argument, the contention that any case of adverse possession could be made out, and they are of opinion that nothing is proved after 1896 to give to Karimunnessa Khatun a share as against other members of the family or their assigns.

Some question arose as to the position of the respondents and the extent of their share in the properties to be partitioned, in virtue of their title as assignees, by mortgage or by sale, of Tazammul Ali and Amjad Ali. Their Lordships have found but scanty material in the record upon this point, and they deem it unnecessary to express any opinion about it. As soon as it is held in the present partition suit that Karimunnessa Khatun is not entitled to participate at all, it is not competent to her to challenge the extent of the shares, which may belong to others who do participate. The present respondents having denied with success her right to share at all, no further question arises on this appeal.

Their Lordships will, therefore, humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Champman, Walkar & Co.*

Solicitors for the Respondents:—Messrs. *Sanderson & Orr Dignams.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 153 OF 1922.

November 25, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

RAMASWAMI PILLAI AND OTHERS—DEFENDANTS Nos. 1 TO 4—APPELLANTS

versus

V. R. M. K. MUTHU KARUPPAN CHETTI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partnership—Death of one partner—Suit by surviving partner against legal representatives of deceased partner—Claim for specific items, maintainability of—Accounts, final, whether must be taken—Procedure.

In a suit by certain partners against the legal representatives of a deceased partner for recovery of certain specific items due from the deceased to the partnership:

Held, that the defendants, who had no personal knowledge of the transactions were entitled to have all the questions at issue determined by a taking of accounts inasmuch as it was impossible to do justice to all the parties without taking a final account of the partnership, and that a suit for the recovery of specific items alone was not maintainable. [p. 155, col. 2.]

Per *Phillips, J.*—It was an established rule in English Law that Courts would not interfere between one partner and another, unless it was for the purpose of dissolving the partnership or if it was dissolved, of finally winding up its affairs. The principle has, however, been relaxed and Courts have interfered in

order to prevent a partner deriving advantage from his own misconduct. [p. 154, col. 2.]

Where justice requires that all the dealings of the partnership should be finally determined, the Courts will not allow a partial account to be taken but when the basis of the claim is unconnected with the partnership business or is only very remotely connected therewith, an action is maintainable, provided no injustice is caused by dealing with the claim separately. [p. 155, col. 2.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Ramnad at Madura, in O. S. No. 35 of 1919, (O. S. No. 79 of 1919, on the file of the Subordinate Judge, Ramnad).

Messrs. *K. Bhashyam Iyengar* and *V. C. Veera Raghavachariar*, for the Appellants.

Messrs. *A. Krishnaswami Iyer* and *M. Subbaroya Iyer*, for the Respondents.

JUDGMENT.

Phillips, J.—Plaintiffs and one Muthuvairava Pillai were partners in a business carried on in Erode and other places. The first defendant is father of the late Muthuvairava Pillai, defendants Nos. 2 and 3 are his sons and 4th defendant is his brother's widow. Plaintiffs have brought this suit against the defendants as legal representatives of the deceased Muthuvairava Pillai alleging that the latter and the defendants were members of a joint Hindu family. The suit is to recover certain sums of money due to the partnership firm by the deceased partner, and in the original plaint there were four items. The first and the third are said to be sums borrowed by the deceased on his own account, and re-paid out of partnership money ; the second item is the amount said to have been overdrawn by the deceased and, therefore, due to the firm; the fourth item is also an amount relating to his drawings on account of his salary less the profit which is due to him.

The accounts of the partnership, which became dissolved by the death of Muthuvairava Pillai, have never been taken and consequently the defendants pleaded that this suit was not maintainable, as plaintiffs were not suing for an account. Subsequently, the plaintiffs withdrew their claim to the fourth item on the ground that that item was disputed and was based on a different cause of action to the other three. Defendants again opposed this anendment and repeated their plea that the suit should be for the taking of accounts. This item which has been withdrawn would, to a certain extent necessitate taking of an account in order to ascertain whether the amount credited to the deceased as his share of the profits was correct ; but nevertheless the Subordinate Judge allowed the amendment and proceeded to trial holding that the suit is maintainable. After taking evidence on the merits of the case, he has decreed plaintiff's suit in respect of the three items which still remained in the plaint. The defendants now appeal and again plead that the suit as framed is not maintainable, and this has been argued as a preliminary point without going into the merits of the case.

It was a very well-established rule in English Law that Courts would not interfere between one partner and another unless it was for the purpose of dissolving the partnership or if it was dissolved, of finally winding up its affairs. This rule has in later years been considerably relaxed because it was found to work hardship in certain cases and in the result Courts have interfered in order to prevent a partner deriving advantage from his own misconduct and have not insisted on the other partners submitting either to continuance of the wrong or to a dissolution; but the reason for the relaxation of the rule has been explained in Lord Lindley on Partnership, 8th Edition, page 630 as follows:—"The first question, (namely, when can an action be maintained between partners without taking a general account of all the partnership dealings and transactions) can only be answered generally by saying that each case must depend upon its own circumstances and upon whether justice can really be done without taking such an account." In the present case, the defendants state that an account should have been taken in order that the amount due by, or to, Muthuvairava Pillai might be finally determined. Plaintiffs' answer to this is that they are not asking for the taking of accounts because the items specified by them as being due by the deceased are moneys which were not brought into the partnership accounts but were taken by the deceased for his own purposes. So far as item No. 2 is concerned, this is clearly wrong, for it represents the amount of drawings by the deceased partner, drawings which he was entitled to make, for as a partner he was entitled to use as much of the partnership money as would represent his share of the profits. Similarly as regards the other two items, I do not think that they can

be treated as sums of money entirely unconnected with the partnership business. They represent two sums of Rs. 10,000 and Rs. 3,000 respectively, borrowed by the deceased in the name of the partnership, and the re-payment of these loans is shown in the partnership accounts. The question whether the firm received the benefit of these two sums of money is one which has to be determined on a consideration of the evidence; and I may say here that, if really the money was not credited to the partnership at all, it is extraordinary that Muthuvairava Pillai should have shown the re-payment of the money in the partnership accounts, thus clearly proving his own misappropriation. However, that may be, I think that these items cannot be treated separately from the partnership business and I do not think that the cases relied upon by the respondents are any authority to the contrary, *i. e.*, *Cross* v. *Cheshire* (1), *Smith* v. *Barrow* (2), *Bedford* v. *Brunton* (3) and *Ex parte Yonge* (4). In the first of these cases [*Cross* v. *Cheshire* (1)], the suit was held to be maintainable because it was for an amount which had been decreed against the partnership in respect of the private debt of one of the partners; the second case [*Smith* v. *Barrow* (2)], is somewhat similar, for it was a suit by one partner against another to recover his own money which had by mistake been put into the partnership funds. Again in *Bedford* v. *Brunton* (3), a member of a company was allowed to sue for rent due to himself personally as against the trustees for the company. The fourth case [*Ex parte Yonge* (4)] does not refer to a suit but bankruptcy proceedings. In *Smith* v. *Barrow* (2), the suit was allowed, but with regard to the further claim for a sum of £30 which was due to the partnership, it was held that the action could not be maintained. In *Bedford* v. *Brunton* (3), it was pointed out by Tindal, C. J., that if the action were virtually and substantially an action on covenant brought by the assignees of one partner, who has become bankrupt against three of his partners, to recover damages against them, to which the plaintiff himself must be contributory if he succeeds, the action would not be maintainable. And I may observe that in all these cases the principle is that, where justice requires that all the dealings of the partnership should be finally determined, the Courts will not allow a partial account to be taken but that when the basis of the claim is unconnected with the partnership business or is only very remotely connected therewith, an action is maintainable, when no injustice is caused by dealing with this one claim separately. As instances of the former class of case I may refer to *Lakshmanan Chetty* v. *Nagappa Chetty* (5), *Annamalai Chetti* v. *Annamalai Chetti* (6), *Godhan Ram* v. *Jaharmall* (7) and to *Karri Venkatareddi* v. *Kollu Narasayya* (8) and *Sunkara Ratha Doss* v. *Epari Kopils* (9) as instances of the latter. As pointed out in Lindley on Partnership, each case must depend on its own special circumstances and upon whether justice can be done without taking an account.

In the present suit, the defendants who have no personal knowledge of the transactions are entitled to have all the questions at issue determined by a taking of accounts for it may well be that, if accounts are taken, amounts will be found due by the partnership to the deceased which must be set off against the items now claimed separately. It is possible also that in addition to the items claimed separately, plaintiffs may be entitled to recover a further amount; in either case, justice will not be done between all the parties unless their claims are determined by final settlement of accounts. Even if the items claimed by plaintiffs were really items criminally misappropriated by the deceased, their action would be an action *in tort* and they would only have the right to reeover any damages for which the deceased is liable out of his assets in the hands of the defendants. If, on the other hand, some money is due by the firm to the deceased, the defendants are entitled to have the benefit of that amount. It is impossible, therefore, to do justice to all

(1) (1851) 7 Ex. 43; 21 L. J. Ex. 3; 15 Jur. 993; 155 E. R. 848.
(2) (1788) 100 E. R. 256; 2 T. R. 476.
(3) (1834) 131 E. R. 1171; 1 Bing. (N. C.) 399; 1 Scott 245; 4 L. J. C. P. 97.
(4) (1814) 13 R. R. 135; 3 Ves. & B. 31; 2 Rose 40; 35 E. R. 391.
(5) 45 Ind. Cas. 86; 34 M. L. J. 408.
(6) 52 Ind. Cas. 456; 10 L. W. 67.
(7) 16 Ind. Cas. 583; 40 C. 335; 17 C. W. N. 67; 17 C. L. J. 636.
(8) 1 Ind. Cas. 384; 32 M. 76; 19 M. L. J. 10; 4 M. L. T. 456.
(9) 49 Ind. Cas. 191.

the parties without taking a final account of the partnership.

Plaintiffs have definitely, and somewhat obstinately, declined to alter their suit into one for taking of accounts and have proceeded to trial on the basis that this was not necessary. During the hearing of the appeal, however, Mr. A. Krishnaswami Iyer for the plaintiffs made a request that the amendment of the plaint may now be allowed, for apparently plaintiffs are afraid that a suit for account would now be barred by limitation. Inasmuch as the plaintiffs have established their claim in the lower Court to certain items, I think it is equitable that an account should be taken but as they obstinately refused to make any such amendment of their plaint in the earlier stages of the trial, they are responsible for all the costs that have hitherto been incurred. I would, therefore, allow the amendment to be made on condition that plaintiffs pay all the defendants' costs of the original trial and in this Court within two months. If that is done, the suit will be remanded for fresh disposal after amendment of the plaint but in default the suit will be dismissed with costs throughout.

Odgers, J.—The facts have been fully set out by my learned brother. I agree, but I will add a few words on my view of the legal point which has been raised, *viz.*, whether the Subordinate Judge was right in his view that the adjudication of the three items claimed in the suit does not necessitate a taking of the entire accounts of the partnership. In considering this question it is important to remember that the partnership during the subsistence of which the various acts alleged against Muthuvairava Pillai took place was dissolved before suit by his death. There is also no question that if a partnership account were taken, certain amounts would be found due to the deceased partner, Muthuvairava Pillai who had 1/16th or 1/17th share in the partnership and who would not be liable to his partners in any event for more than 15/16th or 16/17th of the amounts in question. The present defendants are the father, sons and brothers' widow of Muthuvairava Pillai. The rule laid down in *Karri Venkata Reddi* v. *Kollu Narasayya* (8) is that the Court is to determine under what circumstances it would be equitable to order a partial account and that if the account sought for does not involve the taking of a general account the Court will as a rule give the relief asked for and will refuse to interfere only in those cases in which a partial account would work injustice to the other partner. In *Lakshmana Chetty* v. *Nagappa Chetty* (5), it was said the plaintiff was practically suing himself and his partner and that as he sought to establish liability against the defendants on the basis of accounts and had not asked for them the suit would not lie. In *Godhan Ram* v. *Jaharmull* (7), in a suit by a principal against an agent it was held that plaintiff could not be permitted to select capriciously a single transaction and claim the fruits thereof without the adjustment of the rights and liabilities of the parties in relation to other transactions. Lord Lindley in his work on Partnership (8th Edition) page 539 says that the old rule was that the Court would not decree a partnership account unless a dissolution was sought, on the ground that formerly Courts of Equity were adverse to any interference between one partner and another. This rule has been, however, relaxed in more modern practice when justice demands the Court's intervention to prevent some definite wrong or redress some particular grievance. The Courts will not now, if it is possible to avoid it, allow a partner to derive advantage from his own misconduct by compelling his co-partner to submit either to a continued wrong or to a dissolution. It is argued for the respondent that the present case comes within the modern rule of exceptions, which rule, be it noted, is expressly said to be designed to prevent the necessity of suing for a dissolution. Here dissolution has already taken place. The cases cited by Mr. A. Krishnaswami Iyer for the respondents are the following: *Cross* v *Cheshire* (1), *Smith* v. *Barrow* (2), *Ex parte Yonge* (4) and *Bedford* v. *Brunton* (3). In *Cross* v. *Cheshire* (1), it was held that if one of the partners is called upon by the act of the other to pay his private debt, the former may recover the money so paid by an *assumpsit* for money paid to the use of the other, as the defaulter had admitted that the debt was his own *and not connected with the partnership accounts.* (The italics are mine).

In *Smith* v. *Barrow* (2), it was held that where money was wrongly carried to the partnership accounts when it was really received by one partner for the separate use of the other an action may be maintained.

This is the converse case to *Cross* v. *Cheshire* (1).

Ex parte Yonge (4) was the case of one partner abstracting the joint property of the partnership by fraud. It was held that the partnership might prove against his separate estate for that wrong. The case was in bankruptcy. *Bedford* v. *Brunton* (3) proceeded on the express terms of the deed and can have no bearing on the present case.

The English cases quoted all refer to subsisting partnerships and as stated form exceptions to the general rule in order to preserve the partnership and prevent dissolution. In my opinion they do not apply to the present case. In my opinion justice cannot be effectively done here without taking a regular partnership account which moreover will be essential at some time or another. It is, therefore, clear to me that the Subordinate Judge ought to have held the suit not maintainable without a prayer for an account. A fresh suit for that purpose would now be barred under Art. 106, Limitation Act as Muthuvairava Pillai died in 1919. The plaintiffs had two opportunities of amending their plaint and did not take advantage of either. I think under the circumstances, though I feel it is an indulgence, that on condition, that they pay all the costs incurred up-to-date they may be allowed to amend at this stage. I agree with the order proposed as to the condition under which amendment should be allowed.

V. N. V. *Suit dismissed.*

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 147 OF 1924.

December 12, 1924.

Present:—Mr. Baker, J. C., and Mr. Prideaux, A. J. C.

RAMCHANDRA—APPLICANT

versus

GAJRABAI AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIII, r. 5—Application for leave to sue as pauper, rejection of—Revision, whether lies.

An order rejecting an application to sue as a pauper amounts to a decision of a case within the meaning of s. 115 of the C. P. C., and is subject to revision by the High Court. [p. 157, col. 1.]

Achalsingh v. *D. B. Seth Jiwandas*, 75 Ind. Cas. 993; 19 N. L. R. 165; (1924) A. I. R. (N.) 44, followed.

Where, however, a Court has jurisdiction to determine a question and determines that question, it cannot be said to have acted illegally or with material irregularity merely because it has come to an erroneous decision. [p. 158, col. 1.]

Amir Hassan Khan v. *Sheo Baksh Singh*, 11 I. A. 237; 11 C. 6; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.), followed.

Application for revision against an order of the Additional District Judge, Nagpur, dated the 14th March 1924, in Miscellaneous Judicial Case No. 74 of 1923.

Mr. *M. R. Indurkar*, for the Applicant.

Mr. *D. P. Tiwari*, for the Non-Applicants.

JUDGMENT.—This is an application for revision of an order of the Additional District Judge, Nagpur, refusing permission to the applicant to sue as a pauper. The applicant claims to be the adopted son of one Ramrao Deshmukh. The non-applicants Nos. 1-4 are the widows of Ramrao and deny the adoption.

Tha question that arises in this case is whether under s. 115 of the C. P. C. we have power to interfere with the finding of the lower Court that the applicant has not proved that he is a pauper and is unable to pay the Court-fees.

It has been recently held by a Bench of this Court, of one of us was a member, in *Achal Singh* v. *D. B. Seth Jiwandas* (1) that an order rejecting an application to sue as a pauper is a decision of a case for the purposes of s. 115 of the C. P. C. and is subject to revision by the High Court under that section. But in that case at page 168* it was laid down that "It is, however, doubtful whether either of these findings could be disturbed under s. 115 of the C. P. C. though we are inclined to the opinion that such a degree of direct contradiction between the evidence and the finding is a material irregularity which would justify interference in revision." The present case, however, is one of a pure finding on evidence, and the learned Pleader for the applicant has not been able to show that there is any material irregularity. It is settled law that where a Court has jurisdiction to determine a question, and it has determined that question it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision. This is laid down by the Privy Council in *Amir Hassan Khan* v.

(1) 75 Ind. Cas. 993; 19 N. L. R. 165; (1924) A. I. R. (N.) 44.

*Page of 19 N. L. R. - [*Ed.*]

Sheo Baksh Singh (2), where the Privy Council has held in the most unmistakeable terms that where a Court has jurisdiction to decide the question before it and in fact decides such question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity, merely because its decision is erroneous. Whether the Court decided it rightly or wrongly, it had jurisdiction to decide the case; and even if it decided wrongly, it did not exercise its jurisdiction illegally or with material irregularity.

There is nothing in the present case to show that the decision is wrong, and even if it were, in the face of the remarks of the Privy Council we should not be justified in interfering under s. 115 of the C. P. C. with a finding of fact. We, therefore, reject the application with costs. Pleader's fees Rs. 10.

G. R. D.

Z. K. *Application rejected.*

(2) 11 I. A. 237; 11 C. 6; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 23, 1925.

Present:—Lord Shaw, Lord Carson, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

ADAPPA AND OTHERS—APPELLANTS

versus

GANDAPPA BHARMAGOUDA DESAI AND ANOTHER—RESPONDENTS.

Mortgage, proof of—Oral evidence, conflicting—Documentary evidence and circumstances, consideration of.

In this case the question for determination before their Lordships was as to whether a mortgage had been effected by the defendents in favour of the plaintiffs. The oral evidence produced by the parties was conflicting and their Lordships intimated that it would be most unsafe to rely upon the statements of the witnesses on either side. From the documentary evidence and the circumstances of the case, however, their Lordships came to the conclusion that the mortgage had been established.

Appeal from a decree of the Bombay High Court, dated the 2nd July 1917.

Mr. *K. Brown*, for the Appellants.

Messrs. *George Lowndes* and *E. B. Raikes*, for the Respondents.

JUDGMENT.

Mr. Ameer Ali—This is an appeal from a decree of the High Court of Bombay, dated the 2nd July 1917, made in a suit brought by the plaintiffs to enforce a mortgage made in their favour by the defendants on the 17th September 1905.

The suit was brought on the 29th August, 1911, in the Court of the First Class Sub-Judge of Belgaum in the Central Provinces, who dismissed it on the ground that the plaintiffs had failed to prove consideration for the mortgage; his order was reversed by the High Court and the claim was decreed. The present appeal by the defendants to His Majesty in Council is from the decree of the High Court.

Mr. Justice Shah of the Bombay High Court has examined the facts with such scrupulous and minute care that their Lordships are relieved from the necessity of dealing with them at any length; they desire accordingly to confine their attention to the prominent features of the case.

The mortgage bond, for the enforcement of which the suit was brought, was admittedly executed by the three adult members of the defendants' joint family alive at the time. These three persons named respectively, Adappa, Bhau and Ganapati, purported to sign the document on behalf of the joint family. Adappa alone is now alive and has given evidence in this case. Bhau died in 1909 and his widow is one of the defendants in the suit. The plaintiffs are Desais and hold *deshgat* land by virtue of their office as Desai under the Government, which appears to yield them an income of Rs. 6 to 8,000 a year. The father of the plaintiff No. 1 named Appaji died, it is said, in 1868 leaving him surviving four minor sons and daughters under the guardianship of his widow Amabai. Amabai appears to have continued to manage the property even after her eldest son, Baba Sahib, attained majority. Her daughter, who is now the second defendant, was married to Bhau, the brother of Adappa.

It is established in this case that Bhau was the most intelligent among the members of his family, and he not only carried on the affairs of his own family, but was also entrusted with the conduct of the money-lending business of the plaintiffs' family, which was under the management of Amabai. It is abundantly proved that Bhau carried on all the businesses in the

city of Belgaum, where the defendants resided. The plaintiffs' family with Amabai as head, lived in the neighbouring township of Shahapur. It is also proved in the case that, in carrying on the money-lending business of Amabai, Bhau had in the usual way, opened in his account-books, what is called in the vernacular, *khatas*; in other words, "separate accounts" in the names of Amabai and her sons. These *khatas* are the credit and debit accounts of the particular person in whose name they stand. Apparently—for the sake of convenience in the money-lending transactions—Amabai had a separate account from her sons, but there is absolutely nothing to show that the moneys lent on the *khata* belonged exclusively to her. All the circumstances show that the moneys on these accounts belonged to the joint family.

The *khata* in the name of Amabai was opened in 1899-1900 and was carried on up to 1905. The *khata* in the name of Baba Sahib, plaintiff No. 1, commenced in 1894 or 1895 and was carried on up to 1905. It is not necessary to refer to the *khatas* of the minors, as they do not come into the controversy at all.

Bhau not only opened an account in respect of the money-dealings of Amabai and Baba Sahib in his own books, but he appears to have opened in the books of another neighbouring money-lender named Ranojimane an account in the name of Amabai, sometime in January 1903.

There can be little doubt, as the learned Judges of the High Court point out, that even if the onus of proving consideration for the mortgage lay on the plaintiffs, in the face of the fact that they hold a regularly executed mortgage-bond, the fact appears to be clear that the plaintiffs had ample means, both from their ancestral properties and their monetary dealings, to advance the money to the defendants, as they allege. The only question is, whether the money was in fact lent. The defendants contend that, although they executed the mortgage no consideration passed.

The Sub-Judge threw the onus on the plaintiffs, and as already stated, came to the conclusion that no consideration ever passed. The High Court, assuming that, as the defendants came under the purview of the Deccan Agriculturists Act, the onus was on the plaintiffs to establish clearly that they paid any consideration for the mortgage, have held that they have discharged that onus. On appeal before the Board, it has been contended at considerable length, that the learned Judges of the High Court took a wrong view of the facts.

Their Lordships have given their best attention to the arguments put forward on behalf of the defendants, and have come to the conclusion that the view expressed by the High Court is well-founded.

It appears that the defendants were indebted to another family of money-lenders called Sakhtankars. The Sakhtankars held from the defendants a mortgage executed in 1886 in respect of the properties of the defendants. It was an usufructuary mortgage for ten years and the defendants were in possession of the mortgaged premises under a lease or rent-note. The defendants were wholly unable to discharge the debt or even to pay the rent to the Sakhtankars. The ten years of the lease were expiring and the period for the re-payment of the loan had approached.

In these circumstances, Bhau, who was the chief agent of the defendants in all the transactions relating to their estate and business, sought the assistance of a Pleader of the name of Chatre to induce the Sakhtankars to come to an arrangement by which the mortgagees would accept a smaller amount in full discharge of the debt and mortgage.

The debt had mounted up to something like Rs. 45,000 and Chatre appears to have induced the Sakhtankars to agree to accept Rs. 35,000 in full discharge. In order to obtain the remission, it was necessary for Bhau to show that the money he was paying came from himself. The plaintiffs state that he was Rs. 24,000 short and that they took that amount from Amabai's account to pay the debt to Sakhtankars. The defendants allege, on the other hand, that the whole of the amount paid to the Sakhtankars belonged to their joint family. There is no entry in their books with regard to this payment.

Mr. Justice Shah, in his careful examination of the account-books, shows that Bhau had, at the time when the transaction relating to the payment of Sakhtankars' debt took place, something like Rs. 24,000 belonging to Amabai in his hands. The plaintiffs have produced a memoran-

dum in Bhau's handwriting, Ex. 65, which conclusively establishes this fact. There is absolutely no evidence to contradict this part of the case. From whatever source the balance of the Rs. 35,000 might have come it is established beyond doubt that Bhau had money in his hand at that time belonging to the plaintiffs' joint family, and that he utilised the same for the purpose of paying Sakhtankars.

The Sub-Judge's judgment has proceeded entirely on suspicion; he thought that because Bhau told Chatre at the time when he was inducing Chatre to obtain a remission from the Sakhtankars, that the money, something like Rs. 20,000, belonged to him, that Bhau was playing a trick upon his brothers and that the money really belonged to the joint family. With that view their Lordships emphatically differ.

It was in the interest of Bhau, as well as the other members of his family to get a remission, and that remission they could only get if they represented that the whole of the money came from themselves without any help from outside; and the statement which Chatre says was made to him by Bhau does not appear to their Lordships to be of any value. The oral evidence produced on behalf of the defendants is wholly unworthy of credit. In a case like this, it would be enough to say that to proceed on the divergent statements of the witnesses on either side would be most unsafe.

The facts are quite clear. On the 23rd December, 1904, payment was made of Rs. 35,000 to the Sakhtankars. A week previous to that Bhau executed a promissory note for Rs. 23,219 in favour of Amabai. The document is in the following terms:—

Receipt.—Receipt given in writing by Bhawoo Balappa Shetti residing at Belgaum is as follows:—

"I having passed a promissory note in writing this day in your favour for Rs. 23,219 (twenty-three thousand two hundred and nineteen) have received the amount in cash. Nothing is due from you in respect of that promissory note. I have received the whole of the amount in full. The receipt is duly given in writing as above."

Dated the 16th of the month of December 1904 A. D.

Signature of Bhawoo Balappa Shetti. My own handwriting.

The connection between the promissory note and the payment to Sakhtankars on the 23rd December is obvious. Their Lordships are not prepared to accept the contention that it was not given on the date it bears. By this promissory note it will be seen that Bhau makes himself responsible for the amount he borrowed from Ambabai, and if the proceeds were applied, as their Lordships agree with the High Court in thinking they were applied, in the discharge of the Sakhtankars' mortgage. What more natural than this that Bhau should be anxious to get his brothers to undertake along with him the responsibility of the burden so contracted, in favour of Amabai, and he accordingly went on pressing them to execute a bond? He not only pressed them himself, but invoked the assistance of Chatre in that matter.

On the 17th September 1905, the brothers agreed to join with him in the execution of the mortgage-bond, and the bond was executed and signed by the three brothers, Adappa, Bhau and Ganapati. It appears to have been executed at Shahapur at the residence of the plaintiffs, as would naturally be the case. This mortgage is on the same lines as the one to the Sakhtankars. They, at the same time, executed a rent-note as they were allowed to remain in possession of the properties mortgaged on payment of the usual rent. It is contended on behalf of the defendants that they paid no rent, and that this is evidence of the fact that no money was paid for the mortgage, the non-payment of rent may be explained, as the learned Judges of the High Court point out, by the relationship of the parties.

It is quite true that some two years after the execution of the mortgage, Bhau—in order to evade the liability of the joint family—began to allege that it was only a nominal transaction. But he was alive until 1909 when Baba Sahib, plaintiff No. 1, was pressing for payment, but neither Bhau nor his brothers took any action to get rid of what they called a "nominal" mortgage.

One other fact is most significant in the case, and that is, that in the Record of Rights, the names of the plaintiffs were entered as persons entitled to possession, apparently on the basis of the mortgage.

The defendants have not chosen to get printed the copies of the extracts from the Record of Rights register "C." nor, their

Lordships gather from Counsel in the case, has he been shown any copy of the same.

Their Lordships consider that the defence cannot be accepted, and that the judgment of the High Court is right, and they will, therefore, humbly report to His Majesty that the appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellants:—Mr. *E. Dalgado.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3141 OF 1924.

April 30, 1925.

Present:—Mr. Justice Jai Lal.

MOHAMMOD AFZAL—DEFENDANT—APPELLANT

versus

ABDUL HAMID—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, Paras. 14, 15, 20—Reference to arbitration without intervention of Court—Court, power of, to amend award—Evidence recorded in absence of one party—Misconduct.

In the case of a reference to arbitration without the intervention of the Court, the Court has no power to make a correction in the award. The only order which the Court can make in such a case is to order the award to be filed and to pronounce judgment on the award or to refuse to order that the award be filed. [p. 161, col. 2.]

[Case-law discussed.]

An arbitrator must record evidence in the presence of both parties, allowing each to examine and cross-examine the witnesses produced by the other. Where an arbitrator records the evidence of one party in the absence of the other party, he is guilty of judicial misconduct and his proceedings are vitiated. [p. 162, col. 1.]

First appeal from a decree of the District Judge, Gurdaspur, dated the 1st August 1924.

Sheikh *Niaz Mohammod*, for the Appellant.

Sheikh *Mohammod Munir*, for the Respondent.

JUDGMENT.—The parties to this litigation referred their dispute to the arbitration of two arbitrators and an umpire. The umpire was to act in case the arbitrators differed. The arbitrators having differed the matter was referred to the umpire M. Mohammod Ashraf. He gave an award to which several objections were raised by the appellant. The learned District Judge has overruled all the objections but has found that the umpire made some mistakes in calculating the amount payable to the respondent and as the respondent argeed to the correction of those mistakes by the learned District Judge, he reduced the amount payable by the appellant to the respondent from Rs. 3,725-2-4½ to Rs. 1,469-6-10½. On appeal it is contended that the arbitration being without the intervention of the Court and the award having been given on such reference, the only course open to the learned District Judge was to order the award to be filed and to pronounce judgment according to the award or to refuse to order that the award be filed, and that it was not open to the learned Judge to correct the award himself. This contention of the learned Counsel is supported by para. 21 of Schedule II of the C. P. C. which lays down that where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned in para. 14 or para. 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. This paragraph does not authorize a Court to make any corrections in the award. The matter appears to be concluded by authority [see *inter alia Dhanpat Rai* v. *Kahn Devi* (1) *Jaldhari Rai* v. *Muhammad Abdul Kabir* (2) *Lang* v. *Holland Moss Ltd.* (3) and *Mustafa Khan Phulja Bibi* (4)]. The Allahabad High Court in *Shyam Lal* v. *Parshottam Dass* (5) appear to have taken a contrary view but they did not expressly dissent from or overrule [*Mustafa Khan Phulja Bibi* (4)], which was cited before them. Moreover, the mistake in that case was of a trifling amount as compared with the value of the properties with which the arbitrator had to deal and it was of mere calculation. The mistake in this case is of a very large amount and is not of that nature. In my opinion, therefore, this contention of the appellant must prevail.

(1) 23 Ind. Cas. 422; 30 P. R. 1914; 11 P. W. R. 1914; 31 P. L. R. 1914.

(2) 74 Ind. Cas. 649; (1923) A. I. R. (Pat.) 470; 1 Pat. L. R. 244; 4 P. L. T. 669.

(3) 27 Ind. Cas. 526; 8 S. L. R. 133.

(4) 27 Ind. Cas. 523; 2 A. L. J. 416; A. W. N. (1905) 86.

(5) 58 Ind. Cas 585; 42 A. 277; 18 A. L. J 241; 2 U. P. L. R. (A.) 104.

Another objection that was taken by Counsel for the appellant to the conduct to the arbitration proceedings by the umpire was that he accepted a petition from the respondent in the absence of the appellant and thereupon recorded the respondent's evidence in the appellant's absence. The District Judge has held that the umpire did not record any evidence in the absence of the appellant. The learned Judge is wrong there. A reference to the record shows that the umpire admitted that he recorded such evidence. He, no doubt, says that he told the appellant that he had recorded the evidence and gave him an opportunity to meet it, but that, in my opinion, was not sufficient. The evidence should have been recorded by the umpire in the presence of both parties allowing each to examine and cross-examine the witnesses. In my opinion this amounted to judicial misconduct on the part of the umpire and vitiated his proceedings. I do not think there is any force in the contention of the Counsel for the appellant that the umpire acted illegally in sending the award to the private Secretary and legal adviser of the Mirza of Qadian in order to obtain the approval of the Mirza. Both the parties being the followers of the Mirza of Qadian the umpire sent the award to his private Secretary and legal adviser for communication to the parties. It has not been established that he sent the award in order to obtain the approval of the Mirza or that his conclusions were in any way influenced by the Mirza or his private Secretary and the legal adviser.

The consequence of my finding on the first two contentions of the learned Counsel is that this appeal must be accepted and the petition to file the award dismissed on the ground that the award was vitiated (*a*) owing to an objection to its legality which was apparent on the face of it, and (*b*) misconduct of the umpire in recording evidence in the absence of the appellant and I order accordingly. The parties will bear their own costs throughout.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 582 OF 1923.

March 24, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

DIP CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

Haji MUHAMMAD KHALIL—PLAINTIFF AND *Rani* DHANDEVI KOER—DEFENDANT —RESPONDENTS.

Landlord and tenant—Lease—Permanent rights of occupancy, whether can be created.

It is open to a *zemindar* to confer by grant permanent rights of occupancy upon a lessee.

Bachchi v. *Bachchi*, 28 A. 747; 3 A. L. J. 513; A.W. N. (1906) 219 and *Bhola Nath Tewari* v. *Suraj Bali Rai*, 49 Ind. Cas. 357; 17 A. L. J. 120; 41 A. 223, referred to.

Second appeal from a decree of the District Judge, Azamgarh, dated the 16th January 1923.

Dr. *S. N. Sen* and Mr. *M. A. Aziz*, for the Appellants.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The plaintiff sought to enforce his right to possession of certain land by ejection of the defendants Nos. 1 to 3 and that the fourth defendant, the *zemindar*, be ordered to execute in favour of the plaintiff a perpetual lease in terms of the agreement entered into between the plaintiff and the fourth defendant who had received from the plaintiff a sum as *nazrana*.

The First Court gave him damages only.

The lower Appellate Court gave him a decree ordering the *zemindar* to execute a registered lease in his favour conferring on him a right of occupancy in terms embodied in the receipt, Ex. No. 6, dated the 16th of March 1919 and ordered that he be put in possession by ejectment of the defendants.

The defendants Nos. 1 to 3 set up their possession founding their title on a compromise arrived at in a suit for ejectment brought against them by defendant No. 4 but that compromise has been found to be collusive, and the defendants Nos. 1 to 3 now fall back on the plea that the plaintiffs cannot in any event succeed because their own title is defective.

It is urged (1) that the plaintiffs were not entitled in their suit to have conferred on them by the decree of the Court a right to have a perpetual lease executed in their favour conferring on them occupancy rights; (2) that the plaintiffs asked

for a declaration that they had "occupancy rights," (3) that the lower Appellate Court has declared them to have occupancy rights; and (4) that a *zemindar* cannot by a deed create an occupancy tenancy. We may say at once that there has been much verbal play in the argument for the appellant with the phrases "right to occupy" and "occupancy rights" but there is a very real distinction.

Granting the fourth contention of the appellant to be correct, *i. e.*, that a *zemindar* cannot create an occupancy tenancy having all the characteristics of an "occupancy tenancy" as known to the Tenancy Act neither of the first three will bear examination.

As to the second point, the claim in the first portion of relief (*a*) (*istahqaq haq kasht dakhilkari*) that the plaintiff had "occupancy rights" is not strictly accurate, but its real intent is made clear by the later words in the same relief "*wa niz hasb qarardad bahami mazkur-i-bala muddailehum No. 4 ko hukm ho ki patta dawami nisbat araziat zail muddaie ke haq men tahrir karke registeri karadewen*" by which words they pray that defendant No. 4 be ordered to execute a permanent lease in their favour.

As to the third point some slight ground for the defendant-appellant's contention is to be found in the mark of the District Judge that the decision in *Bachchi* v. *Bachchi* (1) "is in favour of the contention that it is possible for a land-holder to create an occupancy tenancy by grant."

But later he says "there is nothing in the Tenancy Act which prevents a land-holder from carving out a right akin to the rights of an occupancy tenant" and in his final order he did not declare the plaintiffs to have occupancy rights, *i. e.*, to be occupancy tenants within the meaning of the Tenancy Act but merely declared them to have a right of occupancy. In that order he has held quite plainly that the plaintiffs are entitled to a registered lease conferring on them a right of occupancy "in terms embodied in the receipt dated the 16th of March 1919." That such a contract is not illegal is clear: see *Bhola Nath Tewari* v. *Suraj Bali Rai* (2).

The wavering of the lower Appellate Court between its description of a *zemindar* as having power "to create an occupancy tenancy by grant" and having power "to carve out a right akin to the rights of an occupancy tenant" is possibly due to the language used by the learned Judge in the case of *Bachchi* v. *Bachchi* (1) to which the lower Appellate Court refers, where the learned Judge says: "He might confer on him the right to occupy the land at a fixed rate of rent, but that would only make him an occupancy tenant and not a fixed rate tenant within the meaning of the Act." But we may note that the same learned Judge who used in *Bachchi* v. *Bachchi* (1), the words I have quoted made his meaning quite clear, in *Bhola Nath Tewari* v. *Suraj Bali Rai* (2), where in the course of the argument he said: "There is a difference between making a person an occupancy tenant and conferring upon him the rights of an occupancy tenant."

These two cases also further meet the first contention of the defendants that we have noted above.

Here it is clear that the plaintiff is entitled to a decree as prayed in relief (*a*).

The order of the Court is that the claim of the plaintiff in the relief (*a*) is decreed and the defendant No. 4 do execute and register in plaintiff's favour a lease giving him a right of occupancy in terms of the receipt, dated 16th March 1919, and that he be put in possession by ejectment of the defendants.

With the exception of the above verbal alteration the appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 28 A. 747; 3 A. L. J. 513; A. W. N. (1906) 219.
(2) 49 Ind. Cas. 357; 17 A. L. J. 120; 41 A. 223.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 174 OF 1924.
February 16, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

Mirza ABID HUSAIN KHAN—DEFENDANT No. 35—APPELLANT

versus

Lala SARJU PRASAD—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Interest—Maintenance, arrears of, suit to recover—Interest, whether can be claimed.

A claim for interest depends on contract, express or implied, or some rule of law allowing it.

Kalyan Das v. *Maqbul Ahmad*, 46 Ind. Cas. 548; 40 A. 497; 22 C. W. N. 866; 16 A. L. J. 693; 5 P. L. W. 159; 35 M. L. J. 169; 28 C. L. J. 181; 8 L. W. 179; (1918) M. W. N. 535; 24 M. L. T. 110; 20 Bom. L. R. 864 (P. C.), followed.

In a suit to recover arrears of maintenance decreed to the plaintiff by the Settlement Court, where the claim is not based on any contract, the plaintiff is not entitled to interest on the arrears.

Appeal from a decree of the Subordinate Judge, Barabanki, dated the 16th January 1924, in Regular Civil Appeal No. 71 of 1922, confirming that of the Munsif, Ram Sanehighat at Barabanki, dated the 24th of October 1922, in Regular Suit No. 95 of 1921.

Mr. *M. Wasim*, for the Appellant.

Mr. *Daya Kishna Seth*, for Respondent No. 1.

JUDGMENT.—This is the defendant's appeal. The plaintiff-respondent brought the suit out of which this appeal arises for recovery of Rs. 768-2-0, principal and interest due from the defendants as arrears of maintenance decreed to the plaintiff's predecessors-in-interest by the Settlement Court. The Court of first instance gave a decree for Rs. 290-9-2 principal and Rs 220-2-4 interest at the rate of 6 per cent. per annum. The defendant-appellant preferred an appeal to the Court of the Subordinate Judge of Bara Banki from the decree of the Munsif who had decided the suit in the first instance. The appeal was dismissed.

At the hearing of the second appeal today the only ground urged was ground No. 3 and that relates to the plaintiff's right to claim interest. I am satisfied that there is no ground for allowing interest in the present case to the plaintiff-respondent. A claim for interest, to quote from the decision of Lord Sumner in the case of *Kalyan Das* v. *Maqbul Ahmad* (1) "depends on contract, express or implied or some rule of law allowing it." The claim for the maintenance in this case does not depend on any contract, express or implied and it is not contended that there is any rule of law which will allow interest to be decreed in favour of the plaintiff. The learned Subordinate Judge has allowed interest in the form of damages but there could be no claim for damages unless there was a contract and the contract was broken. I have already said that this is not a case of a breach of contract.

(1) 46 Ind. Cas. 548; 40 A. 497; 22 C. W. N. 866; 16 A. L. J. 693; 5 P. L. W. 159; 35 M. L. J. 169; 28 C. L. J. 181; 8 L. W. 179; (1918) M. W. N. 535; 24 M. L. T. 110; 20 Bom. L. R. 864 (P. C.).

The appeal is, therefore, accepted to this extent that the decrees of the Courts below should be modified by striking out the sum of Rs. 220-2-4 from the amount which has been decreed to the plaintiff by those Courts. As the appellant had taken other grounds which were abandoned at the hearing of the appeal the proper order for costs is that the parties should bear their own costs in this Court but that they should pay and receive costs in proportion to their failure and success in the Courts below.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1025 AND 1029 OF 1922.

January 21, 1924.

Present:—Mr. Justice Stuart.

Lala SUNDER LAL—PLAINTIFF—APPELLANT

versus

BHUP SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Previous Court not competent to try subsequent suit, effect of.*

In a previous suit for arrears of rent by one of the parties it was decided by an Assistant Collector of the Second Class that the land in dispute was the defendants' *khudkasht*. The same question arose between the same parties in a subsequent suit triable by an Assistant Collector of the First Class:

Held, that the decision of the Assistant Collector of the Second Class in the previous suit would operate as a decision of a Civil Court in a subsequent suit in a Court of Assistant Collector of the Second Class, but that it would not operate as *res judicata* in the Court of an Assistant Collector of the First Class.

Second appeal from a decree of the District Judge, Shahjahanpur.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *S. P. Sinha*, for the Respondents.

JUDGMENT.—The learned District Judge has dismissed these appeals on the ground that the suits were barred by *res judicata*. I do not agree with this view. It was decided by an Assistant Collector of the Second Class in a suit for arrears of rent that the land was the defendants' *khudkasht*. The question whether this land was or was not the defendants' *khudkasht* was direct-

ly and substantially in issue in a former suit between the same parties litigating under the same title but it was not in issue in a Court competent to try the subsequent suit. So the decision in the former case cannot operate as *res judicata* in the present case. It is unnecessary to say much more. The provisions of s. 199 of the Local Act II of 1901 have no bearing on the matter. It is true that such a decision of an Assistant Collector of the Second Class would operate as a decision of the Civil Court in a subsequent suit in the Court of an Assistant Collector of the Second Class but it would have no effect in the Court of an Assistant Collector of the First Class.

I, accordingly allow these appeals and as I have reversed the decision of the learned District Judge on a preliminary point of law I send the appeals back to him to restore under their original numbers and decide on the merits. The costs will follow results.

Z. K. *Appeals allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 21 OF 1924.

February 16, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

MATADEEN—DEFENDANT—APPELLANT

versus

Saiyed MUSTAFA HUSAIN—PLAINTIFF—RESPONDENT.

Decree for rent—Direction that if decree is not satisfied within a certain time defendant shall be ejected, legality of.

A direction contained in a decree for arrears of rent that if the decretal amount is not paid within a certain time the defendant shall be ejected from his holding, is improper and cannot be allowed to stand.

Madho Prasad v. *Lachhman*, 11 O. & A. L. R. 12, relied on.

Appeal against the judgment and decree of the District Judge, Sitapur, dated the 16th May 1924.

Mr. *H. N. Das*, for the Appellant.

Mr. *Hakimuddin*, for the Respondent.

JUDGMENT.—This is the defendant's appeal in a suit for recovery of arrears of rent brought by the plaintiff-respondent. The arrears amounted to Rs. 7-14-3. The defendant pleaded payment but failed to prove it. The result was that the Court of first instance gave a decree for Rs. 7-14-3 to the plaintiff-respondent and added that the amount decreed should be paid within six weeks from the date of the decree otherwise the defendant would be ejected from the holding in suit. The appellant went in appeal to the Court of the learned District Judge of Sitapur and argued the point of payment alone. The appeal was rejected. In second appeal the question is raised that the decree of the Court of first instance was improper if not illegal in directing the ejectment of the appellant in the event of default of payment of the amount of the decree within six weeks from the date of it. This contention is supported by a decision of the Board of Revenue in the case of *Madho Prasad* v. *Lachhman* (1). The learned Assistant Collector who tried this suit in the first instance should have confined it to one for arrears of rent only. His omission to do so was clearly an error of procedure and this Court is competent to correct it.

I, therefore, direct that the direction contained in the decree of the Court of first instance as to the ejectment of the appellant in case he makes default in payment of the amount decreed shall be expunged and the decree shall be retained merely for the arrears of rent. No order as to costs.

Z. K. *Decree modified.*

(1) 11 O. & A. L. R. 12.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 215 OF 1923.

April 14, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Maulvi MUHAMMAD ABDUL RAB—APPLICANT

versus

Musammat KHODAIJA—OPPOSITE PARTY.

Guardians and Wards Act (VIII of 1890), s. 41—Guardian, discharged, liability of—Order direcitng discharged guardian to restore possession of minor's property—Consent order—Appeal, whether lies—Jurisdiction.

A guardian is an officer of the Court and is responsible to the Court which appoints him guardian for due management of the property of the ward and for restoration of any property of the ward that remains in his possession. Orders made against him by the Court can be executed in proceedings under the Guardians and Wards Act.

Appellant was appointed the guardian of a female minor and under the sanction of the Court he exchanged certain property of his own with that of the minor. He was subsequently discharged and the minor's husband was appointed her guardian. The husband applied to the Court for re-opening the exchange on the ground that it was highly disadvantageous to the minor and the Court after enquiry set aside the deed of exchange and ordered the appellant to return the property which belonged to the minor before the exchange. The order expressly mentioned that the appellant was agreeable to the cancellation of the exchange. The appellant applied in revision against this order but the revision was dismissed on the ground that the order being a consent order was not open to be challenged. The husband of the minor subsequently put that order in execution and obtained delivery of possession of the property belonging to the minor. Appellant thereupon applied to the Court to restore possession of the property to him on the ground that the order was without jurisdiction. His application was refused and he came up in appeal to the High Court:

Held, (1) that the order which had been executed having been passed on the basis of consent it was no longer open to the appellant to contend that that order was passed without jurisdiction;

(2) that although the appellant had been discharged from the guardianship on the date when the order was passed against him, the liabilities of even a discharged guardian continue after his discharge as regards any fraud which may subsequently be discovered and it must, therefore, be deemed that the order was passed against the appellant directing him to restore possession of the property to the minor as a guardian still under the control of the District Judge;

(3) that the order so made was executable against the guardian in proceedings under the Guardians and Wards Act.

First appeal from an order of the District Judge, Pilibhit, dated the 11th August 1923.

St. *C. Thompson* and Mr. *P. N. Sapru*, for the Applicant.

Mr. *S. B. Johari*, for the Opposite Party.

JUDGMENT.—This appeal arises under the Guardians and Wards Act. The appellant was appointed guardian of the minor *Musammat* Khodaija, and under sanction of the District Judge he exchanged certain property of his own with that of his minor ward on the 25th of July 1912. In 1916 he was discharged, and the girl's father was appointed her guardian. Subsequently she was married, and her husband Aziz Ahmad was appointed her guardian. Aziz Ahmad applied to the District Judge for re-opening the exchange on the ground that it was highly disadvantageous to his minor wife. The learned Judge after enquiry passed an order on the 28th of April 1921 setting aside the deed of exchange and ordering Abdul Rab, the appellant, to return the property which belonged to the minor before the exchange. This order expressly mentioned that Abdul Rab was agreeable to the cancellation of the exchange. Abdul Rab came up in revision here. This revision was dismissed on the ground that the said order was a consent order and was not open to be challenged.

Aziz Ahmad has put that order in execution and obtained delivery of possession of the property. Subsequent to the delivery of possession Abdul Rab applied to the Court below to restore him the possession on the ground that the order was without jurisdiction. His application has been refused. Hence this appeal.

We are of opinion that when the order dated the 28th of April 1921 was passed on the basis of consent it is no longer open to Abdul Rab to contend that that order was passed witnout jurisdiction. It is true that on that date he had been discharged from the guardianship, but liabilities of even a discharged guardian do continue after his discharge as regards any fraud which may subsequently be discovered This is expressly provided in s. 41 (4) of Act VIII of 1890. It must, therefore, be deemed that the order of the 28th of April 1921 was passed against Abdul Rab directing him as a guardian still under the control of the District Judge.

An order passed against the guardian is certainly executable. A guardian is an officer of the Court and is responsible to the Court which appointed him as guardian for due management of the property of the ward and for restoration of any property of the ward that remains in his possession. Orders against him can be executed in proceedings under the Guardians and Wards Act. The case is quite different from an attempt to enforce an order against a third party who may be a perfect stranger to such proceedings. We accordingly dismiss the appeal with costs including in this Court fees an the higher scale.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 14 OF 1923.

July 7, 1924.

Present:—Mr. Justice Duckworth and Mr. Justice Godfrey.

MA E KHIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAUNG SEIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Hanafi School—Imam Abu Yusuf and Imam Muhammad, priority between—Wakf, *whether can be created orally*—Mutwalli, *appointment of—Object, declaration of—Presumption—Reservation of power to alter rules, validity of—Life-interest, reservation of—Invalid clause, effect of—Breach of trust—Appeal—Finding of fact—Oral evidence, appreciation of—Interference by Appellate Court.*

Where Hanafi Law is applicable, decisions in India are primarily given according to the tenets of Imam Abu Yusuf and not according to those of Imam Muhammad. [p. 167, col. 2.]

Under the Muhammadan Law a verbal *wakf* is permissible. The mere declaration of the owner that *he dedicates* the property, or *has already dedicated* it, is enough to divest his proprietary right therein. Thenceforth it is absolutely inalienable and uninheritable. [p. 173, col. 1.]

The *wakif* need appoint no *mutwalli*. In the absence of any appointment he is presumed himself to be the *mutwalli*. Nor is it necessary for the *wakif* to declare his object. This will be assumed to be for religion and charity. [*ibid.*]

The reservation of the *wakif's* life-interest in the property does not clash with the conception of a valid *wakf*, provided the *corpus* of the property is, there and then, definitely and finally appropriated to the intended purpose, *i.e.*, to the service of God. [p. 169, col. 2.]

It is open to the *wakif* to reserve to himself, as *mutwalli*, the power to make such alterations in the rules etc. of the grant as may be necessary to meet any new, or changed circumstances, or conditions. [p. 170, col. 1]

The presence of invalid clauses in a *wakfnamah* does not vitiate the *wakf*. The only result is that the offending clauses are invalid. [p. 171, col. 2.]

Where a *wakf* has been validly constituted and perfected by a *wakfnamah*, the mere fact that the *wakif*, as *mutwalli*, has committed breaches of trust in regard to the income of the property would not invalidate the *wakf*. [p. 172, col. 1.]

As a rule an Appellate Court ought to attach great value to the findings of fact of the Trial Court based on an appreciation of oral evidence. Where, however, the Judge who wrote the judgment in the First Court did not examine the witnesses and had no opportunity of observing their demeanour, he could not be in a better position than the Appellate Court to judge of the reliability of the witnesses' evidence. [p. 172, col. 2.]

[Case-law on all points considered.]

First appeal from a decree of the District Court, Mandalay, in Civil Regular No. 42 of 1920.

Mr. *Chatterjee* (with him Mr. *S. Mukerjee*), for the Appellants.

Mr. *Lutter*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents instituted a suit against the defendants-appellants and one Maung Po Lan, for a declaration that there had been a valid dedication of certain landed property worth about Rs. 30,000 situated in Mandalay Town, for religious and charitable purposes by Haji Palitaga U Po Tha deceased, as stated in his deed of *wakf*, and that they were the *mutwallis* thereof in succession to him, and for an order directing the appellants-defendants to give possession of the said property. The defendants are the widow and other relatives of the deceased. The plaintiffs' claim was, in fact, that the deed of *wakf* dated December 28th, 1914, executed by U Po Tha and duly registered, was a valid *wakf*. This deed deals with three holdings in Mandalay with the buildings thereon and purports to dedicate them "*in perpetuum.*"

It was further alleged by the plaintiffs, in their plaint that, about six months before his death, and in about May-June 1919, U Po Tha verbally dedicated as a *wakf*, for the same purpose, two *khans* of another building and the western portion of the holding on which it stood, valued at Rs. 10,000. Their prayer included this property, and their claim is that it was an addition to the previous *wakf*, which was made by the registered *wakfnamah*.

The defendants admitted that Haji U Po Tha executed the registered *wakfnamah*, but they contended that it did not create a valid *wakf* under Muhammadan Law. They denied the alleged later verbal dedication of the two *khans*, and pleaded that, in any case, it was invalid, inasmuch as it was not made in writing duly registered.

The parties are admittedly Zerbaddi Sunni Muhammadans of Mandalay, and are subject to the Hanafi branch of Mussulman Law.

In a long, and well-considered judgment, the learned Judge of the District Court (Mr. H A. Brown, now acting High Court Judge) decided that the *wakfnamah* created a valid *wakf*, and that plaintiffs were the *Mutwallis* thereof, but he held that there was no valid oral dedication of the two *khans*, though there was an expressed intention, never brought to fruition, on U Po Tha's part, to create the later *wakf*. He directed the defendants-appellants to give possession of the properties covered by the registered deed. He also made certain orders as to costs.

In the District Court, the ground on

which the defendants attacked the *wakfnamah* was that Haji U Po Tha retained the property in his own possession, and had full control and enjoyment thereof up to his death on 20th November 1919. They contended that he never made over the property to the plaintiffs as *mutwallis*, though the latter were named as such in the deed. Further they urged that the *wakfnamah* itself indicates that U Po Tha never divested himself of his character as owner of the property, and that, after he lost his case in Suit No. 21 of 1913, he married the principal defendant, Ma E Khin, and resolved to keep the property as his own, by way of making provision for his family.

There was also a plea that, in virtue of the result of Civil Regular Suit No. 21 of 1915, the matter in issue in this case, namely, the validity of the *wakfnamah* was *res judicata*. This was quite rightly found against the defendants, and the question of *res judicata* is not now before the Court.

On appeal to this Court, the grounds raised by the defendants-appellants are that, considering the conduct of U Po Tha, the provisions in the deed were illusory, and no valid *wakf* was created; that if the deed is valid at all, it is only valid as a Will or testamentary *wakf*, and so can affect only one-third of the deceased's nett estate; and that, if the deed is valid, but is not a Will, *then* the charitable dispositions in it must be given effect to, but the residue must accrue for the benefit of U Po Tha's heirs. The ground alleging that, inasmuch as the plaintiffs-respondents could not produce the original *wakfnamah*, and could not establish that the defendants-appellants had possession of it, the lower Court should have held that it did not exist, has not been argued, and may be taken to have been dropped.

The plaintiffs-respondents have filed cross-objections to the learned District Judge's findings, in regard to the later oral *wakf* of the two *khans*, after his marriage to the 1st appellant, Ma E Khin, which they contend was clearly established to have been a valid *wakf*.

The appellants have raised what are really two new points in appeal, but they were clearly involved in their pleadings, and were referred to in their written arguments before the District Court, and, being points of law, can, and must, be dealt with in this appeal.

When the registered *wakfnamdh* was made, it is admitted that U Po Tha was a widower, his first wife, Ma Myin and his second wife, Ma Mya, having both died. It was some considerable time after the *wakfnamah* had been executed that he married the 1st appellant, who was then a young girl of about sixteen years of age whilst the *wakif* was over sixty. It is admitted that U Po Tha left no issue.

It is now stated by the appellants that the property in dispute, which is in the centre of Mandalay Town, is worth over a lac of rupee (Rs. 1,00,000). If so, it appears to have been undervalued in the plaint unless, as is suggested, the local value of immoveable property has since risen very considerably.

The fact that the original *wakfnamah* was not produced in evidence has not been directly commented upon in argument. But it is suggested that U Po Tha must have destroyed it, when he married 1st defendant-appellant, Ma E Khin, after the result of his civil suit about the deed, thus showing that he considered the whole matter at an end. There is no justification in this suggestion. The *wakif* not only took the opinion of the learned Government Advocate Mr. Guy Rutledge (now Rutledge, J.), on the deed, but he went to the trouble of having the property registered in the Town Lots Office as *wakf* property with himself as *mutwalli*. The indications are that the original deed was left with Ma E Khin, and that, in spite of the allegations in the pleadings, and express notice to produce it she has kept it back. There were thus sufficient reasons for admitting secondary evidence of the terms of the deed, and of the *wakf*. The defendants-appellants, moreover, relied and still rely upon the deed just as much as the plaintiffs-respondents, in their attempt to defeat the validity of the *wakf*.

Nothing further need be said about this matter, which was not referred to in the grounds of appeal at all.

It is equally clearly indicated by the proceedings that 1st defendant, Ma E Khin kept back the account-books, in which U Po Tha (and later on she herself) entered the expenditure and income of the trust. The *wakif* was a careful man, and kept regular accounts, even of small items. Ma E Khin's affidavits and evidence about

these speak for themselves. It was clearly a mere afterthought on defendants' part to call Maung It at the conclusion of the case, some two years later, in order to produce *two* alleged account books, which, on plaintiffs' learned Advocate's objection were quite rightly excluded.

The proceedings, in fact, indicate that Ma E Khin, (whether on her own motion, or under the advice of her Advocate and relatives, cannot be stated), has deliberately refused to produce both the original *wakfnamah*, and the account-books, and other papers relating to the *wakf* property and the various tenants thereof.

It is thus not unnatural that Mr. Lutter for the respondents-plaintiffs, now asks that this should lead to strong presumptions being made against the *bona fides* and honesty of the defendants.

It is true Ma E Khin has prevaricated a great deal, and that not much reliance can be placed upon her evidence, either in regard to the documents, or in regard to the *wakfs* now in question.

The *wakfnamah* is a very long document. It was written in Burmese. But it is admitted by both sides that the translation thereof on the record is substantially accurate. The writer of this judgment is acquainted with the Burmese language, and can certify that such is the case.

The clauses of the deed, which require discussion, and to which appellants take objection are cls. 2, 3, 4, 5, 7, 11, 13, 14, 19, 20 and 22. The *wakfnamah* expressly stated that the teachings of "Imam Abu Yusuf" had been relied upon drawing it up. It is necessary to bear this in mind. It is necessary, also, to consider, specially, cl. 1, which specifically shows that the whole intention of the *wakf* was that neither he, nor his heirs and successors after his death, should be able to sell, mortgage, or otherwise alienate, any interest in the *corpus* of the property concerned in the *wakf*. This is *very* important, and what comes afterwards, in the twelve clauses, to which objection has been taken, must be read in the light of this clause.

The *wakfnamah*, up to cl. 4, clearly establishes the actual creation of *wakf* for religious and charitable purposes, and the dedication of the property to the Almighty. Clause 2 reserves to the *wakf*, as *mutwalli*, the occupation of the property up to his death, and the usufruct of the rents and profits of the property, after paying for necessary repairs, extensions, or improvements, and paying taxes, and monthly subscriptions and expenses for his meritorious and charitable acts. In this clause he expressly makes himself the *mutwalli*, as is usual in Zerbaddi *wakfs* in Mandalay [see the case of *Maung Po Thwe* v. *Maung Sha Bin* (1)] and there is nothing objectionable in this. [See the analogy in *Joygunnessa Bibi* v. *Majil-ullah Mamed Promanik* (2)].

In the case of *Casamally* v. *Currimbhoy Ebrahim* (3), it was held that the reservation of the *wakif's* life-interest in the property does not clash with the conception of a valid *wakf*, provided the *corpus* of the property is, there and then, definitely and finally appropriated to the intended purpose, *i.e.*, to the service of God. The *wakfnamah* indicates that this was the case here. Moreover, it is in accordance with what is stated in Dayal's *Durrul Mukhtar* page 351 and page 237 of Hamilton's *Hedaya*.

The *wakf* was made after the passing of the Mussulman Wakf Validating Act of 1913; *i. e.*, after March 7th, 1913, which, as regards Sunni Muhammadans, subject to the Hanafi Law must be taken to have reaffirmed the view taken in the case of *Doe d. Jaun Beebee* v. *Abdoolah* (4) (which is considered correct law by Mr. Amir Ali in his works on Muhammadan Law), that decisions in India are primarily given according to the tenets of Imam Abu Yusuf, and not according to Imam Muhammad. The case of *Muhammed Aziz-ud-din Ahmad Khan* v. *Legal Remembrancer* (5) which relied upon a majority of the judgments, but *not* on that of Amir Ali, J., in the Full Bench case of *Bikani Mia* v. *Shuk Lal* (6) is no longer good law, in regard to *wakfs* made in India after Act VI of 1913 came into force.

There is thus nothing fatal to the *wakfnamah* in cl. 2.

Clause 3 lays down that, *after* the *wakif's* death the monthly income shall invariably be used for the *wakf* property and other purposes specified in the deed. This must be read with cl. 2. It merely states what is to be done with the income, when the

(1) 2 U. B. R. (1897-01) 480 at p. 482.
(2) 81 Ind. Cas. 850; 28 C. W. N. 781.
(3) 12 Ind. Cas. 225; 36 B. 214; 13 Bom. L. R. 717.
(4) (1838) Fulton 345; 1 Ind. Dec. (o. s.) 848.
(5) 15 A. 321; A. W. N. (1893) 109; 7 Ind. Dec. (N. s.) 922.
(6) 20 C. 116; 10 Ind. Dec. (N. s.) 79 (F. B.).

wakif has passed away, and has ceased to be *mutwalli*.

Clause 4—another of the clauses in dispute—goes on to emphasise the irrevocability of the *wakf* and to reserve to the *wakif* alone, *during his life*, the right of making any alterations in regard to the rents and profits of the buildings and land, or anything relating to the said buildings and land, or the donations, rules, etc., laid down in the deed. Very strong objections have been raised in regard to this clause, as evidence of the fact that the dedication made by the deed, was illusory, and not final, and that it was, during U Po Tha's lifetime, still in his power completely to alter the conditions of the deed, and even to interfere with the buildings, and land. The clause is not happily worded, but it does not seem when carefully studied, to go as far as the appellants' learned Pleader contends that it does. It means no more than that, if occasion arises before his death, the *wakif*, as *mutwalli*, may make such alterations in the rules, etc., of the grant, as may be necessary to meet any new, or changed circumstances, or conditions. It cannot well be imported into it that he reserves the power to alter or change the *corpus* of the property. If this was so, it would be inconsistent with the permanent dedication made earlier in the *wakfnamah*, which must be read, as a whole and not otherwise. Moreover, no alterations were ever made by the *wakif*. That there can, according to Mussulman Law, be a power of alteration reserved by the *wakif* in this manner in the *wakfnamah* appears to follow from s. 466, page 558, 2nd Edition of Tyabji's Principles of Muhammadan Law, and page 426 and page 437, 4th Edition of Amir Ali's Muhammadan Law, Volume I Further, the whole conduct of Haji U Po Tha during the period of his suit on the deed, and thereafter, seems to indicate his intentions in regard to this power of alteration, and that it did not denote that the deed was revocable, or that he intended to change the *corpus*. Finally, if, as is admitted, there can be a power to exchange the *wakf* property, then, by analogy, there must be a power to alter rules, and conditions (Amir Ali, Volume I, page 758).

Clauses 5, 6 and 7 of the *wakfnamah* are principally criticised by the appellants, in that therein it is shown that the *wakif's* intention was that the assignment was only to have effect after his death and was no more at best than a testamentary *wakf*. It is contended that, all through the deed the use of the expressions "after my death, whilst I am alive" etc, is very constant, and supports the appellants' claim.

But, in this connection, also, the *wakfnamah* must be read as a whole, and it must be borne in mind that the *wakif* had made himself the first *mutwalli* of the *wakf* properties for life. It is clear enough, so far, that the *corpus* of the property was at once dedicated to God, and that the *wakif* not only intended that this should be so, but also took all possible steps to see that his intention was carried out, within as short a time as possible after the deed had been registered, and afterwards up to his decease.

As regards cl. 11, this merely shows how the income of the buildings was to be used by him, and by the *mutwallis* whom he appointed for the period following after his death. Naturally, as times changed, the total of the income would change. There is nothing materially wrong with this clause. Special provision is made for a *pro rata* alteration, in such circumstances, in the various gifts, donations, expenses and salaries specified in this clause.

Clauses 13 and 14 describe the duties of the *mutwallis* after the *wakif's* death. There is nothing which really requires comment in these clauses. They do not show that the *wakf* was merely testamentary, or that the *wakfnamah* is really only a Will, as is contended by Mr. Chatterjee for the appellants-defendants. These clauses, again must be taken along with the fact that Palitaga U Po Tha was the first *mutwalli*.

Clauses 19 and 20, it is urged, show that the *mutwallis* were not to get possession until after the *wakif's* decease, and then only for 70 days, after which they were to let out the property on monthly rents. The period of 70 days was to be spent in prayer for the *wakif's* benefit, and for feeding the poor. From this the position is taken that the *wakif* is *ab initio* invalid, and that the property never vested in God.

Clearly this is not so. There is nothing contrary to Muhammadan Law in these clauses. According to the School of Abu Yusuf, the *wakf* was completed by U Po Tha's dedication. His changing the character of his possession from mere owner to trustee or *mutwalli*, was, in the circum-

stances, adequate, coupled with the fact that he did, as a matter of fact, carry out several of the objects of the deed, while he was alive. See Tyabji, page 545, and Amir Ali. Edition 4, Volume I, page 237, and the case of *Jinjra Khatun* v. *Mahomed Fakirulla Mea* (7).

Clause 22 is important. It deals further with the power of the *wakif* to make alterations, and is restrictive of the power given in cl. 4. The clause reads:—

"When I during my lifetime, want to make (and do make) alteration, amendment, deletion or addition with regard to the management, rules, and regulations (conditions) relating to (contained in) the *wakf* deed which is hereby executed, and under which the *wakf* is made, such amendment shall be held valid only when made in writing, signed by me personally in the presence of witnesses, and attached to the *wakfnamah* (deed) as correction or supplement."

This is the official translation. It should be translated, more correctly, as follows:—

"With reference to the *wakfnamah*, by which this *wakf* is created, while life is in me, whenever I desire personally to vary, amend, delete, matters of management, conditions and rules, this can only be done by a document written and signed in the presence of witnesses, and attached to the present *wakfnamah* as a correction.

The chief point is that the words "(and do make)" do not seem to occur at all in the Burmese.

This clause taken with cl. 4 clearly reserves a very wide power to the *wakif* to amend the rules of the *wakf*. However, it is not in any way inconsistent with a complete dedication of the *corpus* of the property to God, and no authority has been quoted, which shows that such a power of alteration is illegal, or would avoid the *wakf*, or as to the quantum of power of alteration, which would invalidate the deed. It does not amount to much more than that the *wakif* reserved to himself the power of administration. It is significant that it is a *sine qua non* attaching to this power of alteration, that alteration must be so made as to be consistent with the essentials of a Sunni *wakf*. It must again be borne in mind that these clauses cannot be read by themselves, but must be read in connection with the whole deed. In fact, this clause read with cl. 4, and the main clauses of the *wakfnamah*, cannot be taken to give the *wakif* powers to set aside the original dedication and trust, but only to exercise a wide discretion as to the conditions and objects of the trust.

It seems to have been overlooked moreover by the learned Pleader for the appellants that, if there is an invalid clause, or if there are invalid clauses, in the *wakfnamah*, this will not vitiate the *wakf* [page 306, Volume I, Amir Ali's Muhammadan Law (4th Edition)].

The only result is that the offending clauses are invalid.

Then it is urged that, out of seventeen persons appointed by the *wakfnamah* as *mutwallis*, to succeed the *wakif* after his death, five are dead, and one, did not uphold the *wakf*, and that Haji U Po Tha appointed no successors to those who, died before him. This is laid hold of as evidence that he never intended that the *wakf* should be real, and that, after his marriage to Ma E Khin, he gave up all idea of it. This by no means follows. He was the *mutwalli*, and the survivors of those originally selected by him would have the power, after his death, of appointing others to re-place those who were dead or who had withdrawn.

There is, moreover, ample evidence that the *wakif* paid regular sums as stated in the deed to two mosques, and a *madrassa*, whilst he spent a good deal upon repairs. There is no proof that he bought, from the income, jewels for Ma E Khin. On the contrary, it is proved that he used a sum of Rs. 5,000 which he inherited from his brother, Maung Po Win, and the surplus income from the *wakf* properties, to erect the *pucca* building on the land to the east of those properties, half of which, with half of the land, forms the subject of the alleged oral *wakf* in 1919. It is true that he had no other source of income, so he must have, as he was entitled to do, used a portion for his maintenance and support. Clause 9 of the *wakfnamah* contemplates additions to the 1914 *wakf*. It seems that in view of the admitted intention of U Po Tha to make the 1919 *wakf*, his use of income for the building on the vacant land to the east was fully justified. Moreover, even had he utilized *all* the income for his own purposes, except in regard to cl. 2 of the deed, this, since it did not affect the dedication of the

(7) 67 Ind. Cas. 77; 34 C. L. J. 444; 26 C. W. N. 749; 49 C. 477.

corpus of the property, would not have invalidated the *wakf*. Authority for this has been given already (and see page 423, Amir Ali).

The *wakif's* rent-receipts, filed on the record, show that he leased out the property as *mutwalli*. He was shown in the Town Lots Registers as *mutwalli*. He kept books as *mutwalli*. In October 1916 as *mutwalli* he executed a registered lease of *wakf* property (see 22 P. W.).

In the previous suit he filed a bromide photo of the buildings bearing an inscription, printed from the negative that the property was *wakf* property.

He consulted Moulvi Shahab-ud-din (since deceased), the most famous Muhammadan teacher in Mandalay (see *Maung Po Thwe* v. *Maung Sha Bin* (1), where Shahab-ud-din in 1901 was referred to by the Judicial Commissioner with compliments), about the terms of his *wakf*. His conduct was clearly *bona fide*.

As stated already, he took all possible steps to show that it was a real dedication to the Almighty by consulting Moulvies, by suit, by taking the advice of his lawyer, by consulting the Government Advocate, and by mutation of names in the Town Lots Office. He was in full health in 1914, and there was nothing to impair his mind. He had no children of his own and was a widower, and the property was indisputably his to dedicate.

Everything indicates that the *wakf* of the properties was genuine; there was a substantial dedication of the *corpus* to charity; it was by no means illusory.

Even if he had committed breach of trust in regard to the income of the property, this would be immaterial, and would not have invalidated the *wakf*, if a *wakf* had been constituted and perfected by the *wakfnamah*. [See *Kulsom Bibee* v. *Golam Hossein* (8).]

The *wakf* is clearly not a testamentary *wakf*, as defined in the 2nd Edition of Tyabji's Principles of Muhammadan Law, page 523, s. 457 (6). It is, in fine, valid as a whole, and not only as regards the charitable religious dispositions contained in it, so as to render the residue available for such of the defendants as may be heirs of the *wakif's* estate.

On this question the District Court was clearly right in its decision.

(8) 10 C. W. N. 449 at p. 484.

As regards the alleged *verbal wakf* of the two *khans* of the *pucca* building, and the western half of the land on which it had been built, there is a great deal of evidence, oral, inferential, and circumstantial, which demands consideration.

The learned Judge, who wrote the judgment of the District Court, had not examined the witnesses, nor had he had an opportunity of observing those witnesses' demeanour. In fact, he was in no better position than this Bench to judge of the reliability of the witnesses' evidence. This is very important, and must be borne carefully in mind, because as a rule, in such a case as this, *very great value would be attached by this Bench to the findings of the District Court on facts.*

There can be no doubt that there was a meal of some kind or feast about the time of *ramzan*, (May-June 1919), at the new *pucca* building in question, at which the *wakif*, Haji Palitaga U Po Tha, made some announcement, or that, later on, early in November 1919—about ten days before his death—when he was, admittedly, by no means, in a "death illness," there was a preaching ceremony at the house, where this announcement was re-affirmed by the *wakif*.

Ma E Khin herself admits that, before these ceremonies, U Po Tha had informed her that he would give the two eastern *khans* to her, and that "the western two *khans* would be dedicated as *wakf* by a registered deed." Her case, however, is that her husband died before his intention was carried out. Admittedly there was no second *wakfnamah*.

Here maps, Exs C and E, must be looked at. It will be seen that the addition of E to C completes the latter.

Then cl. 9 of the original *wakfnamah* clearly contemplated possible additions to the 1914 *wakf*.

There is ample evidence that U Po Tha had boundary pillars erected to divide the two *khans* in question from the two *khans* intended for his wife, Ma E Khin. Ramji Dass, an independent Hindu (P. W. No. 5), is clear as to this. There is also other evidence to the same effect.

As a matter of fact, it was admitted, in argument before this Bench, that U Po Tha *did* intend to create a *wakf* of these two *khans* and half the land, though it is urged that he never actually did so. Mr. Chatterjee contends that, if he had done so, he

would have, as before, carried out his intention by executing a registered *wakf-namah*, especially in view of the fact that he was a minutely careful and methodical man. But there is not so much in this argument as would at first sight appear. He had incurred so much trouble in connection with the *wakfnamah*, that he may well have decided, after consulting his advisers, to create this second *wakf*, by oral announcements, in the presence of several witnesses.

It is admitted that, under the Mussulman Law, a verbal *wakf* is permissible. Mr. Amir Ali at pages 474-475, Volume I of his 4th Edition says:—"A verbal declaration of *the intention to create* an endowment is sufficient, if made in the presence of witnesses. Although the witnesses to the fact *depose vaguely*, yet their evidence, *if corroborated by circumstances*, is legally sufficient." Again at page 213, he says:—"The mere declaration of the owner that *he dedicates* the property, or *has already dedicated* it, is enough to divest his proprietary right therein. Thenceforth it is absolutely inalienable and uninheritable." These *dicta* are very clear in their meaning.

Tyabji at pages. 536-537 gives many examples of valid verbal dedications. Some are in the *past* tense.

The *wakif* need appoint no *mutwalli*. He is presumed himself to be the *mutwalli* (page 532, Tyabji) according to Abu Yusuf; whose teachings clearly prevail in regard to this matter. In this connection, the case of *Ramzan Mistri* v. *Zahur Hossein* (9) may usefully be referred to. There it was held by Holmwood and Chapman, JJ., that the appointment of a *mutwalli* is not essential to the validity of an appropriation. Moreover, *here* the apparent object was to add this *wakf* property to that already dedicated in 1914,

Further it is not necessary according to Abu Yusuf for the *wakif* to declare his object. This will be assumed to be for religion and charity (Tyabji, page 601). Delivery of possession to others, as *mutwallis*, also is not essential (*see Jinjra Khatun* v. *Mahomed Fakirulla Mea* (7), already referred to).

Next we have the fact referred to by P. W. No. 1, Thu Kha, that U Po Tha took steps to put the two *khans* in the name of himself as manager or *mutwalli* of the *wakf* (map, Ex. E), and that, as far back as February 1919, he had the land surveyed and divided.

The invitations issued for the November preaching show that the property had been dedicated as *wakf* property.

Haji U Po Tha told the 20th P. W., Isman (one of the plaintiffs), that he was going to add these two *khans* to the original *wakf* property. This was before the new *pucca* building was erected. He stated that, for these two *khans*, he would use surplus income from the *wakf* property. There is no reason to doubt this evidence. The *wakif's* statement was against his proprietary interest and so was admissible in evidence.

U Po Tha's conduct in regard to these two *khans* has now been made clear.

As to what announcement was made by him at the feast, and later, at the preaching, has now to be determined from the oral evidence.

* * * * *

It appears from all this evidence that there are some discrepancies as to the actual words used by Haji U Po Tha at the *ramzan* feast in 1919, some witnesses saying that he stated his *intention* to dedicate, some saying that he gave out that he *did* dedicate, and others saying that he announced that he *had dedicated* the property. In virtue of Mr. Amir Ali's views in regard to what constitutes valid dedication of a "*wakf*," this is not very important. It would have been impossible to obtain complete unanimity as to what was said, unless there had been considerable tutoring of the witnesses, and nothing of this sort has been even suggested. The evidence of really respectable men, such as Ramji Dass, Jaffa, Maung Chit Su, Maung Lu Po, Isman, Maung Paung, Maung Khan, Haji Ko Kyi Kyi, and Mahomed Nur Mahamed, must be taken as quite sufficient to prove this oral *wakf* when considered in connection with the *wakf's* expressed intentions, and the evidence as to what was given out by him at the preaching ceremony ten days before he died. Further, there is the evidence that U Po Tha had intended all along to add these two *khans*, so as to round off, and complete, the registered *wakf* property, and there is the fact that he did not leave his young widow without her portion. Much stress has been laid by Mr. Chatterjee for the defendants on the fact

(9) 18 Ind. Cas. 241.

that U Po Tha did not inform all the prospective plaintiff *mutwallis* about this oral *wakf*. It is probable that he did issue invitations to all the prospective *mutwallis*, and it is clear that he *did* inform many of them. Inasmuch as he was himself the *mutwalli* for life, and did not expect soon to die in May-June 1919, it was not necessary for him to inform them all.

The defence called no evidence to rebut the plaintiffs' evidence as to what occurred at the preaching ceremony in November 1919.

The evidence, in view of the finding of this Bench, has of necessity been set out in great detail.

In conclusion, it is sufficiently clear that *as regards this oral wakf*, the decision of the learned Judge of the District Court was not warranted by the evidence available in the record.

The decree of the District Court is modified by setting aside that portion thereof by which the claim for the two *khans* (and land concerned) was disallowed, and, in its place, granting the plaintiffs-respondents a decree declaring that there was a valid oral "*wakf*" of the land and two *khans*, as set out in the plaint; and that the respondents-plaintiffs are the *mutwallis* thereof; and directing that the defendants-appellants do give the respondents-plaintiffs' possession thereof.

The cross-objections of the respondents are allowed with costs. Advocate's fees (special) ten gold *mohurs* a day for three days' full hearing under r. 3, High Court Notification, dated the 27th September 1923 in addition to costs calculated under r. 1.

The appeal of the defendants-appellants is dismissed with costs.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 4, 1924.

Present:—Lord Sumner, Lord Wrenbury and Lord Carson.

In re PRAGDAS BUDHSEN—PETITIONER.

Privy Council—Practice—Interpretation of Orders in Council—Procedure.

Generally speaking it is no part of the functions of their Lordships of the Privy Council to interpret Orders in Council which have been already made unless they are brought before them in the ordinary way upon appeal.

JUDGMENT.

Lord Sumner.—In accordance with the authority of the case of *In the matter of the petition of Yarlagadda Durga Prasada Nayadu* (1) which has been cited to their Lordships, their Lordships are willing under the particular circumstances of this case to assist the High Court in Bombay by an expression of their opinion upon the question which appears to have been mooted before them. They desire, however, to add that it is no part of the functions of their Lordships' Board, generally speaking, to interpret Orders in Council which have been already made unless they are brought before them in the ordinary way upon appeal. The present Board, of course, is only able to state the intention of the opinion delivered by them and of the Order in Council that His Majesty was then pleased to pass thereupon, by reading the language of the opinion and of the Order and those of their Lordships who were parties to the judgment would hesitate to claim any specific re-collection of the facts of the case.

It does not appear to their Lordships that it was contemplated at the time upon a question which was essentially one merely of calculating the amount of damages, that either party to a commercial dispute in Bombay would have proposed to call evidence long afterwards to contradict evidence which had been allowed to pass at the trial when the facts were comparatively recent. This consideration and an admission of human frailty must be the Board's excuse for having failed to state more explicitly in the opinion that was arrived at what course they anticipated would be pursued in the Court of the Trial Judge. They may perhaps be allowed to say that they fail to see what substantial doubt could have arisen upon the question.

(1) 27 M. 153; 31 I. A. 64; 8 Sar. P. C. J. 621 (P. C.).

The course which the Trial Judge had taken, the mode in which he assessed the damages and his decision-whatever the grounds may be that he gave for it not to admit any fresh evidence of the value of the goods, appear to their Lordships to have been in entire accordance with what the Board contemplated would be done upon the question which it was necessary to remit to the Indian Court because their Lordships were not the proper tribunal to make calculations and the parties were unable to come to an agreement.

In the result, therefore, the answer to the petition is unfavourable to the petitioners and they will have to pay the costs of the petition.

Z. K. *Answered Order accordingly.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent:—Messrs. *E. F. Turner & Sons.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 116 OF 1924.

January 16, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

ZUHARA BEGAM AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

Musammat MASHUQ FATIMA AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Procedure—Decree set aside—Original proceedings, whether can be revived.

Where a final order in a litigation is set aside the proper procedure is to restore the original proceedings.

Khajooroonnissa v. *Roshan Jehan*, 2 C. 184; 3 I. A. 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412 (P. C.) and *Davuluru Vijaya Ramayya* v. *Davuluru Venkatasubha Rao*, 32 Ind. Cas. 881; 39 M. 853; 30 M. L. J. 465, relied on.

Plaintiff obtained a decree for sale of certain properties on the basis of a mortgage against the defendants. The defendants subsequently instituted a suit for a declaration, that the decree was not binding on them for the reason that they were minors at the time when the original suit was brought and were not properly represented in that suit. The declaration was granted and the plaintiff subsequently made an application to the Court which had passed the decree in the mortgage suit that the mortgage suit be restored to its original number and re-tried as against the defendants. This application was granted and the defendants went up in revision:

Held, that the order complained of was a proper order under the circumstances of the case and should not be set aside.

Revision, under s. 115, C. P. C., against an order of the Subordinate Judge, Bara Banki, dated the 19th January 1924.

Mr. *Naimullah*, for the Applicants.

Mr. *Abid Husain*, for the Opposite Parties.

JUDGMENT.—This is an application in revision from the order of the Subordinate Judge of Barabanki dated the 19th January 1924. The facts are as follows: The opposite parties obtained a decree for sale of certain properties on the basis of a mortgage in the year 1912 against the applicants and others. These applicants were minors at the time when the decree was passed: In the year 1921 after certain execution proceedings had been taken on the decree just now mentioned and after they had attained majority, the applicants instituted a suit for a declaration that the decree was not binding on them for the reason that they were not properly represented in the suit in which the decree was passed. The suit succeeded and the declaration in terms of the prayer was granted. The final decree was passed by the First Court of Appeal on the 24th October 1923. On the 14th of the following month the opposite parties moved the Court of the Subordinate Judge which had passed the decree in the mortgage suit in the year 1921 by means of an application that the mortgage suit be restored to its original number and re-tried as against the opposite parties. The prayer was accepted by the order under revision.

At the hearing of this application a preliminary objection was taken that no revision lay on the ground that no case was decided so far. But as we are going to dismiss this application on its merits we do not propose to decide this objection.

On the merits of the case, we are satisfied that the learned Subordinate Judge has passed a proper order in the circumstances The applicants' learned Pleader pressed on us that the proper remedy of the opposite parties lies in instituting a fresh suit against the applicants. To this argument it was replied that a fresh suit would be barred by time. The learned Pleader for the applicants candidly admitted this. To set aside the order of the learned Subordinate Judge would obviously be, therefore, wholly inequitable and if we are not compelled by any provision of law to set it aside we should not do so. We find that there is

no rule of law which compels us to reverse the order under revision. There are series of cases decided by the Courts in India founded upon a decision of their Lordships of the Privy Council in the case of *Khajoor-oonissa* v. *Rowshan Jehan* (1) that where a final order in a litigation is set aside the proper order will be to restore the original proceedings. We may refer to the case decided by the High Court at Madras in *Davuluru Vijaya Ramayya* v. *Davuluru Venkatsubbh Rao* (2). In this case a large number of authorities are considered in support of the view which we have just now expressed. We, therefore, decline to interfere and dismiss this application with costs.

Z. K. *Application dismissed.*

(1) 2 C. 184; 3 I. A. 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412 (P. C.)

(2) 32 Ind. Cas. 881; 39 M. 853; 30 M. L. J. 465.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3037 OF 1924.

March 24, 1925.

Present :—Mr. Justice Jai Lal.

CHANDU AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAJJU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Common land—Encroachment—Injunction, suit for—Limitation—Burden of proof.

In a suit for perpetual injunction directing the defendant to remove an encroachment made by him on common land it is for the plaintiffs to prove that the encroachment was made within six years before suit. A mere surmise by the Court that the encroachment is recent is insufficient for holding that it took place within six years.

Ganda Singh v. *Nathu Ram*, 13 Ind. Cas. 661; 151 P. L. R. 1912: 77 P. W. R. 1912, followed.

Second appeal against an order of the District Judge, Ambala, dated the 3rd January 1924, reversing that of the Additional Sub-Judge, Fourth Class, Ambala, dated the 14th December 1923.

Mr. *Shamair Chand*, for the Appellants.

Mr. *Rustomji*, for the Respondents.

JUDGMENT.—This suit was instituted by the plaintiffs praying for an injunction for the removal of a platform which the defendants were alleged to have constructed on *shamilat* land a few months before suit and so as to obstruct the right of way of the plaintiff. The plea of the defendant was that the *chabutra* had been in existence for about 60 years Two issues were framed :—

1. Was the platform constructed 60 years back ?

2. Was the way leading to the stable not sufficiently wide for the plaintiffs' cart? Both the lower Courts have held that the *chabutra* "must have been constructed sometime after 1894" and that the road was not sufficiently wide for the plaintiffs' cart to pass. Consequently the plaintiffs' suit has been decreed.

On second appeal it is urged on behalf of the plaintiffs that proper issues were not framed by the Trial Court and that the burden of proof as to the date on which the alleged obstruction on the plaintiffs' road took place should have been placed on the plaintiffs. A reference is made to the case of *Ganda Singh* v. *Nathu Ram* (1) in which it was held that in a suit for perpetual injunction directing defendants to remove an encroachment made on common land, it was for the plaintiff to prove that the encroachments were made within six years before suit and that a mere surmise by the Court that the encroachments were 'recent' was insufficient for holding that it took place within six years. This authority applies fully to the findings of the Courts below. The proper issues have not been framed and the finding on the first issue is so vague that it is impossible to give a final judgment thereon. I have considered the advisability of deciding the points that really arise in the case on the evidence before me, but having regard to the fact that proper issues were not framed and the burden of the first issue was wrongly placed on the defendants, it is quite possible that the parties may have other evidence to produce in the case. I must, therefore, set aside the decrees of the Courts below and remand the case for re-trial after the framing of proper issues. Costs of the proceedings incurred by the parties so far will abide the result. The Court-fees paid in this Court shall be refunded to the appellants.

Decree set aside;

Z. K. *Case remanded.*

(1) 13 Ind. Cas. 661; 151 P. L R. 1912; 77 P. W. R. 1912.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 136 OF 1924.
(CRIMINAL REVISION PETITION No. 119 OF 1924.)
December 5, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

In re CHINNA MANIKAM *alias* CHINNAPPA NAICKEN AND OTHERS—ACCUSED Nos. 1 TO 5, 8, 10, 12, 17 AND 18—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 369, 444—Appeal—Several accused—Appellate Court, duty of—Consideration of case against each accused.

In the case of an appeal from a conviction involving several accused persons the Appellate Court must bring to bear with regard to the case of each of the appellants a judicial mind for the purpose of considering whether he was guilty or not having regard to the charges against him and the special evidence directed to him and his particular defence if any. Though the Appellate Court may give satisfactory reasons for accepting the conclusions of the Trial Court, its omission to consider the case against each individual accused separately would vitiate the judgment. [p. 177, col. 2.]

The judgment of an Appellate Court should be self sufficient, that is to say, should contain all the necessary materials to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused, having regard to the various offences with which each of the accused was charged and to enable the High Court to come to a conclusion as to the correctness of the sentence upon each of the accused. [*ibid.*]

In re Bapu Naidu, 31 Ind. Cas. 175; 2 L. W. 958; 16 Cr. L. J. 735, *Dakshinamurthi Rajali* v. *Emperor*, 43 Ind. Cas. 616; (1918) M. W. N. 129; 7 L. W. 83; 19 Cr. L. J. 200, and *Arindra Rajbanshi* v. *Emperor*, 38 Ind. Cas. 326; 20 C. W. N. 1296; 18 Cr. L. J. 296, relied on.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the sentence of the Court of the Sub-Divisional Magistrate, Saidapet, in Criminal Appeal No. 1 of 1924, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Madurantakam, in Case No. 361 of the Calendar for 1923.

Mr. *C. Narasimahchari* for Mr. *G. Thiruvenkatachariar*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—The accused-petitioners before me were convicted along with 20 others of the offences of rioting and hurt by the Magistrate, who heard the case. The Magistrate convicted the 20 accused, and on appeal the Appellate Magistrate acquitted 10 out of the 20. It is now argued before me that the learned Appellate Magistrate has not considered the case of each of the petitioners separately and come to a conclusion with regard to his guilt or otherwise. On a careful consideration of the judgment of the Appellate Magistrate I am satisfied that he did not bring to bear, with regard to the case of each of these accused, judicial mind for the purposes of considering whether he was guilty or not having regard to the charges against him and the special evidence directed to him and his particular defence if any. It has been held by Ayling, J., in the case of *In re Bapu Naidu* (1) that though the Appellate Magistrate may give satisfactory reasons for accepting the conclusions of the Original Magistrate his omission to consider the case against the individual accused separately would vitiate the judgment. To similar effect is the judgment of Kumaraswami Sastri, J., in the case of *Dakshinamurthi Rajali* v. *Emperor* (2). The Calcutta High Court seems even to have gone further and stated in the case of *Arindra Rajbanshi* v. *Emperor* (3) that the judgment of the Appellate Magistrate should be self-sufficient, that is to say, should contain all the necessary materials to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused having regard to the various offences with which each of the accused was charged and to enable the High Court to come to a conclusion as to the correctness of the sentence upon each of the accused. The learned Public Prosecutor has drawn my attention to certain words in the judgment of the Appellate Magistrate which go to show that he found the conclusion arrived at by the Original Magistrate to be correct. But that would obviously be insufficient in view of the decisions just now referred to by me. After stating that the analysis of the evidence made by the lower Court was correct and that on that footing the ten petitioners before me were guilty the Appellate Magistrate proceeds to say thus:—"The defence evidence is untrustworthy as analysed by the lower Court and does not also help the appellants above mentioned referring also 1, 3, 4, 6 and 11." This sentence is rather difficult to understand, but assuming that it means that the defence evidence had relation only to five of these ten petitioners, still it would not go to show that he considered judicially the evidence adduced for the defence in res-

(1) 31 Ind. Csa. 175; 2 L. W. 958; 16 Cr. L. J. 735.
(2) 43 Ind. Cas. 616; (1918) M. W. N. 129; 7 L. W. 83; 19 Cr. L. J. 200.
(3) 38 Ind. Cas. 326; 20 C. W. N. 1296; 18 Cr. L. J. 296.

pect of these five accused. On the whole regarding the judgment in its entirety, I am no satisfied that the Appellate Magistrate brought his judicial mind to bear on the evidence in the case of each of these petitioners separately. His decision was, therefore, wrong, I set aside and remand the case to the Joint Magistrate of Chingleput for entertaining the appeal of these ten petitioners and disposing of the same according to law. Such of the petitioners as have been sentenced to terms of imprisonments will continue to be on bail till the disposal of the appeal on the same security as has been furnished by them.

I might also point out that the Appellate Magistrate has, nowhere, referred to the common object of the unlawful assembly by reason whereof the petitioners have been convicted of the offence of rioting. It may be that this matter was not clearly argued before the Appellate Magistrate in the first instance. For the purpose of arriving at a proper decision with regard to the case of these petitioners it would be necessary to find whether these ten persons were really guilty of the offence of rioting as having formed members of an unlawful assembly with a common unlawful object. The execution of the sentences of fine imposed on the petitioners, should be suspended till the disposal of the appeal.

V. N. V.

Z. K. *Conviction set aside; Re-hearing appeal ordered.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 240 OF 1924.

December 17, 1924.

Present:—Mr. Kotval, A. J. C.

RAMPRASAD—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 297, 303, 423—Charge to Jury, contents of—Duty of Judge—Verdict on several charges, mode of recording—Appellate Court—Re-trial, order for, when justifiable.

A charge to the Jury, in order to comply with the provisions of s. 297 of the Cr. P. C., must sum up the evidence for the prosecution and lay down the law by which the Jury are to be guided. It is defective if it states that the law on the subject has already been presented to the Jury by the Public Prosecutor and that in the opinion of the Sessions Judge no difficult point of law arises in the case. [p. 179, col. 1.]

It is necessary for the Judge under s. 303 (1) of the Cr. P. C. to elicit from the Jury a separate verdict on various charges by questions and to record the questions and answers under s. 303 (2). A statement that the verdict is of guilty where there are several charges, is not a sufficient compliance with the provisions of law. [*ibid.*]

There is no restriction on the powers of an Appellate Court to deal with the case of which it has complete seisin in any of the manners provided by s. 423, Cr. P. C. [p. 179, col. 2.]

An order for re-trial is not justifiable if there is no evidence on the record to warrant a conviction for the offence charged. [*ibid.*]

Taju Pramanik v. *Queen-Empress*, 25 C. 711; 2 C. W. N. 369; 13 Ind. Dec. (N. s.) 465 and *Emperor* v. *Edward William Smither*, 26 M. 1; 2 Weir 521, followed.

Appeal against a finding and sentence of the Sessions Judge, Jubbulpore, dated the 21st October 1924, in Sessions Trial No. 15 of 1924.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The Counsel for the Crown admits that the charge to the Jury in this case is defective.

The charge on which the accused was committed for trial was

"That you on or about the 9th day of July 1924 at Katni, being entrusted with Bhaontas (B) and Rs. 20 in cash dishonestly converted them to your own use and thereby committed criminal breach of trust and thereby committed an offence punishable under s. 466, Ch. XVII of the Indian Penal Code with imprisonment for a term of three years."

This charge was read and explained to the accused who pleaded not guilty.

The Sessions Judge added an alternative charge as follows:—

"That you on or about the ninth day of July 1924 at Katni, by falsely representing to one Nahe Thakur that he could pledge his Bhaontas with one Bhagwandin, deceived the said Nahe Thakur and induced him to deliver to said Bhagwandin the said ornaments and Rs. 20 (in cash and note) and soon after dishonestly induced said Bhagwandin to deliver the same to you by further false representation and thereby committed an offence punishable under s. 420 of the Indian Penal Code."

To this charge also the accused pleaded not guilty.

To both these charges were added charges of being previously convicted of

certain offences and thereby being liable to enhanced punishment.

The charge to the Jury does not comply with the provisions of s. 297, Cr. P. C. It neither sums up the evidence for the prosecution nor lays down the law by which the Jury are to be guided. It states that the law on the subject has already been presented to the Jury by the learned Public Prosecutor and that in the opinion of the Sessions Judge no difficult point of law arises in the case. We do not know what the law was that was presented by the Public Prosecutor and any possibility of knowing what it was is taken away by non-compliance with the instructions in the Judicial Commissioner's Criminal Circular I-22, r. 13. It is a direction of this kind that was condemned in *Mangan Das* v. *Emperor* (1). The present direction is if anything worse as it refers to the law presented solely by the Public Prosecutor. The questions of law connected with the essential ingredients of the charges framed were by no means simple.

It was necessary to point out to the Jury what was the evidence which had a bearing upon the charges of criminal breach of trust and cheating respectively.

The charge of cheating refers to two persons Nanhe Thakur as well as Bhagwandin. It is not pointed out what is the evidence regarding the deception of each of these two persons.

In head 5 of the charge the Sessions Judge says:—

"If you find the accused acted dishonestly, then you can find him guilty of criminal breach of trust or cheating, or of one or the other offence." The reply of the Jury is recorded as follows:—

"The Jury after an absence of 15 minutes returned an unanimous verdict of guilty."

This verdict is not clear. A verdict on all the charges should have been elicited by questions under s. 303 (1), Cr. P. C, and the questions and answers recorded under s. 303 (2). All that we find is a statement in the judgment that the verdict was of guilty under s. 420, Indian Penal Code. Whether the accused is found guilty of cheating Nanhe Thakur or Bhagwandin is not stated.

Under these circumstances it is quite probable that the verdict of the Jury is vitiated by the errors in the process of arriving at it and the conviction must be set aside.

Relying on *Wafadar Khan* v. *Queen-Empress* (2) the learned Counsel for the Crown urges that the only course open to this Court is to order a re-trial. This ruling was expressly dissented from in *Taju Pramanik* v. *Queen-Empress* (3) and it was held that there is no restriction on the powers of the Appellate Court to deal with the case of which it has complete seisin in any of the manners provided by s. 423, Cr. P. C.

Admittedly there is no case of a trust or a criminal breach of it by the accused. As to the cheating I can find no evidence of any deception by the accused of either Nanhe Thakur or Bhagwandin inducing either of them to deliver the property, nor is the learned Counsel of the Crown able to point out any such evidence. Nanhe Thakur admits that he meant to pledge certain articles and did pledge them with Bhagwandin to whom according to the latter he was known for some years. He does not say that he was deceived by the accused into delivering the articles or the money to Bhagwandin, nor does Bhagwandin allege that he was deceived into delivering the same to the accused. As there is no evidence on the record to warrant a conviction for the offence of cheating, an order for a re-trial will not be justified: *Taju Pramanik* v. *Queen-Empress*, (3) and *Emperor* v. *Edward William Smither*, (4). The accused is, therefore, acquitted and directed to be set at liberty.

G. R. D. *Accused acquitted.*

(1) 29 C. 379; 6 C. W. N. 292.

(2) 21 C. 955; 10 Ind. Dec. (N. S.) 1269.

(3) 25 C. 711; 2 C. W. N. 369; 13 Ind. Dec. (N. S.) 465.

(4) 26 Mad. 1; 2 Weir 521.

ALLAHABAD HIGH COURT.
FULL BENCH.

MISCELLANEOUS CASE No. 116 OF 1925.

April 6, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, Mr. Justice Lindsay and Mr. Justice Mukerji.

In the matter of B. RAJ BAHADUR JAIN, VAKIL, SAHARANPUR—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), s. 13—

Unprofessional conduct—Duty of Counsel in drafting pleadings and in cross-examination.

A client who consults a Counsel and who requires a plaint or written statement to be drafted instructs the Counsel as to the facts of the desired document. It does not always happen that those facts are true but from the Counsel's point of view that is not a material matter. He is entitled to accept the instructions of the client subject to this, that, as a matter of prudence and for his own reputation, it is not well for him to associate himself with reckless charges of fraud and criminality or to indulge in abuse. He should explain to the client that such charges if unproved gravely injure the case and prejudice the Judge. He is not, however, supposed to go on hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done, nor is it the practice to do it. Counsel have to depend upon the statement that the client makes, the penalty being that if the client is not telling the turth he may probably lose the case. In such circumstances the rule is that the client is entitled to have the particular document drafted according to the instructions given. Counsel must not, however, import personal ill-will into pleadings and must refrain from making charges against witnesses in examination or cross-examination for which there is no conceivable ground. It may become the positive duty of Counsel to tear a man's character into pieces if his character is in issue, but only when the fullest material exists. No questions attacking a witness's honour should be put unless and until Counsel by enquiry has satisfied himself that the damaging fact is well-founded, and this he ought to do before he comes into Court. [p. 180, cols. 1 & 2; p. 181, cols. 1 & 2.]

Rule.

Mr. *G. W. Dillon*, for the Crown.

Messrs. *Iqbal Ahmad* and *U. S. Bajpai*, for the Opposite Party.

JUDGMENT.—Mr. Iqbal Ahmad.—There is no doubt that you and the Counsel who have represented the respondent have acted wisely in the course which has been followed. We wish this case to be clearly understood and not to be twisted into something quite different from the reality. It is not a case in which we have asked the respondent to come forward and to justify a pleading which he had a perfect right to make; it is a case of quite a different nature. A client who consults a Counsel and who requires a plaint or written statement to be drafted instructs the Counsel as to the facts of the desired document. It unfortunately does not always happen that those facts are true, but from the Counsel's point of view that is not a material matter, and indeed if one looks at pleadings in cases generally it is obvious that a plaint and the written statement cannot both be true because an issue or issues arise out of the denials of the truth of the averments on one side or the other and that enables the case to be fought upon clear lines. A Counsel is entitled to accept the instructions of the client subject to this, that, as a matter of prudence and for one's own reputation, it is not well to associate oneself with reckless charges of fraud and criminality or to indulge in abuse; and Counsel should explain to clients that these charges, if unproved, gravely injure the case, and prejudice the Judge. Counsel is not supposed to go hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done, nor is it the practice to do it. Counsel have to depend upon the statement that the client makes, the penalty being that, if the client is not telling the truth, he may probably lose the case. In those circumstances the rule is that the client is entitled to have the particular document drafted according to the instructions given. But that is not the case here in the slightest degree. This case is, as set out in the order calling upon Babu Raj Bahadur to show cause, a charge that Babu Raj Bahadur maliciously drafted the third written statement at a time when he had the fullest and most abundant proof, as it happened, that those statements ought not to be repeated, and had to his knowledge no foundation in fact. It is part of the Crown's case that the respondent had some cause for feeling a grievance with Mr. Indar Prasad, and that he sought this method, under the protection of what he supposed to be a privileged document, for maliciously taking the opportunity of insulting and defaming Mr. Indar Prasad and alleging criminal acts against him. To our minds the written statement, although there has been a long discussion about it, except for the passage about the Finger Print Bureau which may well be regarded as a dishonest statement, is not so important as the question put to Mr. Indar Prasad by the respondent as to s. 476. We think, however, that there is a good deal to be said on the ground of the written statement being a malicious document.

Mr. Indar Prasad went into the box for the third time in this series of cases, and for the fifth time on the question of promissory-notes of husband or wife, and on the fifth occasion when he was in the box (he having been successful in all the four previous cases) the respondent, knowing perfectly well that there was not the slightest shadow of foundation for the allegation, said to this *mukhtear* in open Court: "Did

you not have a notice served on you under s. 476 in *Musammat* Chillo's case?" Mr. Indar Prasad quite truthfully said, "No." That was a wicked thing to ask of a man of the same type of profession, in his own native town, a man who was probably finding it quite hard enough to make a livelihood, when Raj Bahadur knew full well that no notice had been served because he himself had been the Counsel for *Musammat* Chillo in the execution proceedings and in the appeal out of which the notice was suggested to have been served.

That was an unprovoked, unfounded attack, an attack that no liberty of Counsel justifies, and one which has not been attempted to be justified. That is the view that we have taken of this matter, and on that view our decision would have been given. When, however, a respondent comes in, even as late in the day as this respondent, and tells us that the apology which his Counsel has read is a sincere apology, (and that we hope includes a determination not to do this sort of thing again), it behaves us to take various matters into consideration. One matter undoubtedly that has to be borne in mind is the very unfortunate circumstance that nine pleadings out of ten contain reckless charges and terms of abuse which have nothing to do with the case. One must take that regrettable practice into account.

We have considered the whole matter. We certainly hope that it will be a lesson, not only to Babu Raj Bahadur, but to everybody else, not to import personal ill-will into pleadings, and especially to refrain from making charges to witnesses for which there is no conceivable ground. It may become the positive duty of Counsel to tear a man's character into pieces if his character is in issue, but only when the fullest and clearest materials exist. It would have been Mr. Raj Bahadur's positive duty to have put the question about s. 476 to Mr. Indar Prasad if the fact was true and he had proof of it, and he was entitled to ask Indar Prasad any further questions that would have destroyed Indar Prasad's credit and shown that Indar Prasad was a man whose word could not be believed, provided always that he had good grounds for his questions. He had, however, no grounds at all for attacking the entire honesty of Mr. Indar Prasad. No Counsel is, however, justified, for instance, in opening the Indian Penal Code and asking without the least information to support it, "Were you not charged with bigamy? (No). Were you not charged with murder? (No); and so on. Where questions to credit are material, questions, however damaging, may be put and must be answered but Counsel must always safeguard himself by being able to show that he had reasonable ground for believing in the charges which he in his cross-examination makes against a witness. No questions attacking a witness's honour should be put, unless and until Counsel by inquiry has satisfied himself that the damaging fact is well-founded, and this he ought to do before he comes into Court. We have said enough, and we are content to accept the apology, and we trust, if there has been bad feeling between the parties in the past, that there will be no further bad feeling and no further manifestations of enmity by or between the principal parties and their relatives. There will, therefore, be no order on this Rule except that it will be recorded that Mr. Raj Bahadur made the apology through his Counsel, and has to pay the costs.

The office will communicate with Mr. Raj Bahadur with regard to the payment of the fee of the Government Advocate and the costs of the attendance of Mr. Indar Prasad. Mr. Raj Bahadur undertakes, through his Counsel, to pay whatever sum the office may fix, within seven days from the receipt of the notice.

Z. K. *Order accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION Nos. 149-B, 151-B, 155-B AND 157-B OF 1924.

January 10, 1925.

Present:—Mr. Baker, J. C.

MADHAV BHAGWANT AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Penal Code (Act XLV of 1860), ss. 465, 467—Pending case—Charge, quashing of—Revision—High Court, power of—Evidence, absence of—Forgery—Forgery of valuable security.

The High Court has power to interfere in a pending criminal case but such power is only to be exercised in exceptional circumstances which cannot be laid down with precision, the main test being that

the intervention should be necessary in the interests of justice and that a bare statement of the facts without any elaborate argument should be sufficient to convince the Court that it is a fit one for its interference at an intermediate stage. [p. 182, cols. 1 & 2.]

Quære.—Whether a trial before a Committing Magistrate can be quashed on the ground that there is no evidence to support the charge?

The forgery of a valuable security is merely an aggravated form of forgery and whether or not particular documents alleged to have been forged are valuable securities cannot be material in deciding as to whether a charge framed in that connection should be quashed altogether, because if it be proved that the accused forged the documents he would be still guilty of the minor offence of forgery under s. 465. [p. 185, col. 1.]

Application for quashing the charges framed against the applicants in Criminal Case No. 89 of 1923, pending before the Magistrate, First Class, Yeotmal.

Sir Dr. *H. S. Gour*, Messrs. *S. K. Barlingay*, *W. R. Puranik* and *R. R. Jayawant*, for the Applicants.

Mr. *G. P. Dick*, Government Advocate, for the Opposite Party.

ORDER.—These are four applications for quashing the charges framed against the applicants in a pending case by a First Class Magistrate of Yeotmal. The applications have been heard together and may be disposed of together.

The applicants are being tried for forgery of valuable securities and using forged documents as genuine under ss. 467 and 471 and abetment of the said offences under s. 109, Indian Penal Code, the case arising out of four *kabuliyats* said to be forged. Madhav Bhagwant is the plaintiff in a civil suit in which the alleged forged documents were produced; Vinayak is the person from whose custody they were produced; and Laxman and Abdul Razak are the attesting witnesses. Madhav Bhagwant has been charged under ss. 109, 467 and 471; Vinayak is similarly charged and the attesting witnesses are charged under ss. 467 and 471, Indian Penal Code.

That the High Court has power to interfere in a pending case is undoubted, but such a power is only to be exercised in exceptional circumstances, as is shown by the cases quoted on behalf of the applicants, *viz.*, *Choa Lal Dass* v. *Anant Pershad Misser* (1) and *Ramanathan Chettiar* v. *K. Sivarama Subramania* (2). The latter of these cases lays down that the circumstances which will justify the interference of the High Court have not been and cannot be laid down with precision. While the Judges here repeatedly held that only when exceptional grounds exist the High Court ought to interfere, the decided cases show that no hard and fast rule can be laid down but that when in the interests of justice the High Court's intervention became necessary, it was not refused. In the Calcutta case it is stated that "Without meaning to lay down any hard and fast rule, which it is impossible as it is undesirable to do upon a question like this, we think we may say that one safe practical test would be this, namely, that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince this Court that it is a fit one for its interference at an intermediate stage."

I may here say that a case of this Court reported as *Krishnarao* v. *Emperor* (3) was a case of very exceptional character, in which the Crown admitted that even if the prosecution evidence were accepted it would not show any criminal offence on the part of the accused, and, therefore, no opposition was offered to the quashing of the proceedings.

The main ground on which the present applications are based is that there is no evidence whatever against the applicants of having been concerned in the forgery, assuming forgery has been committed, and although I shall, as far as possible, refrain from expressing any opinion as to the evidence it will be necessary to briefly look at the evidence which has been already recorded in order to see whether, if believed, it would establish *prima facie* case against the accused. The facts which have led up to this case are briefly as follows.

The plaintiff Madhav Bhagwant is an *izardar*. He was formerly the *mukhtear* of his grand-mother Gangabai, to whose estate he succeeded. He brought a suit to recover possession of land, Survey No. 27, from one Bala, alleging him to be an annual tenant. Bala pleaded that he was a tenant of antiquity. The suit went in appeal and in the meantime the Berar Alienated Villages Tenancy Law of 1921 came into force, by s. 47 of which it was provided that a tenant who at the commencement of this law had held land

(1) 25 C. 233; 13 Ind. Dec. (N. S.) 157.

(2) 81 Ind. Cas. 785; 47 M. 722; 20 L. W. 234; (1924) M. W. N. 556; 47 M. L. J. 373; 25 Cr. L. J. 1009; (1925) A. I. R. (M.) 39

(3) 73 Ind. Cas. 335; 6 N. L. J. 119; 24 Cr. L. J. 591; (1924) A. I. R. (N.) 47.

continuously from a date previous to the first day of June 1895, shall be deemed to be a permanent tenant of such land. The suit was remanded in order that an enquiry might be held as to whether the defendant Bala fulfilled the conditions of this section. After the remand the plaintiff Madhav Bhagwant made an application to the Court that he had learnt that there were some *kabuliyats* in the possession of one Vinayak, a former *mukhtear* of his grand-mother Gangabai, which would show that Bala or his family were not in possession of this land, Survey No. 27, and praying that Vinayak may be called on to produce them. The *kabuliyats* in question, which are for the years 1902, 1905, 1906 and 1907, were thereupon produced by Vinayak in Court. The plaintiff's own Pleader, however, was suspicious of the genuineness of these *kabuliyats* which were ultimately held by the Court to be forgeries and it is for the forgery of these *kabuliyats* that the present proceedings were instituted. Vinayak was not examined as a witness for the plaintiff. He was summoned by the Court at the request of the defendant who desired to show that Vinayak was not in possession of any *kabuliyats* other than these and that he had ceased in 1912 to be the *mukhtear* of Gangabai.

The alleged forgery consists in the addition of Survey No. 27 to the other survey numbers, which were alleged to have been originally mentioned in the *kabuliyats* and the prosecution case is that after the original case had been disposed of and when the question of remand arose Madhav Vinayak and the attesting witnesses conspired to interpolate Survey No. 27 in the *kabuliyats* with the object of showing that the defendant had no possession of that number in the years 1902, 1905, 1906 and 1907; but the question of the *kabuliyats* being forgeries has not been seriously pressed in argument as the applicants base their case on there being no evidence that they took any part in forging them, assuming them to be forgeries.

So far as the question of the *kabuliyats* being forgeries is concerned, without expressing any opinion on the sufficiency of the evidence, the prosecution rely on the internal evidence derived from the difference in ink of the alleged interpolation and the signatures of the attesting witnesses, who are now charged with forgery, as also on the fact that the area and assessment shown in the *kabuliyats* do not represent the correct area and assessment if Survey No. 27 had originally been included in them. There is also the evidence of certain witnesses who say that in the years in question Survey No. 27 was not in the possession of the executants of these *kabuliyats*. Obviously it is not my business to express any opinion as to whether this evidence is sufficient or not to prove that these *kabuliyats* have been forged by the addition of Survey No. 27, but assuming them to be forgeries the important question in this case is whether there is any evidence which would establish *prima facie* a charge of forgery against the present applicants.

In this connection I may observe that it has been held by the Bombay High Court that an order of committal cannot be quashed on the ground that there is no evidence in the Committing Magistrate's record to sustain the charges : cf. *Emperor* v. *Suleman Ibrahim Nakhuda* (4). It is doubtful whether the trial before the Magistrate could be quashed on the ground that there is no evidence, but in the present case I am not prepared to accept the contention of the learned Counsel on behalf of the applicants that there is no evidence against their clients. Whether the evidence is sufficient for the conviction is another matter on which I shall express no opinion. It is true that there is no direct evidence of any witness that the *kabuliyats* were forged in his presence, and in the absence of any approver no such evidence can be expected. Forgery is not usually committed in the presence of witnesses.

It has been contended by the learned Counsel on behalf of the applicant Madhav Bhagwant that there can be no conviction for forgery in the absence of an approver. I am not prepared to commit myself to any such opinion. As I have said, assuming these *kabuliyats* to be forgeries, the only person who could benefit by them was Madhav Bhagwant, who was the plaintiff in the case, and it appears that these documents were produced after remand in order to disprove the defendant's allegation that he was a permanent tenant. The *kabuliyats* were not produced at the original hearing of the case. Further, they

(4) 10 Ind. Cas. 802; 13 Bom. L. R. 201; 12 Cr. L. J. 256.

were produced from the custody of a person who ceased to be Gangabai's *mukhtear* 10 years before and who *prima facie* had no reason for retaining in his possession the documents which were of no use to him and which had ceased to have any value, being time-expired *kabuliyats*. There is further the very significant fact that on the day before the suit was instituted, Madhav Bhagwant executed a deed of gift of two fields in favour of Vinayak's son. Further one of the witnesses has stated that the original *kabuliyats* (*i. e.*, before the addition of Survey No. 27) were executed in favour of Madhav Bhagwant himself in his presence as he was then the *mukhtear* of Gangabai, in whose name the *kabuliyats* are. Whether this evidence is sufficient to convict him of forgery is a question which, I think, should be decided by the Trying Court. I certainly cannot say that there is no evidence and it is not my business to decide on the credibility and sufficiency of the evidence.

Then with regard to the production and using of these documents it is stated on behalf of the Crown that these documents were produced in consequence of an application made by Madhav Bhagwant to the Court, asking for their production by Vinayak, and they were produced in support of his case and for his benefit. Whether this amounts to using as genuine false documents is a point which, I do not think, I am called on to decide at the present stage.

In the applications made to this Court for quashing the sanctioned proceedings it was argued, and it has been stated in my judgment in that case, that the reason why the documents were produced by Vinayak was to get over the difficulty that Madhav Bhagwant had not produced them in the original suit. I do not think it is necessary to go any further into these considerations. Numerous other points may doubtless be raised in arguments on both sides. The presumption is that Madhav Bhagwant, who is the heir of Gangabai and in possession of her estate, would also be in possession of her documents and that they would not remain in the possession of a man who had ceased to be her *mukhetar* 10 years ago, also that before filing a suit against a tenant he would naturally search for all documents connected with the land in dispute. Madhav Bhagwant is a man of education and position, being an Honorary Magistrate. In these circumstances I do not think it can be said that there is no evidence against Madhav Bhagwant. Whether the evidence is sufficient or not is another matter, on which I decline to express any opinion.

It is contended that there is no evidence that the forgery was made in the Yeotmal District or at any particular time. The argument of the Crown on this point is that all the parties concerned in the case are residents of the Yeotmal District; the land is situated in the Yeotmal district, and the forgery was presumably committed there and not in any other district. The fact that these *kabuliyats* were not produced in the original case and first came to light after the remand indicates that they were forged to meet the defendant's case of continuous possession since 1895. Here again these are matters of inference and I think it is for the Court below to consider whether these inferences are sufficient for a finding that the accused are guilty.

With regard to Vinayak, the considerations are very much the same as in the case of Madhav Bhagwant. There is no direct evidence that he forged the documents, but it is a question for the Trying Court to consider whether the inferences arising from the facts, above stated, would warrant his conviction. One of the witnesses says that Vinayak handed over all papers to Gangabai when he left services in 1912. There is, therefore, evidence against him, whether sufficient or not is another matter.

As regards the charge against Vinayak of using the documents, it has been argued that the person who produces documents in obedience to the order of the Court cannot be held guilty of using forged documents even if they are found to be forged. Reference is made to two cases of the Madras High Court, *Assistant Sessions Judge, North Arcot*, v. *Ramammal* (5) and *In re Muthiah Chetty* (6). In those cases, however, the production of the documents in Court was involuntary, whereas in the present case the prosecution contention is that these *kabuliyats* were produced in Court in pursuance of a conspiracy between Madhav Bhagwant and Vinayak, Vinayak being made the custodian of the documents in order to get over the difficulty that

(5) 13 Ind. Cas. 275; 36 M. 387; 10 M. L. T. 563; (1912) M. W. N. 3; 22 M. L. J. 141; 13 Cr. L. J. 35.

(6) 13 Ind. Cas. 286; 36 M. 392; 11 M. L. T. 21; 22 M. L. J. 181; (1912) M. W. N. 455; 13 Cr. L. J. 46.

they were not produced in the original suit before remand. I am of opinion that this is not a case in which the proceedings against Madhav Bhagwant and Vinayak should be quashed.

As regards the attesting witnesses, the case is simpler, and the learned Counsel on their behalf have referred to certain evidence as being insufficient to prove that they took any part in the forgery of the documents. Apart from the question of the difference in ink, one of the witnesses who attested the original *kabuliyats* has deposed that the attesting witnesses, who are now charged with forgery, or one of them, were not present at the execution of the documents, and whether this witness should be believed or not is a matter into which I cannot possibly go at this stage of the case. There is also the circumstantial evidence that if Survey No. 27 did not form one of the survey numbers leased by the *kabuliyats* originally, and was not in possession of the executants of those *kabuliyats* these witnesses could not have been attesting witnesses to the *kabuliyats* as they originally stood. I wish to make it quite clear that I do not express any opinion whatever as to whether the *kabuliyats* are forgeries or not, and whether the accused or any of them are guilty or not of the charges against them, but I am clearly of opinion that this is a case in which I ought not to interfere and that the Court below should proceed with the trial and form its opinion upon the evidence before it.

It has been argued that the *kabuliyats* in question, whose term has long ago expired, are not valuable securities and, therefore, no charge of a forgery of valuable security can lie. This is not a crucial point in the case, because the forgery of a valuable security is merely an aggravated form of forgery. If the *kabuliyats* are not valuable securities, which is a question to be decided by the Trying Court, that would be no ground for quashing the charges altogether because if it were proved that the accused have forged them they would still be guilty of the offence of forgery under s. 465, Indian Penal Code which is a minor offence to that under s. 467, and they would be liable to be convicted of such minor offence. Without, therefore, expressing any opinion on the credibility of the evidence, I am of opinion that this is a case in which there is evidence on which the Trying Court must decide and that there are no grounds for quashing the proceedings.

I, therefore, dismiss all the applications. The papers will be returned to the Magistrate without delay and the trial which has been stayed pending the hearing of these proceedings will go on the point at which it stopped.

G. R. D. *Applications dismissed.*

LAHORE HIGH COURT.

CRIMINAL CASE No. 631 OF 1925.

June 15, 1925.

Present:—Mr. Justice Martineau.

CHHAJJU—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 236, 403—Penal Code (Act XLV of 1860), ss. 401, 413—Being member of gang for the purpose of habitually committing theft, trial for—Acquittal—Receiving stolen property, trial for, whether barred.

Accused was tried along with several other persons for an offence under s. 401 of the Penal Code and was acquitted. The case against him consisted of an approver's statement as to his having attended a meeting held with the object of forming a gang for the commission of theft and of evidence as to the discovery of proceeds of certain thefts in his house. The approver's statement was considered unreliable and the evidence as to the discovery of stolen property was held to be insufficient to prove that the accused was a member of the gang. The accused was subsequently prosecuted for an offence under s. 413 of the Penal Code in respect of the discovery of stolen property:

Held, that the two trials were not based on the same facts and that the accused could not in the former trial, when he was tried along with other persons, have been charged with an offence under s. 413 of the Penal Code and that, therefore, s. 403 of the Cr. P. C. did not bar the subsequent trial.

Case reported by the Sessions Judge, Karnal, with his No. 166-J of 31st March 1925.

FACTS.—The applicant Chhajju was tried by the Assistant Sessions Judge of Rohtak on a charge under s. 401, Indian Penal Code, and acquitted. Immediately after that he was arrested by the Police and challaned under ss. 457 and 415, Indian Penal Code. The case is being tried by the Revenue Assistant, Magistrate First Class, under s. 413, Indian Penal Code only, the charge under s. 457 having been dropped by the Public Prosecutor. Chhajju has

filed the present application to this Court for revision.

GROUNDS.—The petitioner's contention is that as he was tried by a Court of competent jurisdiction and acquitted on one charge, on the same facts he cannot be tried for another offence, and reliance is placed on s. 403 (1) of the Cr. P. C.

After hearing his Counsel I am of opinion that this contention is right. The judgment of the Assistant Sessions Judge contains the following sentence:—

"Section 413 of the Indian Penal Code makes the habitual receipt of stolen properties an offence by itself and although Chhajju may be guilty under that section, the offence under s. 401 has not been brought home to him."

It is evident from this fact that if the Assistant Sessions Judge had chosen he could have framed a charge under s. 413, Indian Penal Code, against him. As he did not do so, the applicant is not liable to be put upon his trial twice over on the same facts. The rulings cited by the applicant's Counsel *In re Pundalik Shankar Gujar* (1), *Emperor* v. *Jhabbar Mull Lakkar* (2) and *In re, Chinnappa Naidu*, (3), are very clear on the point. The case is, therefore, submitted to the High Court for revision with a recommendation that the proceedings under s. 413, Indian Penal Code, against him be quashed and the applicant who is on bail be discharged therefrom.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

ORDER.—Chhajju was tried with nine other persons for an offence under s. 401, Indian Penal Code, and acquitted. He has now been prosecuted for an offence under s. 413, Indian Penal Code, and the Sessions Judge, being of opinion that the acquittal in the formar case is a bar, under s. 403 (1) of the Cr. P. C. to the second trial, has forwarded the case to this Court with the recommendation that the proceedings be quashed.

The case against Chhajju at the former trial consisted firstly of an approver's statement as to Chhajju having attended a meeting, held with the object of forming a gang for the commission of thefts, at which it was arranged that the property stolen, except cattle, should be made over to him, and secondly of evidence as to the discovery of proceeds of six of the thefts in his house. The approver's statement about the meeting was considered unreliable, and the evidence as to the discovery of stolen property in Chhajju's house was held to be insufficient to prove that he was a member of the gang, so he was acquitted.

The present trial for an offence under s. 413, Indian Penal Code, is not barred unless (1) it is based on the same facts as those on which the former trial proceeded, and (2) the offence under s. 413, Indian Penal Code, is one for which a charge might have been made against Chhajju under s. 236 of the Cr. P. C. in the former case. It appears to me in the first place that the two trials are not based on the same facts, for the charge for an offence under s. 401, Indian Penal Code, rested primarily on the approver's statement about Chhajju having being present at a meeting held for the purpose of forming the gang, and it was because that statement was disbelieved that the prosecution failed. The approver's statement is not part of the material on which the prosecution for the offence under s. 413, Indian Penal Code has been instituted, but this prosecution will be based entirely on the evidence as to the discovery of the stolen property in Chhajju's house, which it was held in the former trial did not prove his membership of the gang.

In the second place I am unable to agree with the learned Sessions Judge that Chhajju could have been charged with an offence under s. 413, Indian Penal Code, in the former trial. It is unnecsssary for me to express an opinion as to whether he could have been charged with that offence in accordance with s. 236 of the Cr. P. C. if he had been tried alone. The important point which the learned Sessions Judge has overlooked is that Chhajju was being tried jointly with other persons, with regard to whom the allegation was only that they had committed an offence under s. 401, Indian Penal Code, by being members of a gang of thieves, and not, as in Chhajju's case, that they were receivers of the stolen property. Section 236 of Cr. P. C. would not have empowered the Court in the former case to charge Chhajju with an offence under s. 413, Indian Penal Code, unless his trial for that offence could have proceeded joint-

(1) 86 Ind. Cas. 479; (1924) A. I. R. (B.) 448; 26 Bom. L. R. 440; 26 Cr. L. J.

(2) 72 Ind. Cas. 973; (1923) A. I. R. (C.) 179; 49 C 924; 24 Cr. L. J. 509.

(3) 76 Ind. Cas. 708; (1924) A. I. R. (M.) 478; 19 L. W. 31; (1924) M. W. N. 153; 25 Cr. L. J. 244.

ly with the trial of his co-accused for the offence under s. 401, for s. 236 of the Cr. P. C. must be read with ss. 233 and 239. Section 239 enumerates the persons who may be charged and tried together, and the only clauses in this section which need to be considered are clauses. (*d*) and (*e*). Clause (*d*) does not apply as the offence of receiving stolen property and the offence of belonging to a gang of thieves relate to separate transactions. Clause (*e*) also does not apply as an offence under s. 401, Indian Penal Code, cannot be said to include theft, for it is committed as soon as a gang of persons associated for the purpose of habitually committing theft is formed and before any theft is actually committed by them. I hold, therefore, that Chhajju could not have been charged with the offence under s. 413, Indian Penal Code, in the former case, in which other persons were being tried with him for an offence under s. 401.

The present trial is consequently not barred by Chajju's acquittal in the former case, and it will proceed.

The records will be returned.

Z. K. *Records returned.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 157, 158 AND 159 OF 1924.

November 17, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

HASSOMAL M. GURBUXANI—APPLICANT

versus

EMPEROR—RESPONDENT.

Bombay District Municipal Act (III of 1901), ss. 3 (8), 107, 131, 154 (2), 155—Notices under ss. 107, 131—Service on agent—Non-compliance with notice—Prosecution of agent—Conviction, legality of.

Under s. 154 (2) of the Bombay District Municipal Act it is open to a Municipality to issue notices under ss. 107 and 131 of the Act to the owner of the premises without specifying his name, and where this is done and the notices are served on a person who is the owner of the premises, it is open to the Municipality to prosecute such owner for an offence under s. 155 of the Act. Where, however, notices are issued to a person by name and are served upon another person, the latter cannot be prosecuted or convicted for an offence under s. 155 merely because he falls within the definition of an owner as laid down in cl. (8) of s. 3 of the Act or because he accepted service of the notices as agent of the person to whom the notices were addressed. [p. 187, col. 1.]

Sections 107 and 131 of the Bombay District Municipal Act provide for issue of notices but non-compliance with such notices is made punishable under s. 155 of the Act and a prosecution in respect of such non-compliance must be under the latter section and not under ss. 107 and 131. [p. 188, col. 1.]

Criminal revision against the conviction and sentence dated the 17th July 1924 by the Division Bench of Magistrates.

Mr. *Partabrai D. Punwani*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—Notices were issued under ss. 107 and 131 of the Bombay District Municipal Act III of 1901 to one K. S. Ramzan Abdullah per Hassomal. M. Gurbuxani and Kazi Audul Aziz requiring him (1) to renew down-take pipes and gratings and (2) to repair the flush tank attached to a water closet and (3) to lime wash certain premises which belonged to him. These notices were not complied with the Municipality thereupon filed three different prosecutions describing the accused as K. S. Ramzan Abdullah per Hassomal, M. Gurbuxani. All the three summonses were served on Hassomal, M. Gurbuxani, who is the present applicant. He did not personally attend at the hearing but sent his Pleader who admitted before the Court that the applicant was a trusty of the premises in question and was recovering rent from the tenants. On this admission the "D" Bench of Honorary Magistrates fined the applicant Rs. 5-0-0 in each of the cases for failure to comply with the notices. He now comes to us in revision.

We think that the notices issued by the Municipality were not proper. Under s. 154 cl. (2) of the District Municipal Act, it was open to the Municipality to issue the notices addressed to the owner of the premises without specifying his name. If they had done so, it would have been open to them to prosecute the applicant as the owner of the premises as defined in s. 3, cl. 8 of the Act. The notices were, however, addressed to Khan Saheb Ramzan Abdullah by name and it is open to the applicant to contend that he could not be prosecuted for failure to comply with notices addressed to another person and delivered to him as the agent of that person. Again the same mistake was committed by the Municipality in launching their prosecutions against K. S. Ramzan Abdullah per Hassomal M. Gurbuxani and not against the applicant per-

sonally. The applicant is, therefore, justified in raising the further technical plea that he was not served as an accused person and could not be convicted on the complaints as laid.

The conviction of the applicant must, therefore, fail both on the ground that the notices were defective and that the processes were directed against K. S. Ramzan and not against him as an accused person. We further find that the Bench Magistrates have not specified the section of the Act under which the applicant was convicted. Sections 107 and 131 of the Act provide for issue of notices but the non-compliance with such notices is made punishable under s. 155 of the Act and the prosecution and conviction of the applicant, if any, should have been under s. 155 and not under ss. 107 and 131 of the Act.

We set aside the convictions in all the three cases and order the fines to be refunded.

Z. K. *Convictions set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 121 OF 1924.
(CRIMINAL REVISION PETITION No. 104 OF 1924).

November 6, 1924.

Present:—Mr. Justice Krishnan.

KRISHNA IYER AND ANOTHER—ACCUSED—PETITIONERS

versus

AYYAPPA NAICK—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 430—Easements Act (V of 1882), s. 13 (b)—Mischief, what amounts to—Partition—Right to carry water through channel existing on joint lands, whether transferred—Channel filled up—Wrongful loss—Offence.

To constitute the offence of mischief it is not sufficient to show that loss has been caused to the complainant, it is necessary further to show that the loss was wrongful loss and that the accused had the intention to cause or a knowledge that his act was likely to cause loss to the complainant. [p. 188, col. 2.]

On a partition between the complainants and the accused, who were members of a joint family, certain fields fell to the share of the former and other fields fell to the share of the latter. On the lands allotted to the accused there had existed a channel for a long number of years which was used for carrying water to the fields which had been allotted to the complainants. Some years after the partition the accused filled up the channel with the result that water could not be carried to the lands of the complainants for purposes of irrigation;

Held (1) that under s. 13 cl. (*b*) of the Easements Act the right of carrying water through the channel to their fields passed to the complainants on partition; [p. 189, col. 1.]

(2) that the loss caused to the complainants by the channel being filled up was wrongful loss and the accused must be presumed to have had the knowledge that their act in filling up the channel was likely to cause such wrongful loss to the complainants and that consequently they were guilty of an offence under s. 430 of the Penal Code. [*ibid.*]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Koilpatti, in Cr. A. No. 42 of 1923, preferred against the judgment of the Court of the Second Class Magistrate, Koilpatti, in C. C. No. 166 of 1923.

Dr. *S. Swaminathan* and Mr. *T. M. Rama Iyer*, for the Petitioners.

Mr. *K. S. Ramabhadra Iyer*, for the Respondent.

The Public Prosecutor, for the Crown.

JUDGMENT.—This is an application to revise the conviction, under s. 430, Indian Penal Code, of the petitioners, which was confirmed in appeal by the Sub-Divisional Magistrate of Koilpatti.

It is contended that on the findings of the Appellate Magistrate, the offence charged under s. 430, Indian Penal Code, has not been made out. The Appellate Magistrate found that a channel existed between the Re-Survey Nos. 252 and 253, belonging to the accused and that it was a part of the channel, which carried water from the Periakulam tank to the complainant's land, Re-survey Nos. 271 and 272. He also found that that part of the channel between Re-survey Nos. 252 and 253 had been filled up by the accused recently. It is contended that these findings are not sufficient to constitute the offence of mischief. The offence, as defined in the Penal Code, requires, as an essential element of it, that the accused had the intention to cause or the knowledge that their act was likely to cause wrongful loss to the complainant. Dr. Swaminathan rightly points out that it is not sufficient to show that loss has been caused to the complainant but is necessary to show that the loss was a wrongful loss and that his clients had the intention to cause or had knowledge that their act was likely to cause loss to the complainant. He contends that to constitute a wrongful loss in this case, the complainant was bound to show that the channel, which was filled up and

which was entirely on the land of the accused was a channel through which he had a right to carry water to his lands. No doubt that argument is correct, and it is also true that there is not a very clear finding, that the complainant had an easement right to carry such water. But on the fact found, by the Appellate Magistrate, it seems to be clear that such a right did exist. It is not necessary, therefore, to send the case back to him, for a fresh finding. He has found this channel existed for at least 30 years and that during these years, the lands, Re-survey Nos. 271 and 272, were cultivated, with the water carried through this channel. That would establish a right in favour of the complainant, to carry water through the channel; but it is contended by Dr. Swaminathan that during a portion of that period, all his lands, through which the channel from the tank passed, namely, Re-survey Nos. 255, 254, 253, 252 and 271 belonged to one and the same joint family and, therefore, no question of easement right could arise and that as the partition in the family took place within 14 years of the date of this complaint, sufficient time has not elapsed for the complainant to get an independent easement right in his own favour. Assuming that this is so, it should be remembered that the channel has existed for 30 years and, therefore must have existed at the time of the partition. If at the partition, as is conceded, nothing was said against the right in this channel not passing to the owners of Re-survey Nos. 271 and 272, we must take it that it did pass s. 13, cl. (*b*) of the Easements Act lays this down. The question was considered by the learned Officiating Chief Justice in a case, reported as *Souriraja Naidu* v. *Rajagopalan* (1). It must, therefore, be held that as no objection was taken at the time of the partition to this channel passing through, to Re-survey Nos. 271 and 272, the right to take water along that channel did actually pass to the persons to whose share the lands fell. From them it passed to the present owner, the complainant. That being so, the filling up of that channel and thus preventing water going from the lake to the complainant's lands caused not merely loss to the complainant but wrongful loss. There is no difficulty in holding that the accused knew perfectly well that their act was likely to cause wrongful loss, when they filled up the channel. The offence of mischief is thus complete. The conviction under s. 430, Indian Penal Code, is clearly made out, as the accused knew that the prevention of the supply of water, necessary for agricultural purposes, would cause loss.

In these circumstances, there is no ground for revision and the sentence of a fine of Rs. 50 was not by any means excessive.

Petition dismissed.

V. N. V.
Z. K.

(1) 81 Ind. Cas. 833; 20 L. W. 245; 47 M. L. J. 302; (1924) M. W. N. 678; (1924) A. I. R. (M.) 812.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 24 OF 1924.

March 25, 1924.

Present:—Mr. Kincaid, J. C., and Mr. Aston, A. J. C.

MAHOMED—APPLICANT

versus

MAHOMED IDRIS SON OF ABDULLA—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 200, 439—Examination of complainant, object of—Asking complainant to subscribe on oath to complaint, whether sufficient—High Court, when will interfere—Partner falsifying accounts—Penal Code (Act XLV of 1860), s. 477 A.

The object of the examination under s. 200 Cr. P. C, is to ascertain whether there is a *prima facie* case and to prevent the issue of process in cases where the examination of the complainant would show that the complaint was clearly false, frivolous or vexatious and that further proceedings would tend merely to harass unnecessarily an accused person and waste the time of the Court. [p. 190, col. 1.]

When a complaint is in writing and is sufficiently clear it would be a sufficient compliance of s. 200 of the Cr. P. C., if the Magistrate reads it over to the complainant and the complainant on oath is asked to subscribe it and it is only when the written complaint is obscure or vague that the Magistrate is bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made. [*ibid.*]

When a partner of a firm has been appointed to manage its business and write its accounts and he falsifies its accounts, he is liable under s. 477-A of the Penal Code. [*ibid.*]

Emperor v. *Lalloo Ghella*, 6 Bom. L. R. 553; 1 Cr. L. J. 757 followed.

No doubt it is undesirable that the discretionary powers of Courts should become crystallized but it is well-established that only in exceptional cases should the High Court interfere in revision in pending cases. [p. 190, col. 2.]

Murlidhar Jeramdas v. *Naraindas*, 27 Ind. Cas. 205; 8 S. L. R. 143; 16 Cr. L. J. 141, followed.

Application to revise an order of the Special First Class Magistrate, Karachi, dated the 25th January 1924.

Mr. *Tahilram Maniram*, for the Applicant.

Mr. *Hassomal M. Gurbuxani*, for the Opponent.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—This is an application for revision of an order of the Special First Class Magistrate, Karachi, issuing process against the applicant under ss. 408, 468 and 477 (*a*) of the Indian Penal Code.

Mr. Tahilram who appears for the applicant has urged two grounds for interference by this Court. Firstly that the complainant was not examined by the Court as required by s. 200 of the Cr. P. C. and secondly that the complaint upon which process was ordered to issue did not disclose the commission of the offence in respect of which process was issued.

With regard to the first of these grounds it appears that the learned Magistrate put the complainant on oath and the complainant stated that the complaint was true to the best of his knowledge. It has been pointed out in Mr. Sohoni's Commentary (10th Edition, page 568) on the Code of Criminal Procedure "that the object of the examination under s. 200 is to ascertain whether there is a *prima facie* case and to prevent the issue of process in cases where the examination of the complainant would show that the complaint was clearly false, frivolous or vexatious and that further proceedings would tend merely to harass unnecessarily an accused person and waste the time of the Court. And it has been held in Bombay when a complaint is in writing and is ntly clear, it would be a sufficiAmpliance of s. 200 if the Magistrate over to the complainant and the comPenat on oath is asked to subscribe it and Act (V ly when the written complaint is obPartiti ing on or vague that the Magistrate is bound up—amine the complainant at sufficient Tth for the purpose of clearly ascertainsuff the allegations on which the complaint con made. In considring the complaint filed los this case it is clear that the fact of enin lustment is implied from the facts menoned in the complaint. The complainant stated on oath that the accused had charge of all the cash and also the receipts obtained by the sale of pearls. It is also stated in the complaint that the accused kept the accounts as well. It is further stated that the accused went to Bombay, sold pearls belonging to the partnership there and did not give credit for the full value sold but showed a smaller quantity than the quantity actually got. It is further shown in the complaint that during proceedings before an arbitrator, an account-book was produced which showed that there were grave discrepencies between the accounts of the partnership as originally kept and the accounts as kept by the accused. Seven separate items were referred to in which accused in his account-book indicated that larger amounts were spent on behalf of the partnership than those originally shown in the partnership books. In addition to this complainant alleged that the accused debited the partnership account with sums paid to his own private servants that he debited to the partnership a sum paid to a person named Phul for November and December when the partnership had actually ceased on the 31st October and that he drew Rs. 300 himself as salary instead of Rs. 30 which he was entitled to draw. It has been held that where a partner of a firm has been appointed to manage its business, write its accounts and he falsifies its accounts, he is liable under s. 477-A. See *Emperor* v. *Lalloo Ghella* (1). I think there can be no doubt that the complaint *prima facie* discloses the commission of the offences in respect of which process is issued and the learned Magistrate was clearly justified in making the order which he did.

Now, apart from this, although I agree with the opinion of Sir Lawrence Jenkins, that it is undesirable that the discretionary pewers of Court should become crystallized. See *Emperor* v. *Bankatram Lachiram* (2). I entirely agree with the view expressed by Pratt, J. C., and Hayward, A. J. C., that it would seriously impede the administration of justice if parties were encouraged to come to this Court from time to time before the completion of a trial and view expressed in the case of *Murlidhar Jeramdas* v. *Naraindas* (3) that only in exceptional cases should the Court interfere in revision in pending cases.

In the circumstances mentioned I dismiss the application.

K. S. D.

Application dismissed.

(1) 6 Bom. L. R. 553; 1 Cr. L. J. 757.
(2) 28 B. 533; 6 Bom. L. R. 379; 1 Cr. L. J. 390.
(3) 27 Ind. Cas. 205; 8 S. L. R. 143; 16 Cr. L. J. 141.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 69 OF 1925.

March 4, 1925.

Present:—Mr. Justice Sulaiman.

Musammat MUNNO DEVI—APPLICANT

versus

THE MUNICIPAL BOARD, AGRA—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), ss. 178, 185, 307—Application for sanction to erect building—Building commenced before grant of sanction—Notice to demolish, failure to comply with—Offence—Sanction subsequently granted, effect of.

Where a person who has made an application under s. 178 of the U. P. Municipalities Act for sanction to erect a building, commences the construction of a building in anticipation of sanction he is guilty of an offence under s. 185 of the Act and it is immaterial that the sanction is subsequently granted by the Municipality. [p. 192, col. 1.]

Similarly, where such a person is required by notice to pull down the construction erected by him without the sanction of the Municipality, and fails to comply with the requirements of the notice he is guilty of an offence under s. 307 of the U. P. Municipalities Act, and the mere fact that the sanction was subsequently granted does not absolve him from liability. [p. 192, col. 2.]

Criminal reference made by the Sessions Judge, Agra, dated the 20th December 1924.

JUDGMENT.—This is a Reference by the Sessions Judge of Agra recommending that the convictions of *Musammat* Munno Devi, a school teacher, under ss. 185 and 307 of the Municipalities Act (Local Act II of 1916 as amended by Act II of 1919) and the sentences of fine of Rs. 10 on each count be set aside.

The facts are not in dispute. The lady applied to the Municipal Board on the 29th of July 1924 for permission to re-build certain parts of her house, but in her application she did not clearly specify the extent of the proposed building. On the 30th of July the Municipal draftsman prepared a map showing the western side of the building only. Acting probably on the approval of the Ward Member she began to build in anticipation of sanction. On the 25th of August she applied for the preparation of a new plan including both the western and eastern sides. The Board ordered a new plan to be prepared and the applicant to deposit the necessary fees. On the 2nd of September before any final orders had been passed on her application the Board served a notice on her to remove the building already constructed. Later on, namely, on the 6th of September the Board sanctioned permission to build the western half of the building. She stopped going any further with the construction and applied to the Board stating that she had constructed the building in anticipation of sanction because her house was cracked and was in danger of falling down if she did not repair it. On the 19th of September she was prosecuted for building without permission and also for failing to comply with the orders of the Board.

The learned Magistrate came to the conclusion that she did begin to construct parts of the building before leave was granted to her. He also found that the leave was confined to the construction on the western side only and that no order on her application to build on the eastern side had yet been finally passed. Her application for such a permission is still pending. As to the construction on the eastern side the learned Magistrate on inspection has found that the old *chajja* projecting on this side has been enlarged and now extends as far as her *chabutra*. The evidence of the Chief Sanitary Inspector was to the effect that a verandah and a latrine were being built in August and that the said latrine was in the balcony. He further stated that the balcony was covered with tin. In this he was supported by another witness who occupies an adjacent house. On the day when the Magistrate inspected the locality he however did not notice any tin covering. The construction had apparently been partially removed though perhaps not completely.

The learned Magistrate justly commented on the unsatisfactory way in which the Municipal Board acted in the matter. On the 2nd of September notice to remove the construction was issued which included constructions on both sides. On the 6th of September sanction to construct the western portion was actually granted. Nevertheless on the 19th she was prosecuted with regard to both portions. The Municipal Board also does not seem to have acted promptly on her application of July when the rainy season was on and her house must have been in some danger. The Board certainly cannot be congratulated on the way in which it proceeded against the applicant.

Technically speaking the applicant was guilty of beginning to make her construction even on the western side before formal sanction had been granted. Though the subsequent grant of the sanction ought

to have deterred the Board if it had acted reasonably from prosecuting her for building without permission, it cannot obviate the fact that she did begin to build before any sanction had been granted. Furthermore no sanction has yet been granted for the construction on the eastern side.

Section 178 of the Municipalities Act requires that before beginning within the limits of the Municipality to erect a new building or new part of a building, or to re-erect or make a material alteration in a building, a person shall give notice of his intention to the Board. Under s. 179, sub-cl. (1) the Board may require further information and plans to be furnished Under s. 180, sub-cls. 3 and 4 if the Board neglect or omit for one month after the receipt of a valid notice under s. 178 to make and deliver to the person who has given such notice an order of the nature specified in sub-s. (1) of s. 180 such person may by a written communication call the attention of the Board to the omission or neglect, and, if such omission or neglect continue for a further period of fifteen days, the Board shall be deemed to have sanctioned the proposed work absolutely, provided that he does not act in contravention of the Act or any bye-law. In this s. 180 a fifth clause has been added which is as follows:—"No person shall commence any work of which notice has been given under s. 178 until sanction has been given or deemed to have been given under this section". Under s. 185 of the Amended Act "whoever begins, continues or completes the erection or re-erection of, or any material alteration in, a building or part of a building.....without giving the notice required by s. 178, or *in contravention of the provisions of s. 180 sub-s.* (5) or of an order of the Board refusing sanction or any written directions made by the Board under s. 180 or any bye-law, shall be liable upon conviction to a fine which may extend to Rs. 500.

It is, therefore, clear that she should not have commenced the work until sanction had been granted. The Board had not neglected or omitted to take steps on her application for one complete month nor did she by written communication call the attention of the Board to any such omission or neglect and then wait for a further period of 15 days. No sanction, therefore, can be deemed to have been given. The offence mentioned under s. 185 was, therefore, technically committed.

As to the notice to remove the constructions made by her it is to be noted that before the period of the notice had expired the Board sanctioned permission to build the western half of the building. There was, therefore no disobedience so far as this part of the construction was concerned. With regard to the eastern portion the Board had apparently issued notice for demolition on the strengh of its bye-law No. 19 which provides that no erection or construction will be allowed over any existing *chabutra* situated in any road or lane less than 16 feet wide. The Board had power under s. 198 of the Act to make such a bye-law. But she apparently did remove the tin covering though possibly not within the time fixed by the notice, if the evidence of the Chief Sanitary Inspector is to be believed. As the tin covering did not exist when the Magistrate inspected the locality it does appear that she has at any rate partially removed the construction leaving very little of it still in existence. Under these circumstances an offence under s. 307 has been technically committed.

In view however of the conduct of the Municipal Board itself which has been adversely commented upon both by the Magistrate and the learned Sessions Judge and in view of the fact that she did stop further construction of the building after receiving the notice for demolition I do not think that this is a fit case in which anything more than a nominal fine should be inflicted on her.

Accordingly while upholding the conviction I reduce the fines to nominal ones of rupee one each on the two counts. In other respects the order is upheld.

Z. K. *Conviction upheld; Fine reduced.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 147 OF 1923.

February 27, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

B. ISHWARI PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

BABUNANDAN SHUKUL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Alienation by widow, when justified—Arrears of rent in respect of lease taken up by widow for personal benefit—Arrears of rent in respect of ex-proprietary tenancy—Necessity—Gift for charitable purpose, when to be upheld.

Where *zemindari* property in the hands of a Hindu widow is attached in execution of a simple money-decree the question whether the purchaser at auction takes the whole estate or only the right, title and interest of the widow depends on the nature of the suit in which the decree was passed. If the decree under execution was obtained upon a personal claim against the widow then only her interest passes by the sale; but if the suit was one in respect of the family estate then the whole inheritance passes by the execution sale. The same principles apply to family property alienated by the widow. [p. 194, col. 2.]

Where a Hindu widow takes up a lease for her personal benefit, the arrears of rent due on account of the lease form a personal debt of the widow and she cannot alienate the family estate in her hands in satisfaction of such a debt. The same principle applies to an alienation of the family estate made by the widow in order to pay off arrears of rent in respect of an ex-proprietary tenancy which has come into existence by operation of law on the sale by the widow of a portion of the *zemindari* property. [p. 194, col. 2; p. 195, col. 1.]

In every case in which an alienation by way of gift for a religious or charitable purpose is made by a Hindu widow holding an estate with the limited interest of such a widow the Court is bound to take into consideration the proportion borne by the property to the total estate in the hands of the widow on the date of such alienation. [p. 195, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Daniels, dated the 10th May 1923.

Mr. *Iqbal Ahmad*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—These are four connected appeals arising out of one single suit. We need not go into the circumstances under which four appeals have come to be filed. As a matter of fact, a learned Judge of this Court disposed of all the questions now in controversy in one single judgment, and the appeals before us challenge certain of his findings. The essential facts are that the last male owner of *zemindari* property, consisting of an eight-annas share in a certain village, was one Sheo Dayal. He died without male issue. He left him surviving two widows and a daughter by each of them. The names of the widows are *Musammat* Gajra and *Musammat* Bachna. Of these the latter survived the former. The name of the daughter of *Musammat* Gajra is Chhutka, and *Musammat* Gaura is the daughter of *Musammat* Bachna. One Pashpat Nath was the son of *Musammat* Chhutka. On the 6th of June 1871 *Musammat* Bachna, being then in possession of the entire eight-annas share, executed with the concurrence of Pashpat Nath a deed of gift, by which she purported to transfer the same to her own daughter Gaura. The latter between the years 1873 and 1917 executed a series of documents by which she alienated one fractional share after another of this property. The plaintiffs in the suit are three brothers, Babu Nandan, Jadu Nandan and Parmeswar, and it is admitted that they have succeeded to the estate of Sheo Dayal as the nearest reversioners under the Hindu Law, Pashpat Nath having pre-deceased *Musammat* Gaura. The suit was brought to set aside all the alienations made by *Musammat* Gaura and to recover possession of the property. The plaintiffs met with varying degrees of success in three Courts. Finally a learned Judge of this Court partly decreed and partly dismissed their suit, and it is now necessary for us to set forth in detail the alienations complained of and the manner in which they were dealt with by the learned Judge of this Court. The first deed executed by *Musammat* Gaura was dated the 25th of May 1873 and conveyed to one Mulhai one-half of the estate of Sheo Dayal in her hands, that is to say, a four-annas share. This transfer has been upheld by the learned Judge of this Court, who was in agreement on this point with the lower Appellate Court. On the 1st of August 1895, *Musammat* Gaura sold to certain persons a one-anna share for Rs. 350. On the 8th of November 1906, she sold another share of one anna for Rs. 349-15-0 practically to the same persons. Her next alienation was on the 7th of March 1907, when she made a gift of a six-pies share to her family priest a man of the name of Mahadeo. Finally, on the 16th of October 1917, she sold another share of one anna for Rs. 350. It may as well be noted that Mulhai, the ostensible purchaser under the deed of 1873, was admittedly a *benamidar* for one Harihar

Dat, and that the subsequent alienations have all been to members of Harihar Dat's family. Even the six-pies share gifted to Mahadeo was sold by that donee to a member of the same family in July 1910. The suit is, therefore, being contested by the descendants of Harihar Dat. The deed of gift in favour of Mahadeo was set aside by the Trial Court, but was affirmed by the lower Appellate Court. The learned Judge of this Court came to the conclusion that he had to deal with a finding of fact which bound him to affirm the decision of the lower Appellate Court. We shall return to this point presently. The remaining deeds of sale were dealt with as follows. In respect of the deed of August 1, 1895, the learned Judge of this Court held that to the extent of Rs. 238-4-0, this deed was executed for legal necessity, but that there was no legal necessity for an item of Rs. 111-12-0. He has framed his decree accordingly. In respect of the deed of November 8, 1906, the learned Judge has held, differing from the lower Appellate Court, that there was no legal necessity for the transaction, and he has set aside the alienation. With regard to the deed of October 16, 1917, he has held that only a sum of Rs. 128 out of the whole consideration was warranted by legal necessity, and he has framed his decree accordingly. The defendants have appealed against the decree of the learned Judge of this Court in so far as it adversely affects them. Incidentally a difficulty has arisen owing to the fact that these defendants have allowed one of the original plaintiffs by name Jadu Nandan to die while their appeal under the Letters Patent was pending, and have failed to bring his legal representatives on record. This might have complicated the matter if we had come to the conclusion that any portion of the two appeals filed by the defendants must succeed, but the decision we come to is that the appeals fail on the merits. As regards the deed of the 16th of October 1917, we may say at once that the finding of the learned Judge of this Court has not been seriously challenged. He proceeds upon certain findings of fact, and on those findings he is obviously right in law. We might be content to say the same of the deed bearing date August 1, 1895, but as introducing a curious question of law which we have necessarily to deal with we may mention what the point for decision was in respect of this earlier deed. It appears that *Musammat* Gaura, after selling the four-annas share in the year 1873, had taken a lease of some portion of that share from her own vendees. She allowed the rent payable by her to fall into arrears and an item of Rs. 111-12-0 out of the consideration for the sale of August 1, 1895, was applied by her towards satisfying the arrears of rent thus falling due. Now the learned Judge of this Court has pointed out that there is clear authority of the Privy Council [*vide Jugul Kishore* v. *Jotendro Mohun Tagore*) (1)] for the principle that, if *zemindari* property in the hands of a Hindu widow be taken in execution of a simple money-decree the question whether the purchaser at auction takes the whole estate or only the right, title and interest of the widow depends on the nature of the suit. If the decree under execution was obtained upon a personal claim against the widow, then only her interest passes; but if the suit was one in respect of the family estate, then the whole inheritance passes by the execution sale. The learned Judge of this Court was, in our opinion, obviously right in holding that the same principles would apply to a voluntary alienation by the widow. The arrears of rent due from *Musammat* Gaura on account of the lease which she had taken up, presumably for her own personal benefit, formed a personal debt of that lady, and she could not alienate the family estate in her hands in satisfaction of such a debt. The learned Judge of this Court has rightly held that this item of Rs. 111-12-0 was not raised for any justifiable legal necessity. This question crops up again in a somewhat more difficult form when we come to consider the sale-deed of the 8th of November 1906. The consideration for this deed also went to pay off arrears of rent due from *Musammat* Gaura on account of a certain tenancy. The distinction sought to be made between the two cases is that the tenancy in question now was one of a peculiar nature, namely, an ex-proprietary tenancy which had devolved upon *Musammat* Gaura by operation of law from the date on which she sold the *zemindari* share of four annas in the year 1873. The contention on behalf on the defendants-appellants is that in paying off the decree for arrears of rent in respect of this ex-proprietary tenancy *Musammat* Gaura was saving a portion of the family estate in her

(1) 10 C. 985; 11 I. A. 66; 8 Ind. Jur. 455; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.).

hands, and that this alienation must, therefore, be put on the same footing as such alienations, for instance as a sale in order to obtain money to pay off arrears of Government revenue, which have been repeatedly upheld by this Court. On the whole we are satisfied that this contention cannot be upheld. The ex-proprietary tenancy came into existence by operation of law when *Musammat* Gaura sold a portion of the *zemindari* property. It cannot be said to have constituted a portion of the estate as it devolved upon her. She was not even bound in law to continue the tenancy and a relinquishment of the same in favour of the *zemindars*, as soon as she found that she could not carry on the cultivation and pay the statutory rent, would have put an end to the tenancy, leaving nothing which could possibly devolve upon any one after *Musammat* Gaura's death. It must be remembered also that the tenancy would devolve according to the strict rules laid down in s. 22 of the Local Tenancy Act. It by no means follows that it would have devolved upon the present plaintiffs who are reversioners of Sheo Dayal. Indeed, we may say without going into detail that it would have been extremely unlikely to so devolve. We find no adequate reason, therefore, for distinguishing between the arrears of rent due from *Musammat* Gaura on account of the ex-proprietary tenancy and the arrears due from her on account of the other tenancy which she had valuntarily taken up. The learned Judge of this Court was, in our opinion, right in respect of each of these deeds, and the appeals filed by the defendants fail.

The two cross-appeals are on behalf of the plaintiff Babu Nandan, or of the said plaintiff jointly with his brothers they challenge the findings of the Single Judge of this Court in respect of the sale of 1873 and the deed of gift of 1907. We are far from saying that the question of legal necessity for the sale of May 25, 1873, is free from difficulty. We have listened to considerable argument on the point, and we have had to examine carefully the judgment recorded by all three Courts. We think it sufficient to say, however, that, in our opinion, the learned Judge of this Court was right in holding that he had before him findings of fact by the lower Appellate Court, resting upon evidence which that Court was entitled to take into consideration and not to be disturbed in second appeal. The appeal in respect of this alienation, therefore, fails.

With regard to the gift in favour of Mahadeo, we have come to the opposite conclusion. To begin with, we think it very doubtful whether, as a question of law, a gift made to a family priest under the circumstances deposed to by Mahadeo himself, and with a mere recital in the deed itself that the object of the gift was to obtain advantage in the next world, could be upheld as within the authority of a Hindu widow. We might have hesitated to interfere with the learned Judge of this Court on this ground alone, as here also he purports to proceed upon findings of fact; but one important consideration has, in our opinion, been altogether overlooked by him. There can be no doubt that in every case in which an alienation by way of gift for religious or charitable purposes is made by a Hindu widow holding an estate with the limited interest of such widow the Court is bound to take into consideration the proportion borne by the property gifted away to the total estate in the hands of such widow. The learned Judge of this Court, laying stress on the fact that the gift is one of six-pies share only, treats it as amounting to no more than one-sixteenth of Sheo Dayal's estate in the hands of his daughter. Even this is a large proportion, particularly for a gift of the particular nature of the one which we are considering. But the fact of the matter is that it was a gift of a six-pies share out of two-annas share, which represented all that was left of the estate in *Musammat* Gaura's hands on the date of the gift. On this ground we think that the alienation ought not to have been supported.

The net result, therefore, is that the appeals of the defendants fail and are dismissed with costs. The appeals of the plaintiffs succeed to this extent that in modification of the decree of the learned Judge of this Court, we set aside also the deed of gift of a six-pies share of the 7th of March 1907 and decree the plaintiffs' claim in respect of the same. The appeals of the plaintiffs both to the Single Judge of this Court and under the Letters Patent must be held to have succeeded in the proportion of a six-pies share to a four-annas share, and they must pay and receive costs in the lower Appellate Court and in this Court in proportion to such failure and

success. Costs of both hearings in this Court will include fees on the higher scale.

Z. K. *Appeals dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

February 20, 1925.

Present:—Lord Shaw, Lord Carson, Sir John Edge, and Mr. Ameer Ali.

Sreemanthu Rajah YARLAGADDA MALLIKARJUNA PRASADA NAYUDU BAHADUR *Zemindar* —APPELLANT

versus

RENDUCHINTALA SUBBAYYA AND OTHERS—RESPONDENTS.

Privy Council, appeal to—Practice—Concurrent findings of fact—Madras Estates Land Act (I of 1908) —Private land of zemindar, *whether question of fact.*

It is the practice of the Privy Council not to interfere with concurrent findings of fact of the Courts in India.

The question whether certain land is "private land" of the *zemindar* within the meaning of the Madras Estates Land Act, is one of fact and the Privy Council will not disturb the concurrent findings of fact arrived at by the lower Courts with regard to such a question.

Messrs. *L. De Gruyther* and *Narasimham*, for the Appellant.

JUDGMENT.

Lord Shaw.—The question that arises in this appeal has reference to the rights of permanent occupancy of certain *raiyats* who possess lands in the village of Majeru.

Under the Madras Act I of 1908 the right of *raiyats* to such permanent occupancy of *raiyati* land is declared. And *raiyati* land " means cultivable land in an estate other than private land." " Private land means the domain or home farm land of a landholder."

The *zemindar*, the appellant, attempted to show in both of the Courts below that the lands in suit were " private lands " within the meaning of the Act and that he accordingly was entitled to eject the occupants therefrom.

The question thus raised was one of fact. There are concurrent judgments in the Courts below to the effect that the lands were not private. It follows as a matter of law that the permanent occupancy of the *raiyats* was affirmed by those Courts. This right is also affirmed by this Board. They proceed upon the settled principle that this Board does not interfere with concurrent findings of fact in the Courts below. The appeal will accordingly, under the recommendation of their Lordships to His Majesty, be dismissed.

No one appears for the respondents, so there will be no costs of this appeal.

Z. K. *Appeal dismissed.*

Solicitor for the Appellant:—Mr. *Douglas Grant.*

Solicitor for the Respondents:—Mr. *E. Dalgado.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 487 OF 1924.

December 3, 1924.

Present:—Mr. Justice Madhavan Nair.

T. N. RAJAGOPALACHARI—PETITIONER

versus

NARASIMHA THATHACHARIAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLIII, r. 1 (d)*—Application to set aside* ex parte *decree—Order, conditional—Condition not complied with—Application, dismissal of—Appeal, whether lies.*

On an application to set aside an *ex parte* decree the Court passed an order that the decree will be set aside if the petitioner will pay to the plaintiff all costs incurred by him and deposit the decretal amount into Court within a certain period. A note was made on the order that the petition will be called for final disposal on a certain date. On the date on which the application was taken up for final disposal, petitioner applied for permission to give immoveable property as security for the decretal amount. The Court dismissed the application to set aside the *ex parte* decree on the ground that the money had not been deposited in Court. Against this order the petitioner preferred an appeal but the appeal was dismissed on the ground that the order of the Trial Court that the *ex parte* decree would be set aside provided the petitioner paid the costs of the plaintiff and deposited the decretal amount into Court within a certain period not having been appealed against had become final and that an appeal against the order finally dismissing the application to set aside the *ex parte* decree was not sustainable:

Held, (1) that the first order of the Court was merely conditional and that, therefore, it was not open to the petitioner to prefer an appeal against that order; [p. 197, col. 1.]

(2) that the final order dismissing the application to set aside the *ex parte* decree was open to appeal under O. XLIII, r. 1 (*d*) of the C. P. C. and that the District Judge should, therefore, have decided the appeal on the merits. [p. 197, col. 2.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order, dated the 29th March 1924, of the District

Court, Chingleput, in Miscellaneous Appeal No. 32 of 1923, against that of the Court of the District Munsif, Chingleput, in M. P. No. 538 of 1923, in O. S. No. 185 of 1923.

Mr. *O. P. Venkataraghavachari*, for the Appellant.

Mr. *C. Narasimhachariar*, for the Respondents.

JUDGMENT.—The first defendant is the petitioner. The facts of the case are clearly set out in the order of the learned District Judge. These appear to be as follows. A money-decree was passed *ex parte* against the petitioner. He put in an application to set aside the *ex parte* decree and on that application the learned District Munsif passed an order to this effect that "the *ex parte* decree will stand set aside if in 2 weeks petitioner pays to plaintiff all costs of suit so far incurred unconditionally and further he puts the suit amount and interest decreed into Court in 14 days. If he does not pay, petition will stand dismissed with costs." He also made a note on the order that the petition is to be called for final disposal on the 13th September 1923. It appears from the B diary that this application was postponed from time to time and it was posted for final disposal on 20th September 1923. On that date an application was made by the petitioner for permission to give immoveable property as security for the amount. The District Munsif disposed of this petition as well as the original petition Miscellaneous Petition No. 538 of 1923, namely, the petition to set aside the *ex parte* decree together and ordered "Money not put into Court. Application rejected." This order is dated the 2nd of October 1923 and this was the order that was appealed against before the District Judge. The District Judge on the authority of a decision in *Venkataswami Naidu* v. *Shanmugam Pillai* (1) held that it was open to the petitioner to file an appeal against the earlier order passed by the District Munsif dated the 29th of August 1923 and since he had not done so, that order became final and, therefore, he could not prefer the appeal against the order dated the 2nd of October 1923. The decision in *Venkataswami Naidu* v. *Shanmugam Pillai* (1), laid down the proposition that an order like the one passed by the District Munsif in this case was a final order and appeal lay against such order under O. XLIII, r. 1, cl. (*d*), of the C. P. C. But this decision has been set aside in Letters Patent Appeal by their Lordships. Mr. Justice Oldfield and Mr. Justice Bakewell in *Venkataswami Naidu* v. *Shanmugam Pillai* (2) in which the learned Judges held that the order was only a conditional order and that there is no appeal against it. Therefore, according to this, it was not open to the petitioner to prefer an appeal against the prior order passed by the District Munsif and the learned District Judge should, therefore, be asked to hear, the appeal against the last order on the merits. It is true that the District Judge has expressed his opinion on the appeal with regard to the merits also in a tentative way but the last paragraph of the judgment clearly shows that his order is based upon the preliminary objection which he upheld. Therefore, the proper order in this case to be passed is to set aside the order of the District Judge and send it down for fresh disposal according to law.

Mr. Narasimhachariar the learned Vakil for the respondents argues that though the prior order is not appealable, still it is a final order in the sense that the District Munsif had no jurisdiction to extend the time given in that order and in support of his argument he has brought to my notice the following decisions: *Idumbu Parayan* v. *Pethi Reddy* (3) C. R. P. No. 110 of 1922 and *Gopala Iyer* v. *Sannasi* (4). I do not desire to express any definite opinion on the question with regard to the interpretation of this order, because that will be a question which will legitimately arise before the District Judge when he considers the appeal on the merits. But since these decisions have been brought to my notice I might as well express my opinion with regard to their relevancy. It appears to me that the passage in *Idumbu Parayan* v. *Pethi Reddy* (3), is only an *obiter dictum* and the actual decision in the case has nothing to do with the point now raised by the learned Vakil for the respondent and further the *obiter dictum* refers to the construction of a mortgage-decree; and in that respect the order referred to by the learned Judges certainly is distinguishable from the order under appeal in this case. The same may

(1) 32 Ind. Cas. 984

(2) 43 Ind. Cas. 1; 6 L. W. 757; (1917) M. W. N. 815.

(3) 54 Ind. Cas. 451; 43 M. 357 at p, 360; 37 M. L. J. 695; 11 L. W. 25.

be said about *Gopala Aiyer* v. *Sannasi* (4). There the "default clause" was inserted in a decree for specific performance and it was held that the Court had no jurisdiction to extend the time conferred by the decree. That also is a case quite different from the present one, where we have nothing to do with the consideration of a decree passed in the suit, I might also observe that the decision in C. R. P. No. 110 of 1922 is clearly inapplicable to the facts of the present case, because so far as the facts appear from the short notes the learned Judge who disposed of that decision says that the application for extension of time was made after the expiration of the period mentioned in the order, thereby indicating that if the application was made before the expiration of the time, certainly the learned Judge would have dealt with it. In this case all the parties as well as the Court treated the prior order as a conditional order, because it appears as I have already pointed out from the note on the order passed on the first occasion that the petition was to be posted for the 13th September 1923 meaning thereby that no final order has been passed upon it and the learned District Munsif would pass final orders only on that day, and the subsequent history of the application also shows that it was never intended to treat the order as a final one. The case is accordingly remanded to the District Judge to be disposed of according to law.

The costs of this petition will be costs in the case.

V. N. V. *Case remanded.*

Z. K.

(4) 32 Ind. Cas. 401; 3 L. W. 29; 19 M. L. T. 137.

RANGOON HIGH COURT.

CIVIL REVISION No. 127 OF 1923.

December 4, 1923.

Present:—Mr. Justice Carr.

S. OPPENHEIMER & Co.—PETITIONERS

versus

H. LONG—RESPONDENT.

Master and servant—Contract of service—Promise to pay money for passage—Passage not actually booked—Passage money, whether can be claimed—Construction of document.

An agreement of service contained a promise by the defendant to pay the plaintiff money to pay his passage to some destination outside Burma to be determined by himself. Plaintiff demanded from the defendant a sum of money sufficient to pay his passage to the United Kingdom. Defendant contended that he was liable to pay the amount only for a passage actually taken by the plaintiff and that the plaintiff was not entitled to claim passage money without actually taking a passage:

Held, that under the agreement the plaintiff was entitled to claim the passage money irrespective of the fact whether he actually took a passage or not.

Mr. *Patel*, for the Petitioners.

Mr. *Clifton*, for the Respondent.

JUDGMENT.—I find no sufficient ground for interference in this case. It is not unlikely that the applicant intended to bind himself only to pay for a passage actually taken by the respondent. But it may very well be that the respondent read the clause as entitling him to his passage money whether he actually took a passage or not. And the clause as it stands clearly contains a promise to pay the respondent money to pay his passage to some destination outside Burma to be determined by himself. I think he is entitled to have that promise literally fulfilled.

The application is dismissed with costs.

Z. K. *Application dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

March 19, 1925.

Present:—Lord Dunedin, Lord Shaw and Sir John Edge.

Musammat LAJWANTI AND OTHERS—APPELLANTS

versus

SAFA CHAND AND OTHERS—RESPONDENTS.

Appeal to Privy Council—Practice—Order in Council conformity of, to judgment—Persons deriving title from plaintiff, whether entitled to decree—Procedure.

It is the duty of their Lordships of the Privy Council to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him.

It is out of question that persons who assert that they have a derivative interest in the stake of a suit can, by getting added as plaintiffs, be associated in a decree in favour of the person who has the only real title. In a case, however, where the question o the interest acquired by such persons was raise before their Lordships, they gave a direction that the judgment was to be without prejudice to the right such persons to recover in respect of any conveyan or assignment made or of any contract to convey

assign, such share of the property recovered under the judgment as may appertain to them in respect of such conveyance, assignment or contract.

Mr. *W. Wallach*, for the Appellants.

Messrs. *L. De Gruyther* and *S. Hyam*, for the Respondents.

JUDGMENT.

Lord Dunedin.—This petition is presented under somewhat peculiar and unsatisfactory circumstances. In the recent appeal of *Musammat* Lajwanti, and others, judgment was pronounced in which their Lordships said that they would humbly advise His Majesty to allow the appeal and pronounce judgment in favour of the plaintiff. That by the expression "plaintiff," their Lordships designated *Musammat* Lajwanti alone without the addition of the other appellants, is made perfectly clear not only by the use of the singular and not the plural, but also by a sentence in the judgment in which their Lordships, after narrating the claim and suit of the *Musammat*, added, "Certain persons who might have been respondents backed up the plaintiff and were added as plaintiffs, a very unnecessary proceeding, as no decree could pass in their favour." No representation was made to their Lordships as to there being any error in this.

On the judgment being presented to His Majesty in Council for embodiment in the formal order, the word "appellants" in the plural was used. The plaintiff and appellant, *Musammat* Lajwanti, now presents this petition to have the order made rescinded and an order pronounced in favour of herself alone. Now in ordinary circumstances this petition would be granted as a matter of course. It is the duty of their Lordships to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him.

But the petition is opposed by the other appellants. The Counsel who at the hearing pleaded the case of the *Musammat* now appears for these other appellants and points out that the *Musammat* herself in her original pleading had set forth that by arrangement between her and three other appellants she was to take only three-fifths of all she recovered, the other two-fifths going to them; and it is further alleged that the *Musammat* herself has not authorized this petition. An affidavit is presented to that effect. It is met by counter affidavits.

Their Lordships disregard the affidavits on both sides. They are quite contradictory and it is impossible to determine what the truth is.

Their Lordships have no doubt that the prayer of the petition must be granted in so far as it prays to have the order in Council made to conform to the judgment pronounced. Even had the facts now brought forward been clearly set before their Lordships, it would not follow that the judgment would have been altered. It is out of the question that persons who assert that they have a derivative interest in the stake of a suit can, by getting added as plaintiffs, be associated in a decree in favour of the person who has the only real title. The respondents have an interest in this as well as the plaintiff. At least it is safe to say that no decree would have been granted in favour of all the appellants jointly unless there had either been a consent signified by the respondents or a legal conveyance or assignment, produced by the real plaintiff of a share of the subjects of the suit.

At the same time their Lordships wish to do justice and not to allow anyone to take advantage of a slip in order to appropriate to himself property that is not fairly his. Their Lordships will, therefore, humbly advise His Majesty to rescind the order complained of and to pronounce judgment in favour of the plaintiff *Musammat* Lajwanti alone, but with the addition that this judgment is to be without prejudice to the appellants other than Lajwanti to recover in respect of any conveyance or assignment made or of any contract to convey or assign, such share of the property recovered under the judgment as may appertain to them in respect of such conveyance, assignment or contract.

As their Lordships think that both parties were in fault, there will be no costs of the petition.

Petition granted.

Z. K.

Solicitors for the Appellants:—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondents:—Mr. *H. Polak.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 330 OF 1924.
March 25, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Boys.
Babu RUDRA PRATAP SINGH—OBJECTOR—APPELLANT
versus
Raja SHARDA MAHESH PRASAD SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 53—Hindu Law—Decree passed against father, whether can be enforced against ancestral property in the hands of son.

Under s. 53 of the C. P. C. property in the hands of a son or other descendant, which is liable under the Hindu Law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed must, for the purpose of execution, be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative. [p. 200, col. 2.]

Where a decree for costs is passed against a Hindu father who honestly resists a claim to certain property brought against him by a person who might have failed to establish his right, the decree might be enforced after the death of the judgment-debtor against ancestral property in the hands of his son by virtue of the provisions of s. 53 of the C. P. C. [p. 201, col. 1.]

Execution first appeal from a decree of the Subordinate Judge, Mirzapur, dated the 26th July 1924.

Mr. *H. K. Mukerji*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—This in an appeal by certain objectors arising out of an execution proceeding. Briefly stated the facts of the case are as follows:—A Hindu widow was in possession of a large estate situated in the District of Mirzapur and in 1913 she purported to surrender it in favour of Baijnath Prasad Singh the father of Babu Rudra Pratap Singh the present appellant. She died soon after and a suit was instituted by Raja Tejbali Singh the father of Raja Sharda Mahesh Prasad Singh the defendant-respondent, for recovery of possession of the property claiming it by right of lineal primogeniture. He impleaded certain relations of Baijnath Prasad Singh who were transferees from the widow but did not implead the present appellant Babu Rudra Pratap Singh. In this suit we understand that the present appellant actually appeared as a witness for his father at some stage of the proceedings and also joined his father in executing a security bond in order to obtain a temporary stay. The case was fought up to the Privy Council. The ultimate result was that with the exception of certain moveable properties the bulk of the property was given to Raja Tejbali Singh. Baijnath Prasad Singh died in January 1921 just before the judgment was pronounced by their Lordships of the Privy Council, though it is suggested on behalf of the respondent that he died after the arguments were over.

The decree-holder has put the decree for costs in execution and has attached the joint ancestral property in the hands of the present appellant who is the son of the deceased judgment-debtor.

Two objections were raised on behalf of the objector (1) that no credit had been given for Rs. 4,000 which had been deposited in cash as security in the High Court, and (2) that the appellant was not the legal representative of the deceased judgment-debtor inasmuch as the previous suit had been contested by him in his personal capacity.

With regard to the sum of Rs. 4,000 there is no force in this appeal. The amount was deposited as security but has not yet been taken out by the decree-holder. He cannot, therefore, be called upon to give credit for it at once. If, however, he takes this amount out in execution of the decree credit will, of course, have to be given for it.

The main point raised in this appeal is that the appellant is not the legal representative of the deceased judgment-debtor. Before the passing of the new C. P. C., there was some conflict of opinion as to whether a decree-holder who had a decree against a Hindu father could proceed in execution after his death against the joint ancestral property in the hands of the son and could treat the son as the legal representative of his judgment-debtor That controversy has now been set at rest. by the inclusion of s. 53 in the new Code which provides that for the purpose of execution property in the hands of a son or other descendant *which is liable under Hindu Law for the payment of the debt of a deceased ancestor*, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative. So the only point to consider is whether the property which is now to be attached is the property of the son or the other descendant which is liable under the Hindu

law for the payment of the debt of the deceased ancestor. The debt was a judgment-debt against the father of the present appellant and there is nothing to suggest that it was in any way tainted with illegality or immorality. Baijnath Prasad Singh had obtained a surrender from a Hindu widow and he was put in possession. He was honestly contesting a claim brought by a third party and the present appellant also by his conduct approved of the defence raised by his father. It has been suggested on behalf of the appellant that the litigation was a mere speculation and gambling. This contention cannot be accepted. The deceased had been put in possession by a qualified owner and as defendant he was resisting a claim brought by a person who might have failed to establish his right. There is no question of fraud or collusion and it is, therefore, impossible to say that the judgment-debt against Baijnath Prasad Singh was tainted with immorality or illegality. It is open to the decree-holder to proceed in execution against the ancestral property in the hands of the son which the Court is bound to treat as property of the deceased which has come to the hands of the son as his legal representative. The objection, therefore, has no force and must be overruled.

The result is that this appeal fails and is dismissed with costs.

Z. K. *Appeal dismsssed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 134 OF 1924.

January 23, 1925.

Present :—Mr. Wazir Hasan, A. J. C.

RAZA MOHAMMAD KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM LAL KALWAR—PLAINTIFF—RESPONDENT.

Mortgage — Redemption — Usufruct appropriated towards interest on portion of mortgage-money—Interest payable on balance—Period fixed for redemption—Clog on equity of redemption.

One of the conditions of a mortgage was that the usufruct of the property would be appropriated towards the interest on two-thirds of the principal amount at the rate of 12 per cent. per annum. The remaining one-third of the mortgage-money was to carry interest at the same rate which was payable by the mortgagor to the mortgagee year after year. In the event of default in the payment of interest the mortgagee was entitled to compound interest at the same rate and the mortgage was made irredeemable for a period of 25 years:

Held, that having regard to all the provisions of the mortgage-deed the postponement of the right of redemption for a period of 25 years was a clog on the equity of redemption and that the mortgagor or his successor-in-interest was entitled to be relieved of it.

Abdul Hakim v. *Sajjad Hussain*, 74 Ind. Cas. 304; 26 O. C. 209; 10 O. L. J. 46; 9 O. & A. L. R. 733; (1923) A. I. R. (O.) 209, *Balbhadra Prasad* v. *Dhanpat Dayal*, 80 Ind. Cas. 213; 10 O. L. J. 447; 9 O. & A. L. R. 707; 27 O. C. 4; (1924) A. I. R. (O.) 193, followed.

Appeal against a decree of the District Judge, Fyzabad, dated the 1st November 1924, modifying that of the Subordinate Judge, Fyzabad, dated the 24th October 1923.

Mr. *M. Wasim*, for the Appellant.

Mr. *G. N. Misra*, for the Respondent.

JUDGMENT.—This is the defendants' appeal in a suit for redemption of a mortgage dated the 10th May 1909 executed by Dhup Narain Singh in favour of Dhauntal Singh for a sum of Rs. 2,100. The mortgage was partly usufructuary and partly a simple one. In pursuance of the provision of the mortgage the mortgagee entered into possession of the property. Both the mortgagor and the mortgagee are dead. The defendants are the representatives of the mortgagee The plaintiff is the assignee of the interest of the mortgagor from the sons of the mortgagor. One of the conditions of the mortgage was that the usufruct of the property would be appropriated towards the interest on the sum of Rs. 1,400 at the rate of 12 per cent. per annum. The remaining amount of the mortgage money, that is, Rs. 700 was to carry interest at the same rate and was payable by the mortgagor to the mortgagee year after year. There was a further condition that in the event of default in the payment of interest the mortgagee was entitled to compound interest at the same rate. Another important condition of the contract of mortgage was that it would he irredeemable for a period of 25 years.

The mortgagor has all along been unable to pay the accruing interest on the sum of Rs. 700 with the result that the mortgagee has become entitled to compound interest from year to year and at the end of 25 years the mortgage-money so far as the amount of Rs. 700 is concerned will approximately reach the high figure

of Rs. 12,000. The sale value of the property is Rs. 5,000 at the most. There are other provisions in the deed of mortgage which are wholly advantageous to the mortgagee and there are no corresponding advantages in favour of the mortgagor. On this state of facts the lower Courts have held that the postponement of the right of redemption for a period of 25 years is a clog on the equity of redemption and the plaintiff is entitled to be relieved of it.

There have been a series of cases in this Court in support of the view which the Courts below have taken in this case: two of them may be mentioned here, *Abdul Hakim* v. *Sajjad Husain* (1) and a judgment of my own in *Balbhadra Prasad* v. *Dhanpat Dayal* (2). It is wholly unnecessary to repeat what was stated in those cases. I am, therefore, of opinion that the case was rightly decided by the Courts below.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 74 Ind. Cas. 304; 26 O. C. 209; 10 O. L. J. 46; 9 O. & A. L. R. 733; (1923) A. I. R. (O.) 209.
(2) 80 Ind. Cas. 213; 10 O. L. J. 447; 9 O. & A. L. R. 707; 27 O. C. 4; (1924) A. I. R. (O.) 193.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1708 OF 1923.
February 27, 1925.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

DURGA PRASAD—PLAINTIFF—APPELLANT
versus
GANGADIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Pre-emption suit—Property re-transferred to vendor during pendency of suit—Pre-emptor, right of, whether affected—Lis pendens, *doctrine of, applicability of.*

Where during the pendency of a pre-emption suit, the vendee re-transfers the property to the vendor, the transaction cannot affect the result of the suit inasmuch as the doctrine of *lis pendens* applies to such a case.

Second appeal from a decree of the Subordinate Judge, Mainpuri, dated the 6th September 1923.

Mr. *Baleswari Prasad*, for the Appellant.
Mr. G. *Agarwala*, for the Respondents.

JUDGMENT.—We have heard the learned Counsel for the appellant in this case. The appellant is the purchaser.

It appears that on the 16th June 1922 the 2nd and 3rd defendants sold the property in suit to the 1st defendant. The plaintiff then brought his suit for pre-emption and after the institution of the suit and while the suit was pending the purchaser reconveyed the property to the vendor.

Both the Courts below have allowed the plaintiff's claim and given him a decree for pre-emption. The learned Judge of the lower Appellate Court was of opinion that inasmuch as the purchaser had during the pendency of the suit reconveyed the property to the vendor, that transaction could not affect the result of the suit inasmuch as the doctrine of *lis pendens* applied. In our opinion that was a correct view to take. We have been referred to a good many rulings of this Court. But it has been held that the doctrine of *lis pendens* does apply to pre-emption suit and it has been so applied in many cases. Here there can be no doubt as to the propriety of its application.

Mr. Baleshwari Prasad for the appellant has referred us to the case of *Herkeshi* v. *Mewa Ram* (1) which is a decision of the Pre-emption Bench of this Court. It is sufficient to say that that case can be distinguished on the facts from the case now before us. As authority for the view that the doctrine of *lis pendens* applies to a suit of this kind we need only refer to the case of *Ghasitey* v. *Gobind Das* (2) and to the still more recent decision of a Bench of this Court in *Kamta Prasad* v. *Ram Jag* (3).

This appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K.

Appeal dismissed.

(1) 72 Ind. Cas. 247; (1923) A. I. R. (A.) 294; 9 O. & A. L. R. 495.
(2) 30 A. 467; 5 A. L. J. 477; A. W. N. (1908) 221.
(3) 22 Ind. Cas. 266; 36 A. 60; 12 A. L. J. 9.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEAL No. 1 OF 1925.

February 18, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

LAL RAM PARKASH—JUDGMENT-DEBTOR No. 1—APPELLANT

versus

JANKI PRASAD AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 3—Foreclosure decree, preliminary and final—Costs of suit, whether included—Mortgagee, whether entitled to recover costs from mortgagor.

The words "such payment" in cl. (*d*) of r. 2 of O. XXXIV of the C. P. C. must be interpreted to mean payment of the amount due as declared by the preceding clauses, and within the amount so declared due are included the costs of the suit. Where, therefore, a preliminary decree for foreclosure is passed under this rule the foreclosure is to take place in lieu of the principal and the interest on the mortgage as well as the costs of the suit, and under cl. (2) of r. 3 of the Order the final foreclosure must be declared to take place in lieu of the entire mortgage-money plus the costs of the suit. After a final foreclosure decree has been passed in terms of r. 3 of O. XXXIV, the mortgagee is not entitled to recover the costs of the suit separately from the mortgagor. [p. 203, col. 2; p. 204, col. 1.]

Maqbul Fatima v. *Lalta Prasad*, 20 A. 523; A. W. N. (1898) 157; 9 Ind. Dec. (N. S.) 696, *Damber Singh* v. *Kalyan Singh*, 43 Ind. Cas. 557; 40 A. 109; 15 A. L. J. 914 and *Mirza Sadiq Husain Khan* v. *Ummatul Fatima Begum*, 48 Ind. Cas. 329, relied on.

Shaffar Khan v. *Satyanunda Das Gupta*, 4 Ind. Cas. 545; 13 C. W. N. 742, dissented from.

Appeal against an order of the Sub-Judge, Barabanki, dated the 1st November 1924.

Mr. *Manohar Lal*, for the Appellant.

Mr. *Gokul Prasad*, for Respondent No. 2.

JUDGMENT.—This is the judgment-debtor's appeal in proceedings for execution of a decree. The facts are as follows:—

The respondent obtained a preliminary decree in a foreclosure suit against the appellant on the 22nd of March 1923 from the Court of the Subordinate Judge of Barabanki. The amount due under this decree was not paid by the appellant within the time fixed by the Court in that decree. The result was that the respondent applied for a final decree to be made in the case. The application was granted and the final decree was prepared. On the 27th of October 1923 the application out of which this appeal arises was made by the decree-holder to recover costs of the suit in which the two decrees, preliminary and the final for foreclosure, were passed. The appellant objected to the decree-holder's right to execute his decree for against the applicant. His contention was that the final foreclosure decree was made in lieu of the mortgage-money as well as of the costs of the suit and, therefore, the decree-holder has no right to recover this amount of costs from the appellant personally. The Court of first instance has rejected the contention of the judgment-debtor and allowed the execution to proceed. This is an appeal against that order of the lower Court.

The appellant put forward his objection to the execution of the decree for costs by means of two applications made under ss. 151 and 152 of the C. P. C. Having regard to the opinion which I have formed in this case and which I shall presently state it is not necessary to discuss the applicability of ss. 151 and 152 of C. P. C. to the objection made by the judgment debtor. There is no doubt that he objected to the execution for which the decree-holder applied on the ground that there was no personal liability for payment of the costs decreed in the foreclosure suit and I must decide that objection.

According to my judgment the contention of the judgment-debtor is correct and should be maintained. The form of a preliminary decree in a foreclosure suit is prescribed by O. XXXIV, r. 2 of the C. P. C. When we look to that form we find that under cl. (*d*) of r. 2 the defendant shall be debarred from all right to redeem the property, if such payment is not made on or before the day to be fixed by the Court. The words "such payment" must be interpreted to mean payment of amount due as declared by the preceding clauses and within the amount so declared due are included the costs of the suit. It follows that the foreclosure is to take place in lieu of the principal and interest on the mortgage as well as the costs of the suit. The preliminary decree in the case before me is literally in the form prescribed in the rule mentioned above. When the final decree came to be prepared it was found that the judgment-debtor had failed to make the payment as directed by the preliminary decree. The result was that the Court passed the final decree in terms of cl. 2 of r. 3 of O XXXIV of the C. P. C. A consideration of the terms of that clause again leads to the result that the final foreclosure is declared to take place in lieu of the entire mortgage-money plus the

costs of the suit. The reasonable inference, therefore, is that the costs are made a part of the mortgage money for the purposes of the foreclosure. The final decree prepared in this case does not go beyond the form which the law prescribed for it except in so far that it orders for Rs. 4-8 to be paid as costs of the decree-holder in so far as the application for making a final decree was concerned. To that amount the decree-holder is clearly entitled but to no more. The view which I have taken in this case entirely rests upon the interpretation of the decree prepared in the particular instance before me. That that is the right interpretation of a decree for foreclosure or a decree for sale is supported by a Full Bench ruling of the Allahabad High Court in the case of *Maqbul Fatima* v. *Lalta Prasad* (1). The opinion expressed in that Full Bench decision seems to have been followed again in the case of *Damber Singh* v. *Kalyan Singh* (2) and by a Bench of our own Court in the case of *Mirza Sadiq Husain Khan* v. *Ummatul Fatima Begum* (3). On the side of the decree-holder reliance was placed upon a decision of the Calcutta High Court in the case of *Shaffar Khan* v. *Satyanunda Das Gupta* (4). If the Calcutta ruling does in any way come into conflict with the decisions of the Allahabad High Court and of this Court I most respectfully say that I decline to follow it.

The result is that the appeal is accepted the order of the Court below is set aside, and the application for execution is dismissed except in respect of a sum of Rs. 4-8 with regard to which it would proceed. The judgment-debtor will be entitled to his costs in both the Courts but will pay costs to the decree-holder in respect of that portion of the application which relates to recovery of Rs. 4-8 in both the Courts.

Z. K. *Appeal accepted.*

(1) 20 A. 523; A. W. N. (1898) 157; 9 Ind. Dec. (N. S.) 696.
(2) 43 Ind. Cas. 557; 40 A. 109; 15 A. L. J. 911.
(3) 48 Ind. Cas. 329.
(4) 4 Ind. Cas. 545; 13 C. W. N. 742.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 89 OF 1923.

December 18, 1924.

Present:—Mr. Justice Odgers and Mr. Justice Wallace.

MANGAMMA NAYA KURLU—DEFENDANT—APPELLANT

versus

B. M. RAMADASAPPA NAYANANVARU AND OTHERS—PETITIONERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Decree, satisfaction of—Modification in appeal—Restitution—Subsequent application for execution—Limitation.

Pending an appeal against a decree by the widow of a *zemindar* judgment-debtor, the *zemindari* property was attached in execution. The widow raised funds and satisfied the decree and the execution petition was dismissed. The appeal was then disposed of and the decree was modified by excluding the *zamindari* property from liability. The widow thereupon applied for restitution and obtained refund of the amount paid by her. More than 3 years from the date of the appellate decree but within 3 years from the order for refund, an application for execution was presented by the decree-holder against the assets of the deceased *zemindar* in the hands of the widow:

Held, that the right to apply for execution accrued only on the date when the judgment-creditor was ordered by the Court to refund the money by way of restitution and that Art. 181 and not 182 of Sch. I to the Limitation Act applied and the petition was in time. [p. 206, col 2.]

The doctrine of continuation or revival of execution petitions discussed.

Per *Wallace, J.*—In order to make Art. 182 of Sch. I to the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances of being enforced. [p. 207, col. 1.]

In the above case the decree-holder could not, at least until the judgment-debtor demanded restitution, apply for execution of the amended decree. Until then it was not a decree capable of execution and Art. 182 would have no application. Article 181, therefore, applied, and the right to execute the amended decree would accrue from the date on which the decree-holder ought to have handed over the sum improperly obtained. [p. 208, col. 1.]

Rungiah Gounden & Co. v. *Nanjappa Row*, 26 M. 780; 13 M. L. J. 412, *Ramineedi Venkata Appa Rao* v. *Lakkaju China Ayyanna*, 30 M. 209; 17 M. L. J. 194, *Aiyasamier* v. *Venkatachela Mudali*, 37 Ind. Cas. 741; 40 M. 989; 31 M. L. J. 513; (1916) 2 M. W. N. 296; 20 M. L. T. 391; 4 L. W. 507, *Rameshvar Singh* v. *Homeshvar Singh*, 59 Ind. Cas. 636; 40 M. L. J. 1; 1 P. L. T. 731; 19 A. L. J. 26; (1921) M. W. N. 21; 33 C. L. J. 109; 25 C. W. N. 337; 13 L. W. 546; 6 P. L. J. 132; 23 Bom. L. R. 721; 30 M. L. T. 189; 48 I. A. 17 (P. C.), relied on.

Appeal against an order of the District Court, Chittoor, in A. S. No. 318 of 1921, preferred against an order of the Court of the Subordinate Judge, Chittoor, in E. P. No. 21 of 1920 in O. S. No. 6 of 1911.

Messrs. *K. Bhashyam Iyengar* and *V. C. Veera Raghavachari*, for the Appellant.

Mr. *A. Rama Chandra Iyer*, for the Respondents.

JUDGMENT.

Odgers, J.—This is an appeal giving rise to a somewhat important point of limitation, and the dates are important. The appellant is the judgment-debtor, the wife of a certain *zemindar* against whom a suit was filed which resulted in a decree on the 10th April 1911, subsequently confirmed on appeal to lower Appellate Court on 28th March 1912. The decree-holder applied on 15th August 1912 for execution and attempted to attach the *zemindari* properties. Thereupon the defendant raised funds and satisfied the decree on 14th July 1913 and the execution petition was dismissed. An appeal from the decree of the lower Appellate Court dated 28th March 1912 was preferred to the High Court which by its decree dated 23rd April 1914 introduced a modification which has given rise to the question at issue, as in the second appeal the High Court modified the decree by adding the words "excluding the *zemindari*." After the High Court decree, the first defendant filed I. A. No. 19 of 1916, for refund of the amount paid on 1913, in satisfaction of the decree on the ground that it was realized by the decree-holders by proceeding against *zemindari* properties which were not liable under the modified decree of the High Court. The order of refund was passed on 30th March 1918 and on 1st November 1918 the appellant got back the amount she paid in satisfaction of the decree, *i. e.*, the whole amount was refunded. On 22nd April 1920 the decree-holders presented the present application for execution against the assets of the first defendant's husband; and the question is is this application in time? Both the lower Courts have held it is.

We have been referred to a number of cases on the subject which may be said to fall into two main categories, (1) the class of cases which regards a subsequent proceeding in execution as a continuation of the prior one, which doctrine was apparently introduced in order to obviate the provisions of the Limitation Act of 1877, s. 15, which could not be applied to applications but was only applicable to suits; (2) the other class of cases recognises that Art. 182 of the present Limitation Act is not exclusively to be applied to execution applications but there may be certain instances in which it would be right and proper to apply Art. 181. The effect of this class of cases would be to give a fresh starting point from the time when the right to apply accrues. Another possibility is suggested by the learned Vakil for the appellant, namely, that the time when the decree-holders were prosecuting their original execution application should be excluded from computation. I can, however, find no authority for this unless it can be construed as part of what may be called the continuation theory. A quite possible view is that down to 1918 the decree was in fact non-executable by the decree-holders as they had been paid in full. I am in favour of regarding 1918 as a fresh starting point of limitation by the application of Art. 181. That Art. 181 can be applied to execution matters was established in *Rungiah Gounden & Co.* v. *Nanjappa Row* (1) which held that Art. 179, *i. e.*, Art. 182 is not exhaustive of applications for execution of decrees and that it is not the law that Art. 178, *i. e.*, Art. 181 cannot be applied to any application for execution of any decree. See also the Privy Council case in *Rameshvar Singh* v. *Homeshvar Singh* (2) where their Lordships applied Art. 181 holding that Art. 182 did not apply inasmuch as the decree in question was not under certain circumstances capable of being enforced. A very similar case to the present is the case referred to by the learned District Judge *Ramineedi Venkata Appa Rao* v. *Lakkoju China Ayyanna* (3). There the sale in execution was set aside, and the decree-holder was ordered to refund and it was held that on the decree-holder subsequently applying to execute his decree such application is governed by Art. 178, *i.e.*, Art. 181 when time began to run against him from the date when he is ordered to refund the purchase-money when alone his right to apply accrued. The Court there was obviously pressed by the difficulty of avoiding Art. 179, *i. e.*, Art. 182, but they were equally pressed by the injustice that would accrue if the opposite view were taken. Two

(1) 26 M. 780; 13 M. L. J. 412.

(2) 59 Ind. Cas. 636; 40 M. L. J. 1; 1 P. L. T. 731; 19 A. L. J. 26; (1921) M. W. N. 21; 33 C. L. J. 109; 25 C. W. N. 337; 13 L. W. 546; 6 P. L. J. 132; 23 Bom. L. R. 721; 30 M. L. T. 189; 48 I. A. 17 (P. C.).

(3) 30 M. 209; 17 M. L. J. 194.

older authorities can be cited one in *Issurree Dassee* v. *Abdool Khalak* (4) which is an example of what may be called the continuation theory. There the former execution proceedings were struck off the file. Subsequently a refund was ordered, and the plaintiff 18 or 19 months after applied to execute his decree. The High Court held that under the circumstances, the application should be considered as an application to continue the old proceedings. Similarly in *Kalyanbhai Dilpchand* v. *Ghansham Lal Jadunathji* (5) the learned Judges were pressed by the fact that Art. 15 of the Limitation Act of 1877, was in terms applicable to applications. They held that if Art. 179 applied "the most monstrous injustice would ensue," and construed the application as an application to continue the former proceedings.

An objection has been advanced to regarding the present case as a continuation from the fact that a different property, *i. e.*, non-*zemindari* property is now to be proceeded against, whereas the decree was admittedly previously satisfied from the *zemindari* property. The answer to that objection appears to me to be two-fold, namely, that this is the first application to execute the High Court decree as such, and, therefore, the decree-holders are perfectly justified in proceeding against any property of the appellant which is non-*zemindari* property, and, secondly, it has been held in *Gnanendra Kumar Rai Chowdhury* v. *Shayama Sunder Sen* (6) that the filing of a supplementary list of properties may be taken as part of the original application and that the decree-holders need not be confined to the properties they had originally specified. See also the remarks of Seshagiri Iyer, J., in *Raja of Kametnagar* v. *Venkata Reddi* (7): "The fact that the decree-holder moved the Court only for a particular remedy open to him cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which the law enables him to adopt." Also in *Mohini Mohan Sircar* v. *Navadwip Chandra Biswas* (8), a decision of the Calcutta High Court, it was held that when on an application for execution made in accordance with law, execution cannot be successfully taken against the property specified by reason of causes for which the decree-holder is in no way responsible he should not be confined to the properties first specified and it is open to him to ask the Court to proceed against the other properties specified in his supplementary list. There the first application proved ineffective against the moveables of the judgment-debtor as the result of proceedings taken by the latter. His subsequent application was to attach the immoveables. Here in the present case the payment in discharge of the original execution petition was, of course, made by the judgment-debtor, and I think it would be unfair to hold that this must be a matter for which the decree-holder is responsible. Further his prior execution proceedings proved ineffectual owing to the modification of the decree by the High Court which is certainly outside the control of the decree-holder. Severel other authorities were cited to us. But I do not think it necessary to review them all. I think the case may fall under either of the theories that I have set out above. But it seems to me that some of the cases have proved to an extreme length on what I have called the continuation or revival theory, and speaking for myself I think it more satisfactory to rest the case on the application of Art. 181 of the Limitation Act. It is clear that in either case the application is within time. In my opinion, therefore, the second appeal must be dismissed with costs.

Wallace, J.—I agree with my learned brother's proposed order, but I would like to add my own view of this case. I think the principle to be applied is the general principle that a decree or an application for execution which cannot be executed cannot be time-barred. This principle has, with respect to questions of limitation under s. 48 of the C. P. C., been applied in a Full Bench case of this Court in *Aiyasamier* v. *Venkatachala Mudali* (9). It is true that a later Privy Council case which is very briefly stated contains no reasons and which is not reported in the authorised rulings but in *Khulna Loan Company* v. *Jnanendra Nath Bose* (10) seems in conflict with

(4) 4 C. 415; 3 C. L. R. 46; 2 Ind. Dec. (N. S.) 263.
(5) 5 B. 29; 3 Ind. Dec. (N. S.) 21.
(6) 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398.
(7) 29 Ind. Cas. 231; 39 M. 570 at p. 573; 29 M. L. J. 96; (1915) M. W. N. 334; 17 M. L. T. 427.
(8) 47 Ind. Cas. 911.
(9) 37 Ind. Cas. 741; 40 M. 989; 31 M. L. J. 513; (1916) 2 M. W. N. 296; 20 M. L. T. 931; 4 L. W. 507.
(10) 45 Ind. Cas. 436; 22 C. W. N. 145 (P. C.).

the view taken by the majority of the Full Bench. *Narhar Raghunath Napbad* v. *Krishnaji Govind Nadgavandi* (11) is another case in point on this portion of the discussions.

But coming to the application of the principle to Art. 182 of the Indian Limitation Act there is a Privy Council case in *Rameshvar Singh* v. *Homeshvar Singh* (2) a later decision than the *Khulna Loan Company* v. *Jnanendra Nath Bose* (10) in which the principle was enunciated that Art. 182 does not apply to an execution petition when the decree was not at the time capable of being enforced. The decree in that case only became enforceable in a certain contingency which might or might not have happened. It did happen and the Privy Council held that limitation began to run, not from the date of the decree which would make Art. 182 applicable but from the date of the happening of the contingency which made the decree executable, and that Art. 181 applied. The principle is enunciated there in wider terms than previously. It had been held in several cases that the immediate non-executability of a decree must be inherent in the decree itself that is, that the mere reading of the decree would show that it was unexecutable at once. But the decree in *Rameshvar Singh* v. *Homeshvar Singh* (2) did not on the face of it imply any such non-executability since, for all that the Court passing the decree knew, the judgment-debtor might be already in possession of Janeshwar's property and, therefore, the decree would be enforceable as soon as passed. The general principle laid down by the Privy Council is that, in order to make a provision of the Limitation Act, namely, Art. 182, apply, the decree sought to be enforced must have been in such a form as to render it capable "in the circumstances" of being enforced. I would stress the words "in the circumstances" as implying that the Court is to be guided by the circumstances of the case in deciding whether the decree could or could not have been enforced at once, that is, whether any right to execute it had or had not accrued. Part of the circumstances which their Lordships considered relevant in that case was whether or not the decree-holder was responsible for the delay which had taken place in giving effect to his title, that is, his right to execute.

(11) 15 Ind. Cas. 822; 36 B. 368; 14 Bom. L. R. 381.

Now when the decree-holder in the present case got his final decree as amended by the High Court, the decree he had obtained in the lower Appellate Court was already satisfied and would remain satisfied unless the judgment-debtor chose to recover by appropriate proceedings, the amount already paid. In my view the decree-holder could not, at least until the judgment-debtor demanded restitution, apply for execution of the amended decree. Until then it was not a decree capable of execution and Art. 182 would have no application. Article 181 must, therefore, apply. On what date then did the right to execute accrue "in the circumstances" and was the delay in filing the execution petition due to any laches or default on the decree-holder's part ? It might fairly be contended that the decree-holder's right accrued the moment that he was aware that the judgment-debtor was demanding restitution. The decree-holder was then in that view bound to hand over the amount obtained, and, as the High Court had finally determined improperly obtained, in satisfaction of the decree finally amended, as he had no legal right to retain that amount any longer. His right to execute the amended decree would, therefore, accrue from the date on which he ought to have handed over the sum improperly obtained, just as if the restitution was due to a stranger whose money he had wrongfully acquired by improper execution proceedings against him.

Analogous cases are cases in which a decree-holder who has sued to remove an obstruction which barred the execution of the decree has failed to remove that obstruction. It has been held that the period during which he was pursuing that infructuous proceeding would not be executed in his favour. [See *Shivram Chintaman* v. *Saraswati Bai* (12) and *Khair-un-Nissa* v. *Gauri Shankar* (13)]. The case in *Sunder Lal* v. *Banarsi Das* (14) bears some resemblance to the present, but it does not appear from the facts whether the decree-holder's final execution petition of 13th February, 1916, was within 3 years of the decision in favour of the judgment-debtors under the decree which had been attached and, there-

(12) 20 B. 175; 10 Ind. Dec. (N. S.) 675.
(13) 3 A. 484; A. W. N. (1881) 1; 2 Ind Dec. (N. S.) 197.
(14) 45 Ind Cas. 531.

fore, within 3 years of the time when the right to have refunded the money arose. The case in *Ramineedi Venkatta Appa Rao* v. *Lakkaju China Ayyanna* (3) is almost on all fours with the present and there it was held that where an execution sale is set aside at the instance of the judgment-debtor and the decree-holder has to refund the money to the judgment-debtor, time begins to run against the judgment-creditor not from the date of the demand by the auction-purchaser but from the date when the decree-holder is first compelled by order of Court to refund the money to auction-purchaser. Following this decision I think I must hold in this case in agreement with my learned brother that the right to apply accrued on the date when the judgment-creditor was ordered by the Court to refund the money by way of restitution of the judgment-debtor.

I should like to say a word or two on the argument put forward at some length before us that the execution petition should be treated as a revival or a continuation of the execution petition under the decree before amendment which, being satisfied, was dismissed. It seems to me difficult to apply such a principle to the present case. From the mass of case-law, not always very consistent, which has grown upon this subject, I think the following general principles emerge; Firstly, Art. 182 assumes that the decree is capable of immediate execution and does not apply if it is not; in such a case Art. 181 applies; Art. 182 is not exhaustive; [See *Chhedi* v. *Lalu* (15) and *Rungiah Goundan & Co.* v. *Nanjappa Rao* (1)]; and where a decree is immediately capable of execution an execution petition *prima facie* after time may be treated as a revival or continuation of previous execution petition when the decree-holder has in fact been diligent and put in such a petition. Secondly, such an execution petition or application may be treated as a continuation or revival of the former application closed or even dismissed; but if the decree-holder has not been diligent [See *Langtu Pande* v. *Baijnath Saran Pande* (16)] or if he has sought to be rid of an obstruction in execution and failed [See *Khair-un-nissa* v. *Gauri Shanker* (13) and *Shivram Chintaman* v. *Sarasvatibai* (12)] or if he does not seek for the same relief as in the previous execution petition, see *Virasami* v. *Athi* (17) and *Krishnaji Raghunath Kothavle* v. *Anandrav Ballal Kolhakar* (18) but later cases noted by my learned brother take a wider view then it cannot be treated as a revival or continuation. Thirdly, this is an execution petition, if treated as a revival or continuation of the former one is governed in the matter of limitation by Art. 181 and not 182. On this point there is a mass of authority. The principle is stated, although the actual Article applicable is not specified in the Privy Council case in *Qamar-ud-din Ahmad* v. *Jawahir Lal* (19) and *Sasivarna Tevar* v. *Arulanandan Pillai* (20). Other reported cases which definitely lay down which Article is applicable are the Full Bench case in *Suppa Reddiar* v. *Avudai Ammal* (21), *Chalavadi Kotiah* v. *Poloori Alimellammah* (22) and *Ghulam Nasir-ud-din* v. *Hardeo Prasad* (23) and other cases.

Applying these principles to the present case it would seem that, even if the application is to be treated as the continuation or revival of the previous execution petition, the Article applicable is 181 and not 182; and that Article prescribes 3 years from the date when the right accrued, that is, the right to revive or continue the execution proceedings and to put in the application for a continuation or revival; so that this plea even if allowed to the appellant, takes the case no further. This case has to be governed by the considerations already laid down and on the decision of the question when his right to apply occurred under Art. 181.

I, therefore, agree with the order proposed by my learned brother.

V. N. V. *Appeal dismissed.*

(15) 24 A. 300; A. W. N. (1902) 60.
(16) 28 A. 387; A. W. N. (1906) 54; 3 A. L. J. 143.
(17) 7 M. 595; 8 Ind. Jur. 613; 2 Ind. Dec. (N. S.) 998.
(18) 7 B. 293; 4 Ind. Dec. (N. S.) 198.
(19) 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).
(20) 21 M. 261; 8 M. L. J. 18; 7 Ind. Dec. (N. S.) 540.
(21) 28 M. 50.
(22) 31 M. 71; 18 M. L. J. 76; 3 M. L. T. 329.
(23) 14 Ind. Cas. 343; 34 A. 436; 9 A. L. J. 540.

MADRAS HIGH COURT.

STAMP REGISTER No. 9636 OF 1923
IN APPEAL No. 186 OF 1923
AND
STAMP REGISTERS Nos. 13674, 12052
AND 13423 OF 1923
IN S. R. No. 9636 OF 1923 IN APPEAL
No. 186 OF 1923.
November 28, 1924.

Present:—Mr. Justice Madhavan Nair.

In re Syed MAHAMAD GOUSE AND OTHERS —APPELLANTS.

Court Fees Act (VII of 1870), s. 7 (v), *Sch. II, Art. 17* (b)—*Suit for declaration and possession of* durga *and its properties—Court-fee payable.*

In determining the amount of Court-fee payable on a plaint, the sole question to be considered is what is the "subject-matter of the suit". [p. 210, col. 2.]

A suit by a plaintiff for a declaration that he is the *sajjadanashin* of a *durga* and for possession of its properties is governed by s. 7, cl. v of the Court Fees Act and not by Art. 17 (*b*) of Sch. II to the Act and an *ad valorem* Court-fee is payable on the plaint. [*ibid.*]

Sonachala v. *Manika*, 8 M. 516; 3 Ind. Dec. (N. S.) 353, relied on.

Ramadoss v. *Hanumantha Rao*, 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 337, *Ratnasabhapathi Pillai* v. *Ramaswami Iyer*, 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N. 112; 7 M. L. T. 311; 20 M. L. J. 301 and *Swaminatha Iyer* v. *Ramier*, 80 Ind. Cas. 1053; 47 M. L. J. 671; 20 L. W. 893; (1925) M. W. N. 52; (1925) A. I. R. (M.) 421, distinguished.

Reference under s. 5 of the Court Fees Act regarding the Court-fee to be paid in Stamp Register Nos. 9636 (Appeal No. 186 of 1922), 13674, 12052 and 13423 of 1923, being appeals preferred to the High Court against a decree of the Court of the Subordinate Judge, Mayavaram, in O. S. No. 10 of 1909 (O. S. No. 15 of 1908 on the file of the District Court of South Arcot).

The Advocate-General and Mr. *K. S. Desikan*, for the Appellants in S. R. No. 9636 of 1923.

Mr. *L. A. Govinda Raghava Iyer*, for the Appellant, in S. R. No. 13423 of 1923.

Mr. *S. Varadachariar*, for the Government Pleader, for the Government.

ORDER.

S. R. No. 9636 OF 1923 IN A. S. No. 186 OF 1923.

This is a reference under s. 5 of the Court Fees Act as regards the proper Court-fee to be paid on the memorandum of appeal filed by the 6th defendant.

This suit out of which this appeal arises was instituted by the plaintiff for a declaration that he is the *sajjadanashin* of two *durgas* in the South Arcot District and for the possession of the *durgas* and their properties. The plaintiff alleged that he was appointed by the last *sajjada* as his successor and that he took possession of the *durgas* and the properties on the last *sajjada's* death, but that he was subsequently dispossessed by the 1st defendant, one of the heirs female of the original family of the founder. The lower Court holding that the plaintiff was not nominated by the last *sajjada* and also that he was not the nearest male heir, dismissed the suit. On appeal by the plaintiff, the High Court remanded the suit to the lower Court to re-hear the case after bringing on record the descendants of the original founder and to appoint a trustee from amongst them, since the last *sajjada* had failed to nominate his successor. After remand, the plaintiff compromised the suit with the 1st defendant and asked for permission to withdraw it but the Court refusing such permission transposed some of the defendants as plaintiffs, made the original plaintiff a defendant and proceeded with the suit. By his decree, dated 27th March 1923, the Subordinate Judge appointed the 1st and 2nd plaintiffs, according to the revised cause-title, as *mutwallis* of the two *durgas* on probation for a period of three years and directed that they should take possession of the *durgas* and their respective properties (see cls. 1, 3, 4 and 6 of the decree). The decree also provided that the surplus income after meeting the expenses of the *durgas* should be distributed amongst the members of the family. The 6th defendant in his appeal against this decree prays that he should be appointed trustee of both the *durgas* in the place of plaintiffs Nos. 1 and 2.

In the lower Court and previously in this Court on appeal, Court-fees were paid *ad valorem* on the value of the plaint properties. The appellant now seeks to value his appeal under Art. 17, cl. (*b*), Sch. II of the Court Fees Act on the ground that it is not possible to estimate at a money value the subject-matter in dispute; on the other hand, it is contended by Mr. Varadachariar on behalf of the Government that the case is governed by s. 7 of cl. v of the Court Fees Act and that the appellant should pay *ad valorem* Court-fee on the value of the suit properties.

The main argument of the learned Advocate-General on behalf of the appellant is this: If the suit had been against persons claiming adversely to the trust, *ad valorem* Court fee might have to be paid; but in a

case like the present, where all the parties to the suit claim the properties for and on behalf of the trust, the only point in dispute is as to who amongst them is entitled to manage the trust properties and as that, *viz.*, the right of management is incapable of valuation, the proper Article applicable is Art. 17, cl. (*b*), Sch. II of the Court Fees Act. This argument appears to me to be untenable, because, though the defendants do not claim the properties adversely to the trust, they do claim the right to hold them adversely to the plaintiff and, therefore, plaintiff has necessarily to ask for relief by way of possession as against them. In *Ramadoss* v. *Hanumantha Rao* (1) relied upon for the appellant, the lands were in the possession of persons who were willing to pay rent to the plaintiff as soon as he recovered the office of *dharmkartha*. In distinguishing the case before them from the decision in *Ratnasabhapathi Pillai* v. *Ramaswami Iyer* (2) and the other case brought to their notice the learned Judges indicate their opinion that, if the possession had been adverse to the plaintiff, then it would have been necessary for him to sue for the relief of possession, also see page 366. In *Sonachala* v. *Manika* (3) where the plaintiff prayed for a decree for the removal of the defendant from the management of properties endowed for charity and for the appointment of himself as the manager thereof, it was held that the plaintiff was to sue for possession of the properties and that he should pay *ad valorem* Court-fee under s. 7 of the Court Fees Act.

Reference has been made by Mr. Govindaraghava Iyer, the learned Vakil for the appellant in the connected S. R. No. 13423 of 1923, in which also the same question is raised, to the decisions in *Thakuri* v. *Bramha Narain* (4), *Girdhari Lal* v. *Ram Lal* (5) and *Ramrup Das* v. *Sujaram Das* (6). These are cases under s. 92 of the C. P. C. and do not really help him. Shortly stated, what was decided in those cases was that in suits coming under s. 92 (s. 539 of the old Code) of the C. P. C., the mere inclusion in the plaint of a prayer either for account or for the appointment of plaintiffs themselves as trustees, does not render the plaintiffs liable to pay *ad valorem* Court-fee on that part of their plaint. The suit which has given rise to this appeal is not one under s. 92 of the C. P. C., nor does it possess the essential characteristics of such a suit. It cannot also be said that the nature of the suit has in any way been altered subsequent to the remand by the High Court.

It has been further urged on behalf of the appellant that since the plaintiff sues for trusteeship only and has no beneficial or personal interest in the properties in his capacity as trustee, no *ad valorem* Court-fee need be paid. This argument receives a certain amount of support from the observations of Spencer, J., in his Order of Reference to the Full Bench in *Ramamairtha Mudaliar* v. *Govinda Mudaliar*, C. R. P. 862 of 1917. With all respect, I am unable to see how the question as to whether the plaintiff has or has not any beneficial interest in the properties that he sues for, can make any difference as regards the Court-fee payable by him. A guardian of a minor, for instance, suing on behalf of his ward for recovery of possession of immoveable property has no beneficial interest in the property, but I do not think that it can be argued that he need not pay *ad valorem* Court-fee under s. 7, cl. v, when he sues for possession of properties of the ward.

It seems to me that in determining the amount of Court-fee payable in these cases the sole question to be considered is what is the "subject-matter" of the suit. As already pointed out in a case like the present one the plaintiff is bound to ask for possession and the plaintiff here has, as a matter of fact, prayed for possession of the trust properties. So far as this relief is concerned, the suit, in my opinion, falls under s. 7, cl. v of the Court Fees Act and the appellant should pay Court-fee under that section. As in my view the case comes under s. 7, cl. v, it follows that Art. 17, cl. (*b*), is inapplicable. I give six weeks' time for the appellant to pay the necessary Court-fee.

S. R. Nos. 13674, 12052 AND 13423 OF 1923.

The same question arises in these stamp reference numbers which deal with the other

(1) 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387.

(2) 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N. 112; 7 M. L. T. 311; 20 M. L. J. 301.

(3) 8 M. 516; 3 Ind. Dec. (N. S.) 353.

(4) 19 A. 60; A. W. N. (1896) 187; 9 Ind. Dec. (N. S.) 39.

(5) 21 A. 200; A. W. N. (1899) 32; 9 Ind. Dec. (N. S.) 837.

(6) 7 Ind. Cas. 92; 12 C. L. J. 211; 14 C. W. N. 932.

appeals filed against the lower Court's judgment. The order passed in S. R. No. 9630 of 1923 will apply to them also.

These Court-fee references having been set down to be spoken to, on the 6th day of November 1924, in the presence of the Advocate-General and Mr. *K. S. Desikan*, for the Appellant, in S. R. No. 9636 of 1923 (Appeal No. 186 of 1923), Mr. *A. Viswanatha Iyer*, for the Appellant, in S. R. No. 13674 of 1923, Mr. *C. R. Madhava Iyer* for Mr. *C. V. Anantakrishna Iyer*, for the Appellant, in S. R. No. 12052 of 1923, and Mr. *L. A. Govindaraghava Iyer*, for the Appellant in S. R. No. 13423 of 1923 and of Mr. *S. Varadachariar*, for the Government Pleader on behalf of the Government and having stood over for consideration to this day the Court made the following additional

ORDER.—These stamp references were posted to be spoken to at the instance of Mr. Govindaraghava Iyer, but after hearing the arguments of the learned Vakils, on both sides I do not see any reason to modify or alter the order which I have already made.

The only point now urged by Mr. Govindaraghava Iyer is that the decision of this Court reported as *Swaminatha Iyer* v. *Ramier* (7) is against the view which I have taken in my prior order and that I should, therefore, re-considered my order in the light of the said decision. I will assume that if the decision in *Swaminatha Iyer* v. *Ramier* (7) has really taken a contrary view, it is open to me to re-consider my order. In that case the plaintiffs sued for a declaration that they and the first defendant were the lawfully appointed trustees of a certain temple; and they prayed for a direction that defendants Nos. 2 and 3 should be made to restore the office of trustee to them and for an injunction restraining them from interfering with the exercise by the plaintiffs and the first defendant of their duties as trustees. The tenants who were in possession of the properties were willing to pay the rents to whomsoever was the proper trustee. It was held that the plaintiffs were not bound to sue for the possession of the temple properties and their omission to sue for such possession did not offend against the proviso to s. 42 of the Specific Relief Act. The learned Judges had not to consider the question as to what is the Court-fee payable if the plaintiffs had, as a matter of fact, asked for possession and nowhere do they say that in such a case *ad valorem* Court-fee need not be paid. Even as regards the necessity of asking for possession where the plaintiff alleges that some others had illegally taken possession of the temple lands, the learned Officiating Chief Justice states thus when distinguishing the case in *Ratnasabapathi Pillai* v. *Ramaswami Iyer* (2). "The maintainability of the suit must depend upon the allegations in the plaint..... In this plaint he [the plaintiff in the case in *Ratnasabhapathi Pillai* v. *Ramaswami Iyer* (2)] mentioned that the defendants Nos. 8 and 9 had illegally taken possession of the temple lands and leased out the fishery in the tank and collected rent. The plaintiff in that case having, for reasons best known to himself, combined two actions in one, namely one action against the Temple Committee for the restoration of his trustee's office and for damages, and a second action for the recovery of the trust properties against persons who had wrongfully dispossessed him of such property, was bound to ask for the relief of possession of the temple properties to which he asserted a present right of possession. On the allegations in the plaint in that suit it may have been right to require the plaintiff to add a prayer for possession of the lands and if he refused to do so, his suit might have been dismissed. But he was not bound to sue for possession of the lands before he was restored to office. If he had chosen to strike out from his plaint his statement as to the part played by defendants Nos. 8 and 9, he might have waited till he was restored to his office of trustee, and he might then have brought a separate suit on behalf of the trust to recover the trust properties which had been wrongfully alienated." The plaintiff in the present case alleges in his plaint that he was dispossessed by the 1st defendant and asks for possession from him, and I do not think that the remand by the High Court and the subsequent re-arrangement of the parties can in any way alter the nature of the case. It is not necessary for me to decide whether even in this case the plaintiff is bound to ask for possession. But as possession has been asked for and as the

(7) 80 Ind. Cas. 1053; 47 M. L. J. 671; 20 L. W. 893; (1925) M. W. N. 52; (1925) A. I. R. (M.) 421.

decree also directs that the *durga* should be taken possession of, I think that Court-fee should be paid under Art. 7 V of the Court Fees Act. Time for payment of the Court fee is extended by six weeks from today in all the references.

V. N. V.

Z. K. *Reference answered.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 78 OF 1922.

March 12, 1924.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

Raja UDAIRAJ SINGH—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

U. P. Local Rates Act (I of 1914), s. 14—Suit for declaration that levy of cess is illegal—Jurisdiction of Civil Courts—Test—Valuation of suit—Duty of Counsel.

By virtue of the provision contained in s. 14 of the U. P. Local Rates Act, a Civil Court is debarred from taking cognisance of a suit for a declaration that the levy of a particular cess under the provisions of the N.-W. P. Local Rates Act, on certain property was illegal and invalid. [p. 213, col. 2; p. 214, col. 1.]

No Civil Court has jurisdiction to grant a declaration that a certain person is entitled to hold certain property for all time as a revenue free and untaxable domain in perpetual succession. [p. 214, col. 1.]

It is the substance of the relief sought, and not the mere form in which the case is preferred in the plaint, that must be looked to in order to determine the proper *forum* for the trial of the action. [p. 213, col. 1.]

It is necessary in the interests of the litigant public that a fair valuation should be put upon every suit. In the High Court fees on the higher scale are usually given and in the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff. If a plaintiff is permitted to place any fanciful figure as the value of the suit, he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his Counsel and [illegible] subjects him to a continuing possible liability to excess of the [illegible]laintiff an amount by way of costs far in also embarras[illegible] real value of the case. The plaintiff may

It is as much [illegible]himself. [p 214, col. 2.]

client from the [illegible]the duty of a Counsel to protect his protect him from an[illegible]ability to pay excessive fees as to [illegible] adverse decree. [p. 215, col. 1.]

First appeal fro[illegible]m a decree of the Sub-ordinate Judge, Bij[illegible]or at Moradabad.

Messrs *F. Owen* [illegible]'Neil, *E. A. Howard*, *Uma Shankar Bajpai* [illegible] and *Shiam Krishna Dar*, for the Appellant.

Mr. *Lalit Mohan Banerji*, for the Respondent.

JUDGMENT.—This was a suit brought by Raja Udairaj Singh of Kashipur against the Secretary of State for India in Council in which certain reliefs were sought by way of declaration. Those reliefs may be set forth at once in the precise language of the plaint. They are as follows:—

(*a*) A declaration "to the effect that the plaintiff is entitled to hold the domain of Barhapura for all time as a revenue free and untaxable domain in prepetual succession."

(*b*) A declaration "that the imposition of 1874 is illegal and invalid as against himself".

We do not quite understand why the second relief has been worded in this particular form. What the plaintiff desires to challenge is the levy of a cess on the property described as "the domain of Barhapura" under the provisions of the N. W. P. Local Rates Act (XVIII of 1871), which came into force on the 6th of April of that year. The record before us shows that a cess was levied upon this property immediately on the passing of the said Act.

One of the pleas raised by the defendant was that the cognisance of the suit by the Court in which it was instituted, that of the Subordinate Judge of Bijnor, was barred by the provisions of s. 14 of the U. P. Local Rates Act (Local Act I of 1914), which now takes the place of the older Statute under which the cess was first imposed. The words of this section are as follows :—

"A suit shall not lie in any Civil Court to set aside or modify any assessment of a rate imposed under this Act."

The Trial Court framed an issue on this plea, but has not decided it; it tried out the suit and has dismissed it on the merits. The question of jurisdiction has, however, been argued out before us and we think we ought to determine it. We note that the words of the prohibition are :—

"To set aside or modify."

It might perhaps be argued that any question as to the amount of assessment imposed under this Act might well be left to the exclusive jurisdiction of the Revenue Courts; but that it must be competent for a Civil Court to adjudicate upon the larger question whether certain property was liable to assessment at all

It is undoubtedly a principle of English Law that a subject from whom any tax or impost is sought to be levied, is entitled to raise before a Court of competent jurisdiction the question whether the authorities levying such tax or impost are or are not acting within their statutory powers. The question in this case, however, is as to the proper Tribunal competent by law to give the plaintiff the relief which he seeks. In this Province we have side by side with the ordinary Civil Courts, other Courts constituted under the Local Land Revenue and Tenancy Acts, and certain matters are reserved by law to the exclusive jurisdiction of these latter Courts. The Collector of a District, the Commissioner of a Division and the Board of Revenue in these Provinces are not merely executive authorities, but they are also Courts of Justice with special jurisdictian of their own which is guarded by Statute from interference on the part of the ordinary Civil Courts. In determining questions which from time to time arise with regard to cases apparently lying somewhere near the borderland of the jurisdiction of the two sets of Courts, one principle has been consistenly laid down and maintained by this Court : it is the substance of the relief sought, and not the mere form in which the case is preferred in the plaint, that must be looked to in order to determine the proper *forum* for the trial of the action. Looking at the question thus broadly, it seems to us almost beyond argument that the present suit is, as regards the second of the two reliefs claimed, a suit to set aside the assessment of a rate imposed under the Local Rates Act. If it be suggested that the Revenue Courts to which we have referred, being presided over by officers directly concerned in the assessment and collection of taxation levied upon agricultural land, are not suitable authorities to adjudicate upon a question of liability such as that raised by the plaintiff in this case, the answer appears to be that the Legislature having seen fit to trust these Courts to make a just and impartial use of the special knowledge which their Presiding Officers do undoubtedly possess in such matters, it is not for us to question the policy of the Legislature. Moreover, it may be pointed out that an appeal lies to His Majesty in Council from a decision pronounced by the Board of Revenue in its judicial capacity.

Mr. O'Neil, in his argument on behalf of the appellant, laid great stress on the provisions of s. 42 of the Specific Relief Act (I of 1877). We do not deny for a moment that the plaintiff, on the facts alleged by him, would have a cause of action for relief under the provisions of this section, provided always that the jurisdiction of the ordinary Civil Courts in this matter is not expressly taken away by Statute. A mere reference to the general provisions of s. 42 of the Specific Relief Act cannot by itself assist us in determining the further question, whether the relief sought in this particular suit does or does not fall under the prohibition contained in s. 14 of the U. P. Local Rates Act (I of 1914). Indeed, if the point is to be argued on technical grounds rather than on the broad principle which we have already suggested, this reference to s. 42 of the Specific Relief Act only suggests a further difficulty in the plaintiff's way. Under that section itself the Civil Courts are prohibited from granting relief by way of a mere declaration when the plaintiff, being entitled to further or consequential relief, has omitted to claim it. In the present case it seems obvious that the plaintiff could have claimed further relief, both by way of a refund of money paid by him under protest in the past in satisfaction of the demand which he alleges to be illegal, and also by way of a perpetual injunction for the future. The plaintiff has omitted to claim these further reliefs, because by doing so he would have made it too flagrantly obvious that his suit was essentially one to set aside the assessment of a rate imposed under the U. P. Local Rates Act of 1914. The Civil Court, however, is not concerned with the reasons which may have influenced a plaintiff in omitting to claim a particular relief. It would be a curious and anomalous result if we were compelled to hold that the cognisance of the Civil Court was barred in respect of the subsidiary reliefs obviously claimable by the plaintiff, and necessary in order to give him complete relief on the cause of action preferred by him, but that this bar could be evaded by the plaintiff's abandoning such consequential reliefs and limiting himself to a suit for a mere declaration.

The conclusion we arrive at is that the cognisance of this suit by the learned Subordinate Judge of Bijnor was barred, at any rate, in respect of the second of the two reliefs

claimed, by the prohibition enacted in s. 14 of the U. P. Local Rates Act of 1914. It is contended, however, that these considerations do not apply to the first of the two reliefs claimed. Our own opinion with regard to this relief is that in so far as the defendant to the action is concerned, the declaration sought is one which it is simply incompetent for any Court of civil jurisdiction to grant. The question sought to be raised by the words "in perpetual succession" in the said relief is not one which concerns the defendant. He does not desire to prevent the "domain of Barhapura" from descending as an inalienable estate, in accordance with the line of succession laid down in a certain *sanad* of the year 1828 which is the original document of title set up by the plaintiff; nor is there anything in the imposition of a local rate or cess upon this land to interfere with the plaintiff's tenure of the property, or its devolution after the death of the plaintiff. So far as the defendant is concerned, the claim preferred in connection with his first relief is one for a declaration that the land described as "the domain of Burhapura" is for all time untaxable by any Act either of the Local, or of the Imperial Legislature. If the land in suit forms part of " the territories for the time being administered by the Governor of the United Provinces", then it is subject to the jurisdiction of the Legislature of the Province, and a Civil Court exercising jurisdiction within those territories has no right to declare it for ever untaxable. This is a perfectly distinct question from the question whether the rate or cess which is being levied upon the plaintiff now has actually been imposed, or is being levied, within the statutory authority of the Local Rates Act of 1914.

We doubt, however, whether this point can be made perfectly clear without a more detailed examination of the pleadings and evidence in the case. Moreover, we are bound to take note of the fact that the Trial Court has elected to pass over the preliminary objection to its own jurisdiction and to try out the suit on the merits. In spite, therefore, of the doubts which we felt at an early stage of the argument on the question of jurisdiction, we thought it our duty to hear the appeal on the merits and it seems only fair to both parties that we should pronounce a decision on the same. * * * * * * * * *

We now pass to a matter of more general interest. The plaintiff valued this suit for purposes of jurisdiction and Court-fees at no less a sum than fifty lakhs.

Whilst appreciating, though not wholly accepting the view of the Raja that the claim of the Local Goverment touches the diginity and honour of his house and family, we express our regret that he should have acquiesced in or directed such a figure to be inserted.

Allowing the widest margin for contingencies, the interest on a capital sum of Rs. 50,000 would more than provide the annually recurring payment, and it would, in our opinion, have been better had the plaintiff set out the considerations of status and dignity in the petition and, whilst emphasizing the importance which he attached to them had stated that he refrained from appraising them in terms of money.

It is necessary in the interests of the litigant public that a fair valuation should be put upon every suit. In this Court fees on the higher scale are usually given and in the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff. Obviously if a plaintiff is permitted to place any fanciful figure as the value of the suit, he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his Counsel and also subjects him to a continuing possible liability to pay the plaintiff an amount by way of costs far in excess of the real value of the case.

A minor and less important matter is that the plaintiff may embarrass himself.

The latter indeed is exactly what happened. The effect of this unwise valuation pressed so heavily upon the Raja in this Court that he applied on the 15th of May 1923, for a nine months' adjournment on the ground that he was prevented at present from "undertaking heavy expenditure in Counsel's fees". On the 3rd of December 1923 he applied again stating that until the *kharif* collections in January 1924 he would not be in a position to find the fees necessary to engage Counsel. At the time of granting these concessions the Court was not in possession of information to enable the extravagance of the valuation to be estimated.

We think that Counsel for the defendant, when first this excessive valuation came to their notice, should at once, before

drafting any written statement, have applied to the Court for an order on the plaintiff to deliver particulars in writing "of the valuation of fifty lakhs stating how much there is referable to the cess and how much to other and what considerations." It is as much the duty of a Counsel to protect his client from the liability to pay excessive fees as to protect him from an adverse decree. It was not, in our opinion, sufficient for the written statement to allege that the valuation was excessive and to leave it at that.

It would have been the manifest duty of the Judge to make such an order and in all probability the plaintiff would have amended his valuation to an amount more within the limits of reality.

If he failed to do so, then the Judge should himself have decided the matter and been watchful not to allow the plaintiff, if he succeeded, more than a reasonable amount of costs. As regards the costs incurred by the defendant, there would be no ground for withholding any sum certified as having been paid, even if such amount happened to be more than in the opinion of the Judge, would have been disbursed on a fair valuation.

In this particular case we have been told that the Local Goverment has paid the usual higher scale fee on the recognised computation and whilst the recoupment of this to the Local Goverment will impose a heavy burden upon the plaintiff, we can see no ground for relieving him of any part of the liability. The amount of the valuation was fixed by him and he must bear the consequences.

We, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3909 OF 1924.

December 1, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

KANTHIMATHI AMMAL—PETITIONER

versus

R. PERUMAL KONA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XLI, r. 22—Respondent, death of—Legal representative, substitution of, in memo. of objections, effect of, on appeal.

Any order that is made bringing the legal representatives of a deceased respondent on record in the memorandum of objections will enure for the whole of the proceedings including the appeal.

Vathiar Venkatachariar v. *Ponappa Ayyengar*, 45 Ind. Cas. 959; 7 L. W. 614, followed.

Petition, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to bring on record the petitioner herein as the legal representative of the deceased 1st respondent Ramaswami Pillai, so far as the memorandum of objections is concerned in A. S. No. 361 of 1923, on the file of the High Court (O. S. No. 40 of 1918 on the file of the Court of the Subordinate Judge, Tuticorin).

Messrs. *Chidambaram* and *Marthandam*, for the Petitioner.

Mr. *S. T. Srinivasagopalachari*, for the Respondents.

ORDER.—This is an application on behalf of the legal representative of the deceased 1st respondent to be brought on record in the place of the 1st respondent in the memorandum of cross-objections. The learned Vakil for the petitioner states that he has had no instructions to apply for bringing his clients on record as the legal representative of the deceased 1st respondent. Messrs. Chidambaram and Marthandam, Vakils for the appellant, state that having regard to the principle, decided in the case of *Vathiar Venkatachariar* v. *Ponappa Ayyengar* (1) any order that is made bringing the legal representatives of the deceased respondent on the record in the memorandum of objections will enure for the whole of the proceedings including the appeal. I see, therefore, no objection whatever on the present application to make an order directing that the legal representatives of the deceased 1st respondent be brought on the record not only in the memorandum of objections, but also in the main appeal. Costs of this application will be costs in the appeal. The learned Vakil for the petitioner states that he has filed a *vakalat* in the Court, but at the instance of the office the *vakalat* was specially restricted to the memorandum of objections. The *vakalat* which was filed will be for the whole of the proceedings including the appeal and it will be so treated.

Petition allowed.

V. N. V.

Z. K.

(1) 45 Ind. Cas. 959; 7 L. W. 614.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 92 OF 1923.
January 7, 1924.
Present:—Mr. Justice Heald and Mr. Justice May Oung.
LIM CHWE HTAW—APPELLANT
versus
LU TYAW TAT—RESPONDENT.

Rangoon Rent Act (II of 1920), s. 10—Ejectment of tenant—Partnership business—Partner's separate business—Personal use.

Where the premises in an ejectment suit under the Rangoon Rent Act, 1920, are required more for the landlord's partnership business and the separate business of the managing partner and his family, than for the personal use of the landlord or any member of his family, the premises cannot be regarded as being reasonably and *bona fide* required for the occupation of the landlord within the meaning and intention of s. 10 of the Act.

First appeal from a decree of the High Court on the Original Side, in C. R. No. 320 of 1922.

Mr. *Das*, for the Appellant.

Mr. *Leach*, for the Respondent.

JUDGMENT.—The respondent is owner of a house in Strand Road, Rangoon, and appellant is his monthly tenant. The respondent sued to eject appellant and appellant pleaded that he could not be ejected because the premises were not reasonably and *bona fide* required for occupation by respondent himself or any member of his family.

The Original Court gave respondent a decree.

Appellant appeals on his original plea.

There is no dispute about the facts. Respondent is one of three partners who carry on business as brokers in a house in Crisp Street where the managing partner lives. The house in Crisp Street has to be re-built and the business has, therefore, to be moved elsewhere. Respondent proposes to move it into his house in Strand Road. It is admitted that the 3rd partner has a house in Crisp Street which is vacant, but it is alleged that it is not suitable for the business of the partnership because the ground-floor has been designed as a garage. It is also admitted that the premises in suit are required more for the respondent's, and separate business of the managing partner and his family, than for the purpose of the partnership business, and that neither respondent nor any member of his family propose to live in them.

The learned Judge on the Original Side was of opinion that because respondent had a one-third share in the partnership and the partnership proposes to occupy part of the premises for the purpose of its business, the premises might be regarded as being required for occupation by respondent himself.

We have read the records and heard the learned Advocates on both sides and we are of opinion that the premises cannot be regarded as being reasonably and *bona fide* required for occupation by the respondent within the meaning and intention of s. 10 of the Rangoon Rent Act.

We, therefore, set aside the decree of the Original Side and dismiss respondent's suit with costs for appellant throughout.

S. S. *Decree set aside.*

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS No. 164 OF 1925.
March 26, 1925.
Present:—Mr. Justice Walsh and Mr. Justice Mukerji.
In the matter of MESSRS. LACHHMAN PRASAD-BABU RAM OF CAWNPORE.
—APPLICANTS.

Income Tax Act (XI of 1922), s. 64—Business with branches—Income Tax Officer having jurisdiction over principal place of business, powers of, with respect to branches—Concurrent jurisdiction—Jurisdiction, exercise of, mode of.

The provisions of sub-s. (4) of s. 64 of the Income Tax Act do not oust the jurisdiction of the Income Tax Officer of an area in which the principal place of business of an assessee is situated so far as the assessment or the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned. The jurisdiction of such Income Tax Officer in respect of the branch business situated in another area is concurrent with the jurisdiction of the Income Tax Officer within whose jurisdiction that area is situated. Under sub-s. (1) of s. 64 the Income Tax Officer of the principal place of business has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. By sub-s. (4) every Income Tax Officer has also jurisdiction to exercise the powers of an Income Tax Officer with regard to the profits arising in the area within his jurisdiction. The Income Tax Officer of the principal place of business should not, however, exercise his powers oppressively, so that persons willing to submit to the requirements of the Income Tax Officer of the particular area in which the branch is situated should not be deprived of an opportunity of supplying him with all proper materials. [p. 219, cols. 1 & 2.]

Reference under s. 66 of the Indian Income Tax Act of 1922, from the Commissioner of Income Tax, U. P., dated the 16th of March 1925.

REFERENCE.—This is a demand for a reference to the High Court under s. 66 (2) of the Indian Income Tax Act, 1922,

made by Lachhman Das-Babu Ram of Cawnpore.

2. The principal place of business of the assessee is in Cawnpore but there are also branches in Bombay, Karachi, and Calcutta. When the assessment for the financial year 1924-25 came to be made, the Income Tax Officer, Cawnpore, received reports from the Income Tax Officers of Bombay and Karachi containing an estimate of the profits of the assessee in those places. The Income Tax Officer in Calcutta, however, who had been requested to report the profits of the Calcutta branch after examining the firm's accounts replied that according to the assessee's allegation the books relating to the branch business in Calcutta were at Cawnpore and would be duly produced before the Income Tax Officer; he accordingly reported no estimate of the profits. On the 24th July 1924 the Income Tax Officer, Cawnpore, issued a notice under s. 22 (4) for the production, on the 3rd September 1924, of the books not only of the principal place of business in Cawnpore but also of the several branches. The books relating to Cawnpore alone were produced on that date and a second notice under s. 22 (4) was issued, while further the assessee was requested, under the provisions of s. 23 (3), to deal with certain ambiguities affecting the accounts of the principal place of business and the branches in Bombay and Calcutta. On the 4th September 1924 the assessee was further called on under s. 22 (4) to produce the accounts of the Cawnpore business for the years *Sambat* 1977-78 in order to clear up further doubtful points, the date fixed being 30th September 1924. On that date the assessee asked for an extension of time and was granted up to the 22nd October 1924. The case was not decided on that date in the absence of proper authority for his representative from the owner of the business and the case was accordingly disposed of on the 23rd October 1924. The representative, when asked why the books of the Calcutta branch were not produced, replied that it was most inconvenient that the Calcutta accounts should be produced, in Cawnpore and that he was, therefore, unable to do so. An application was also presented asking that the case might be referred to the Income Tax Officer, Calcutta, for the examination of the accounts of that branch. The Income Tax Officer, considering the delay which had taken place and the failure of the assessee to produce his accounts before the Calcutta Income Tax Authorities in the first instance, refused the request. On this ground, and also because the assessee did not produce the books of the principal place of business for *Sambat* 1977-78, he proceeded to frame an assessment under s. 23 (4).

A copy of the relevant portion of the order of assessment is appended (Appendix A).

3. On the 24th November 1924 the assessee presented to the Income Tax Officer, Cawnpore an application under s. 27 of the Indian Income Tax Act, 1922, praying "that the assessment as it stands be cancelled and it be sent to the Income Tax Officer of Calcutta to report the income of that branch." The grounds given in support of the application are contained in the petition of which a copy is contained in Appendix B.

4. The Income Tax Officer, in an order of which a copy is attached (Appendix C) did not consider that the assessee had proved his case and rejected the application. It will be noted that the assessee does not refer to the application of s. 23 (4) to the assessment which was involved by his failure to produce the Cawnpore books relating to *Sambat* 1977-78. The Income Tax Officer also in his order does not refer to this point.

5. The assessee filed an appeal before the Assistant Commissioner of Income Tax, the petition being contained in Appendix D.

6. The Assistant Commissioner, after hearing arguments, held that the contention of the appellant was in effect not that he had been prevented by any reasonable cause from complying with the notice under s. 22 (4) but that the Income Tax Officer had no jurisdiction and that the assessment was illegal. He refused to accept this interpretation of the law and rejected the appeal. A copy of the judgment is appended (Appendix E).

7. The assessee, in a petition of which a copy is attached (Appendix F), now desires a reference to be made to the High Court on the following questions of law:—

"(1) Whether the Income Tax Officer of Cawnpore, in face of the provisions laid down under s. 64 (4) and under notes and instructions, has any jurisdiction to issue a notice

under s. 22 (4) for the account-books of the branch shops situate at Bombay, Calcutta and Karachi.

"(2) Whether the provisions laid down under s. 64 (1) empower an Income Tax Officer of one area in one Province to issue notices under s. 22 (4) etc., and to make an estimate of the income of branch shops situate in a different area and in a different Province altogether.

"(3) Whether the assessing officer of the principal places of business can compel the production of the branch accounts before him and him alone.

"(4) Whether the rejection of the petitioner's application regarding the examination of the branch books at the branches was legal.

"(5) Whether there is any evidence to support the finding of the Income Tax Officer of Cawnpore regarding the income of the Calcutta branch.

"(6) Whether the assessment, as made, is *arbitrary or to the best of his judgment* as laid down under s. 23 (4).

"(7) Whether the Income Tax Officer of Cawnpore or that of Calcutta alone is empowered to estimate the income of the Calcutta branch; and

"(8) Whether the assessment, made under s. 23 (4) by the Income Tax Officer of Cawnpore on account of the non-production of the books of the Calcutta branch alone, is legal."

In accordance with his previous action he does not refer to the applicability of s. 23 (4) involved by his failure to produce the accounts of *Sambat* 1977-78 for Cawnpore.

8. A copy of the above statement of the facts was supplied to the assessee who was also informed that the only points of law which, in the opinion of the Commissioner, could arise and which he proposed to refer for the decision of the High Court were—

(*i*) Was the opportunity given to the assessee to produce certain accounts, and in particular the accounts of the Calcutta branch, reasonable? and

(*ii*) Was the assessee prevented by sufficient cause from producing those books?

The assessee in a letter written by his Advocate of which a copy is attached (Appendix G) has replied that his "main legal contention" has not been referred to the High Court, *viz.*, that "the Income Tax Officer of Cawnpore in face of the provisions laid down under s. 66 (4) and under notes and instructions had no jurisdiction to issue a notice under s. 22 (4) for the account-books of the branch shops at Bombay, Calcutta and Karachi and to make an estimate of the income of branch shops situate in a different area and in a different Province altogether." The Commissioner is of opinion that this point does not arise out of an appellate order relating to s. 27 but as the assessee clearly feels aggrieved over the action taken by the Income Tax Officer and as the question is one of some importance, the Commissioner has decided to submit a reference under sub-s. (1) of s. 66 of the Indian Income Tax Act, 1922, on the following point also.

Do the provisions of sub-s. (4) of s. 64 of the Indian Income Tax Act oust the jurisdiction of the Income Tax Officer of the area in which a principal place of business is situated so far as the *assessment* of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned?

9. There are thus three points of law which are submitted for the opinion of the High Court—

(*i*) On the facts stated was the opportunity given to the assessee to produce certain accounts, and in particular the accounts of the Calcutta branch, reasonable?

(*ii*) Was the assessee prevented by sufficient cause from producing those books? and

(*iii*) Do the provisions of sub-s. (4) of s. 64 of the Indian Income Tax Act oust the jurisdiction of the Income Tax Officer of the area in which a principal place of business is situated so far as the assessment of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned?

As regards the first question the Commissioner is of opinion that as the period which was given for the production of accounts was a long one it cannot be said that the assessee had no reasonable opportunity to comply with the notice. The

Commissioner is also of opinion that the assessee was not prevented by sufficient cause from complying with the notice. He failed to do so on the ground that he was not obliged to do so. The word "prevent" in s. 27 involves some definite active cause, making compliance with the order impossible, and not a passive cause such as the opinion that compliance is not obligatory because of rights supposed to be secured under the Act.

On the third question the answer is, in the opinion of the Commissioner, clearly in the negative.

The Commissioner would add that the present proceedings will be sterile: the *assessment* under s. 23 (4) must in any case stand because the failure to produce the Cawnpore accounts for *Sambat* 1977-78 makes that sub-section applicable.

Mr. *L. M. Banerji*, for the Crown.

Dr. *K. N. Katju* and Mr. *U. S. Bajpai*, for the Applicant

JUDGMENT.—The answers to the three points submitted to us are as follows:—

On the facts stated, a reasonable opportunity was given to the assessee to produce the accounts of the Calcutta branch, first in Calcutta, secondly in Cawnpore, where the Income Tax Officer of Calcutta was led to believe that the books were available.

Secondly, on the evidence stated, the assessee was not prevented by sufficient cause from producing the books in Cawnpore.

Thirdly, in our opinion, the jurisdiction of the Income Tax Officer of the area in which the principal place of business is situated is not ousted. The jurisdiction is concurrent. Under s. 64, sub-s. 1, the Income Tax Officer of the principal place of business has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. By sub-s. 4, every Income Tax Officer has also jurisdiction to exercise the powers of an Income Tax Officer with regard to the profits arising in that area.

It is of course understood, and ought to be understood, by the authorities that the Income Tax Officer of the principal place of business will not exercise his powers oppressively, so that persons willing to submit to the requirements of the Income Tax Officer of the particular area in which the branch is situated, should not be deprived of an opportunity of supplying him with all proper materials, but exceptional cases may require exceptional remedies.

We allow the fee of Rs. 150 payable to the Government Advocate. As Mr. L. M. Banerji will no longer be Government Advocate when the certificate will be filed, we authorise it to be filed by his clerk.

Z. K. *Order accordingly.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 120 OF 1921.

May 12, 1924.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Kulwant Sahay.

NAGENDRA NATH GHOSH—PLAINTIFF—APPELLANT

versus

SAMBHU NATH PANDEY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 91, 92—Sale in execution—No saleable interest of judgment-debtor—Suit for recovery of purchase-money, whether maintainable—Auction-purchaser, remedy of.

It is, under the present Code, no longer open to an auction-purchaser to maintain a regular suit for a declaration that the judgment-debtor had no saleable interest in the property which amounts to a declaration that the order confirming the sale was bad and for setting aside the same and for a refund of the purchase-money. [p. 223, col. 1.]

The only remedy of the auction-purchaser is by way of an application under O. XXI, r. 91 of the Code. [*ibid.*]

Ram Sroop v. *Dalpat Rai*, 58 Ind. Cas. 105; 43 A. 60; 18 A. L. J. 905; 2 U. P. L. R. (A.) 318, *Balwant Rangnath* v. *Bala Malu*, 67 Ind. Cas. 360; 46 B. 833; 24 Bom. L. R. 308; (1922) A. I. R. (B.) 205, *Tirumalaisami Naidu* v. *Subramaniam Chettiar*, 45 Ind. Cas. 109; 40 M. 1009, *Juranu Mahamad* v. *Jathi Mahamed*, 46 Ind. Cas. 783; 22 C. W. N. 760 and *Banka Behari Das* v. *Guru Das Dhar*, 80 Ind. Cas. 257; 28 C. W. N. 20; (1924) A. I. R. (C.) 172; 40 C. L. J. 157, relied on.

Asadullah Khan v. *Karm Chand*; 76 Ind. Cas. 605; 4 L. 354; 6 L. L. J. 67; (1924) A. I. R. (L.) 115, dissented from.

Appeal from a decision of the Subordinate Judge, Dhanbad, dated the 28th February 1921.

Mr. *Sharoshi Charan Mitter* (with him Mr. *Baikunth Nath Mitter*), for the Appellant.

Mr. *Susil Madhab Mullick* (with him Mr. *Nagendra Nath Sen*), for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—[His Lordship after setting out the facts of the case proceeded):—In order to decide the point raised in this appeal it is necessary to

examine the law as it now stands after the various changes thereof by the Legislature from time to time in regard to the right of auction-purchasers at execution sales in this behalf.

Regulation VII of 1825 which provided for the first time for the sale of houses, gardens, orchards and small portions of land held exempt from public assessment by the Civil Court instead of through the Collectors, provided, in s. 3 (3), for setting aside the sale if application was made within thirty days of the sale on the ground of material irregularity in the sale. Clause (4) of s. 3 provided that the purchaser at such sale was entitled to receive back the purchase-money on restoring any property delivered to him if the sale was set aside as invalid under cl. (3) or on any account whatsoever. Clause (7) provided that it should be clearly explained to the bidders that nothing was guaranteed to them in the land beyond the rights and interests therein of the individuals answerable for the amount of the decree. It will be noticed that there was no provision in this Regulation for setting aside the sale on the application of the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the property sold, nor did the law provide for a refund of the purchase money to the auction-purchaser on the ground of there being no saleable interest in the judgment-debtor. The auction-purchaser was only entitled to a refund of the purchase-money in case the sale was set aside on the ground of material irregularity and the purchaser was compelled to restore the property delivered to him as a result of setting aside the sale or on any other ground whatever. There was nothing in the law to bar a regular suit by the purchaser.

Then came the C. P. C. (Act VIII of 1859). Section 249 directed that the sale proclamation shall declare that the sale extends only to the right, title and interest of the defendants in the property specified therein. Section 256 provided for application for setting aside sales on the ground of material irregularity in publishing and conducting the sale, if the applicant proved that he had sustained substantial injury by reason of such irregularity. Section 257 empowered the Court to set aside a sale on the ground of material irregularity and substantial injury. Section 258 provided that: "Whenever a sale of immoveable property is set aside the purchaser shall be entitled to receive back his purchase-money with or without interest in such manner as it may appear proper to the Court to direct in each instance." With reference to this s. 258, it was decided by the Courts that a purchaser at a sale in execution of a decree could not recover his purchase-money if it was subsequently found that the judgment-debtor whose property he had purchased had no saleable interest therein, and that s. 258 applied only to cases in which a sale had been set aside for irregularities in publishing and conducting the same [*Dorab Ally Khan* v. *Khajah Mohceooddeen* (1), *Framji Besanji Dustur* v. *Hormasji Pestanji Framji* (2), *Hira Lal* v. *Karim-un-Nisa* (3) and *Ram Narain Singh* v. *Mahtab Bibi* (4)]. The auction-purchaser, under the Act of 1859, purchased at his own risk. All that the Court purported to sell under the distinct provision of s. 249 of the Code was the right, title and interest of the judgment-debtor and if it was subsequently found that the judgment-debor had no interest, the purchaser could not obtain a refund of the purchase-money; there being no guarantee of title, the purchaser took at his peril and if he failed to obtain possession of the property or was dispossessed therefrom he had no remedy at law to get back his money.

Act X of 1877, by which the C. P. C. of 1859 was repealed, contains provisions similar to those in Act XIV of 1882, and it will, therefore, be sufficient to examine the provisions relating to the point under consideration in the Act of 1882.

Section 235 of the Act of 1882 provided that the application for execution of a decree shall be in writing verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain certain particulars set out there in a tabular form. Section 237 provided that when an application is made for the attachment of immoveable property belonging to the judgment-debtor it shall contain at the foot a description of the property sufficient to identify it, and also a speci-

(1) 1 C. 55; 24 W. R. 372; 1 Ind. Dec. (N. S.) 35.
(2) 2 B. 258; 2 Ind. Jur. 643; 1 Ind. Dec. (N. S.) 597.
(3) 2 A. 780; 1 Ind. Dec. (N. S.) 1047.
(4) 2 A. 828; 1 Ind. Dec. (N. S.) 1066.

fication of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same. Section 237 provided that when any property was ordered to be sold by public auction in execution of a decree the Court shall cause a proclamation of the intended sale to be made in the language of such Court, and then it sets out the particulars which the proclamation shall contain. These particulars consist of the description of the property, the revenue assessed upon it, any incumbrance to which the property was subject, the amount for the recovery of which the sale was ordered, and cl. (*e*): "every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property." Section 311 provided that the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the sale on the ground of material irregularity in publishing or conducting the sale; but that no sale was to be set aside on the ground of irregularity unless the applicant proved to the satisfaction of the Court that he had sustained substantial injury by reason of such irregularity. Section 312 provided that if no application such as one contemplated by s. 311, was made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser. If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale; and then the last clause of s. 312 provided:

"No suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made." Section 313 authorized the purchaser at the execution sale to apply to the Court to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein, and the Court was upon such application to make such order as it thought fit. Section 315 provided as follows:

"When a sale of immoveable property is set aside under s. 310 (A) 312 or 313,

or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it,

the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The re-payment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money."

Now, these are the essential provisions relating to the point under consideration in the Code of 1882. Provision was made for the purchaser to apply for setting aside the sale on the ground that the person whose property he had purchased had no saleable interest therein, and if the Court found that the person whose property it had purported to sell had no saleable interest in the property sold and that the purchaser was for that reason deprived of that property, then a declaration was to be made that the purchaser was entitled to receive back his purchase-money from any person to whom it had been paid, and that the re-payment of such purchase-money could be enforced against such person under the rules provided by the Code for execution of a decree for money. Under this Code the Courts had held that a regular suit by the purchaser for a declaration that the judgment-debtor whose property he had purchased had no saleable interest therein and for refund of the purchase-money was not barred by the provisions of s. 315 of the Code. The leading case on the point is the Full Bench decision of the Allahabad High Court in *Muna Singh* v. *Gajadhar Singh* (5). This case was followed in a number of cases in the other Courts [*Kishun Lal* v. *Muhammad Safdar Ali Khan* (6), *Pachayappan* v. *Narayana* (7), *Ram Kumar Shaha* v. *Ram Gour Shaha* (8), *Hari Dayal Singh Roy* v. *Sheikh Samsuddin* (9) and *Nitayanand Roy* v. *Juggat Chandra Guha* (10).]

(5) 5 A. 577; A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491.
(6) 13 A. 383; A. W. N. (1891) 138; 7 Ind. Dec. (N. S.) 244.
(7) 11 M. 269; 12 Ind. Jur. 92 & 381; 4 Ind. Dec. (N. S.) 187.
(8) 2 Ind. Cas. 559; 37 C. 67; 13 C. W. N. 1080; 10 C. L. J. 558.
(9) 5 C. W. N. 240.
(10) 7 C. W. N. 105.

Then came the present C. C. P. (Act V of 1908).

Order XXI, r. 66, of the present Code provides for the proclamation of the intended sale to be made by the Court ordering the sale. Sub-r. (2) of r. 66 contains a provision for notice to be given to the decree-holder and the judgment-debtor before drawing up the sale proclamation, and this is a new provision which is not to be found in the Act of 1882. The particulars required to be specified in the sale proclamation are the same as those under the Act of 1882. Sub-r. (2) provides that every application for an order for sale under this rule should be accompanied by a statement signed and verified containing the matters required by sub-r. (2) to be specified in the sale proclamation, and this provision is also a new provision not to be found in the Code of 1882. This rule provides for a judicial enquiry in order to settle the particulars to be specified in the sale proclamation.

Order XXI, r. 89, provides for setting aside sales on deposit of the decretal amount and compensation of 5 per centum to be paid to the auction-purchaser, if such deposit is made within thirty days of the sale. Rule 90 provides for an application for setting aside a sale on the ground of material irregularity or fraud in publishing or conducting the sale, provided the applicant has sustained substantial injury by reason of such irregularity or fraud. Rule 91 which corresponds with s. 313 of the Code of 1882, runs as follows:

"The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold."

Rule 92 runs thus:

"(1) Where no application is made under r. 89, r. 90 or r. 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:

(2) Where such application is made and allowed, and where, in the case of an application under r. 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale.

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

It is noticeable that whereas s. 312 of the Code of 1882 referred only to an application for setting aside a sale on the ground of irregularity and consequent injury as provided in s. 311 which corresponds with r. 90 of the Code, 1908, r. 92, applies not only to applications referred to in r. 90, but also to those referred to in rr. 89 and 91 and the effect of including applications under r. 91 is that the provision contained in sub-r. (3) and providing that:

"No suit to set aside an order made under this rule shall be brought by any person against whom such order is made," is now made applicable to applications by auction-purchasers unde r. 91 also.

Then r. 93 provides that: "Where a sale of immoveable property is set aside under r. 92, the purchaser shall be entitled to an order for re-payment of his purchase-money with or without interest, as the Court may direct, against any person to whom it has been paid."

It will be noticed that the provision in s. 315 of the Code of 1882 to the effect that:

"When it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it." is omitted, and the provision that:

"the repayment of the purchase-money and of interest allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money" has also been omitted, and, in lieu of the words; "shall be entitled to receive back" in s. 315, r. 93 contains the words: "shall be entitled to an order for re-payment."

Therefore, under the present Code, an auction-purchaser may apply under r. 91 to set aside a sale on the ground that the person whose property was sold had no saleable interest therein; and, if the sale is set aside upon such application he may apply under r. 93 for an order for re-payment of his purchase-money. If his application is disallowed, the Court has under r. 92 to make an order confirming the sale, whereupon the sale becomes absolute; and when an order confirming the sale is made, then under sub-r. (3) of r. 92 no suit can be maintained to set aside that order. To my mind the present C. P. C. makes a material alteration in the provisions of the

Code of 1882, and it is, under the present Code, no longer open to an auction-purchaser to maintain a regular suit for a declaration that the judgment-debtor had no saleable interest in the property which amounts to a declaration that the order confirming the sale was bad and for setting aside the same and for a refund of the purchase-money. Whereas under s. 315 of the Code of 1882 it was optional to enforce re-payment of the purchase-money upon setting aside of a sale by having recourse to the procedure provided for execution of a decree for money, and the auction-purchaser was not limited to that remedy which was not an execlusive remedy but he could, if he so choose, bring a regular suit to enforce payment of the purchase-money, under the present Code no such option is left to the auction-purchaser and his only remedy is by way of an application under O. XXI, r. 91 of the Code.

This view has been held in a number of recent cases of the different High Courts [*Ram Saroop* v. *Dalpat Rai* (11), *Balwant Rangnath* v. *Bala Malu* (12), *Tirumalaisami Naidu* v. *Subramaniam Chettiar* (13), *Juranu Mahamad* v. *Jethi Mahamad* (14), and *Banka Behari Das* v. *Guru Das Dhar* (15).] A contrary view has been taken by a Division Bench of the Lahore High Court in *Asadullah Khan* v. *Karam Chand* (16); but with very great respect to the learned Judges I am unable to agree with them. A comparison of the provisions in the Code of 1908 with those in the previous Codes leaves no doubt in my mind that under this present Code a regular suit is not maintainable. I am, therefore, of opinion that the decision of the learned Subordinate Judge on the point that the suit was not maintainable is correct.

It has been argued by the learned Vakil for the appellant that the provision in the present Code contained in O. XXI, r. 66, as regards the settlement of the sale proclamation, shows that in execution sales held by Court under the present Code there is a warranty of title and that the auction-purchaser, if he is subsequently deprived of the property, will be entitled to maintain a suit on the ground of this warranty. To my mind there is no distinction in the provisions of the present Code from those in the earlier Codes on this point. All that is sold and is proclaimed for sale is the interest of the judgment-debtor in the property advertised for sale. The only innovation in the present Code is that in order to settle the sale proclamation the Court has to make some sort of judicial enquiry; but it has been held that the result of such enquiry made for the purpose of settling the sale proclamations will not operate as a bar to any party in a subsequent proceeding relating to the setting aside of the sale. For instance, it has been held that the valuation of the property proclaimed to be sold, as given in the sale proclamation which is arrived at after a judicial enquiry, can be re-opened in a proceeding for setting aside the sale, and it is open to the judgment-debtor to prove that the value of the property was more than what was stated in the sale proclamation. There is, therefore, no substance in the argument of the learned Vakil that O. XXI, r. 66, has made any such change in the law as regards warranty and the position of an auction-purchaser is, to my mind, no better in this respect under the present Code than what it was under the old Code.

Next, it has to be noticed that assuming that the present suit was maintainable nothing has been shown as to why the sale should be set aside, and how the plaintiff is entitled to recover the purchase-money. It will be remembered that the plaintiff is one of the sub-lessees of the underground rights, he is in possession as such sub-lessee, he has obtained a sale certificate in pursuance of his purchase, and there is no allegation, much less proof, that his title or possession has been disturbed by the purchaser at the previous sale of the 15th of September 1919. Indeed the allegation of the contesting defendants is that the purchaser at previous sale, namely, the defendant No. 10, is merely a *benamidar* for the present plaintiff, and the evidence adduced in the case lends support to such contention. Moreover, the decree in the execution of which the plaintiff made his purchase was a mortgage-decree and the mortgaged property was ordered to

(11) 58 Ind. Cas. 105; 43 A. 60; 18 A. L. J. 905; 2 U. P. L. R. (A.) 318.
(12) 67 Ind. Cas. 360; 46 B. 833; 24 Bom. L. R. 308; (1922) A. I. R. (B.) 205.
(13) 45 Ind. Cas. 109; 40 M. 1009.
(14) 46 Ind. Cas. 783; 22 C. W. N. 760.
(15) 80 Ind. Cas. 257; 28 C. W. N. 20; (1924) A. I. R. (C.) 172; 40 C. L. J. 157.
(16) 76 Ind. Cas. 605; 4 L. 354; 6 L. L. J. 67; (1924) A. I. R. (L.) 115.

be sold therein. The decree in execution of which the defendant No. 10 made his purchase was also a mortgage-decree; but his purchase must be held to be subject to the mortgage in favour of the defendants Nos. 1 to 3, and even if the defendant No. 10 is a real purchaser and not a *benamidar* for the plaintiff he cannot disturb the position of the plaintiff and his purchase was subject to the mortgage decree of the defendants No. 1 to 3. Under these circumstances even if the present suit was maintainable, the plaintiff has made out no case for a refund of the purchase-money.

The result is that the decree of the Subordinate Jude is confirmed and the appeal is dismissed with costs.

Jwala Prasad, J.—I agree.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 547 OF 1923.

March 6, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

BAHADUR—PLAINTIFF—APPELLANT

versus

THE HON'BLE *Raja* MOTI CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 18, 20, 59, 79—Lease, permanent and transferable—Mortgage of tenancy—Mortgage-decree—Sale—Ejectment proceedings by landlord, effect of—Auction-purchaser, rights of—Jurisdiction of Civil Courts.

Where a tenant is entitled to make a mortgage of his land and thus to transfer his interest to a third party, the interest so transferred under the express authority of the *zemindar* should not be allowed to be extinguished unless the person who has acquired that interest has had an opportunity of preventing that extinction. [p. 227, col. 2.]

Section 79 of the Agra Tenancy Act can have no application to the case of an auction-purchaser who never actually or constructively was in possession of the tenancy and who in fact acquired his interest at an auction-purchase subsequent to the ejectment. [p. 228, col. 1.]

Defendant who was the *zemindar* of certain lands granted an agricultural lease of the lands in perpetuity and gave express power to the lessee to transfer his rights. The lessee executed a mortgage of his tenancy, and the mortgagee brought a suit to enforce his mortgage. Almost simultaneously the defendant filed a suit against the lessee for arrears of rent in the Revenue Court and after the mortgagee had obtained a decree for sale enforced the ejectment of the lessee. The tenancy was eventually sold in execution of the mortgage-decree and was purchased by the plaintiff who brought the present suit in the Civil Court for a declaration that the ejectment proceedings carried through in the Revenue Courts by the defendant were null and void and inaffectual as against him:

Held, (1) that the defendant having granted an express right of transfer to his lessee, the mortgage executed by the lessee of his tenancy rights must be deemed to have been executed with the express consent of the defendant; [p. 226, cols. 1 & 2.]

(2) that, therefore, the ejectment of the lessee did not put an end to the mortgagee rights, which subsisted even after the ejectment proceedings and were validily put up for sale in execution of the mortgage-decree and were purchased by the plaintiff; [p. 227, col. 2.]

(3) that s. 79 of the Agra Tenancy Act had no application to the present case inasmuch as the plaintiff was never in possession of the tenancy and had acquired his interest at an auction-purchase subsequent to the ejectment; [p. 228, col. 1.]

(4) that the suit was maintainable in the Civil Court and must be decreed. [*ibid.*]

Second appeal from a decree of the District Judge, Benares, dated the 11th January 1923.

Mr. *Ram Nama Prasad*, for the Appellant.

Mr. *Damodar Das*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for a declaration that certain ejectment proceedings carried through in the Revenue Court were null and avoid and ineffectual as against the right of the plaintiff and that the defendant No. 1, the *zemindar*, had not acquired any right in the said lands as against him. There was a further prayer for a declaration that the proceedings relating to delivery of possession in favour of defendants Nos. 3 to 9 were also not binding on him. There were many pleas taken in the written statement filed by the contesting defendants to which we shall refer later. The Court of first instance dismissed the suit and on appeal that decree has been affirmed by the District Judge.

In order to understand the points in dispute it is necessary to recite briefly the history of this litigation.

It appears that the defendant No. 1 who is a *zemindar* of the village granted two leases in November 1909 in respect of different sets of plots in favour of the defendant No. 2, the terms of which are worthy of note. The lessee was to remain in possession of the plots leased generation after generation on payment of a fixed rent without any right of enhancement. There was a further provision that he would be entitled to transfer the lands by way of sale or mortgage like a fixed rate tenant. It was further provided that if rents were not paid, the *zemindar* would have the right to recover them in the way provided by law

and it was recited that the lessee could apply to the Revenue Court for the mutation of his name as a perpetual lessee (*pattadar dawami*).

Under the power given to him, in 1914 the defendant No. 2, the lessee or tenant made three mortgages of his rights, but all these three mortgages were simple and not usufructuary. On the 17th of June 1919 a suit was instituted by defendants Nos. 10 and 11, two of the mortgagees, against the tenant defendant No. 2 and other subsequent transferees, for sale of the property. A preliminary decree was obtained on the 31st of October 1919 which was followed by a final decree dated the 17th of June 1920. In execution of this decree the interest of the tenant was put up for sale and sold on the 20th of July 1921 and a formal delivery of possession followed on the 31st of August 1921 in favour of the auction-purchaser, the present plaintiff.

Almost simultaneously with these proceedings, it appears that the *zemindar* after the institution of the suit by the mortgagees filed a suit for arrears of rent on the 27th of August 1919 in the Revenue Court against the tenant defendant No. 2. On the 15th of September 1919 he obtained a decree for arrears. In December of that year the *zemindar* applied for ejectment of the defendant tenant under s. 59 of the Tenancy Act. Before the tenant was finally ejected the mortgagees who had by that time already obtained their final decree for sale applied to the Revenue Court for stay of proceedings for ejectment and offered to pay up the arrears. Nevertheless while the application was still pending and was undisposed of, the Court actually ejected the tenant and put the *zemindar* in possession of the lands on the 15th of February 1921. On the 6th of May 1921 the application of the mortgagees was ultimately rejected. Much trouble has arisen because the Revenue Court did not accept the payment by the mortgagees of the arrears of rent and did not grant relief to the tenant after the payment had been made.

Having failed in their attempt to get the ejectment proceedings stayed in the Revenue Court the mortgagees applied to the Civil Court for a personal decree against defendant No. 2 fearing that his rights somehow became extinguished. This application was also rejected. They then proceeded to execute the decree and to put the interest of their mortgagor the tenant to sale. This interest has been sold and purchased by the plaintiff.

The Courts below have taken the view that the mortgage made by the tenant was subject to the right of ejectment by the *zemindar* and that, therefore, as soon as the tenant was duly ejected by the order of the Revenue Court the mortgage was extinguished, and that, therefore, after that date no interest whatever remained in the mortgagor tenant which could have been put up for sale and purchased by the plaintiff. The view of the Courts below, therefore, is that by the auction-purchase the plaintiff has acquired no interest whatsoever and his suit is bound to fail. This is the substantial point which arises in this case. There were questions of the six months' rule of limitation, the plea of a bar under s. 42 of the Specific Relief Act and a few other matters.

As the suit has been dismissed by the lower Appellate Court on the substantial question as to whether the plaintiff acquired any rights by his auction-purchase, it is necessary for us to examine that point first.

Unfortunately no direct authority has been cited before us which would cover this case exactly, that is to say no case has been cited before us which would show whether the result of the ejectment proceedings against the mortgagor tenant is to extinguish the rights of the mortgagee automatically. The learned Vakil for the respondents, however, has relied on certain remarks found towards the close of the judgment in the Full Bench case of *Khiali Ram* v. *Nathu Lal* (1). That, however, was not a case of mortgage of any tenancy but was really a case of sub-letting. Any remarks, therefore, bearing on the rights of a mortgagee are at most *obiter dicta* but of course they are entitled to weight. The learned Judges in order to prevent any mis-understanding or mis-application of their decision thought it necessary to remark that it was obvious that the interest in an occupancy holding of any person to whom an occupancy tenant sub-lets or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding, will determine on the termination of the right of occupancy and can subsist no longer than the right of occupancy subsists. They go on to add that "the rights of the *zemin-*

(1) 15 A. 219; A. W. N. (1893) 125; 7 Ind. Dec. (N. S.) 859 (F. B.).

dar to obtain an enhancement of the rent payable to him or to abtain an ejectment of his occupancy tenant and of those holding under him, cannot be interferred with or lessened by the fact that his occupancy tenant has by a lease, or other form of sub-letting, or by a usufructuary mortgage, to the granting of which the *zemindar* was not *an actively consenting party* sub-let or mortgaged the occupancy holding or any part of it." Over and above the fact that the observations were not necessary for the purpose of that case it is to be noted that they were dealing with the case of a mortgage of an occupancy holding. Furthermore the learned Judges expressly excluded from the operation of the rule laid down by them cases where to the granting of mortgages the *zemindar* was an *actively* consenting party.

In order to see whether the observations made in that case are applicable, we must, in the first instance, examine the true nature of the rights created by the lease. It was first contended before us that the rights created were those of a fixed rate tenant. In this particular case, however, it was clearly a perpetual lease granted to the tenant, the condition of the lease being that there would be no enhancement of rent and that the rights would be inheritable and transferable. In our opinion this was clearly a lease for agricultural purposes granted in perpetuity by the *zemindar* with the express power given to the grantee to transfer his rights. Under s. 20 sub-cl. (3) of the Tenancy Act the interest of a *thekadar* is, subject to the terms of his lease, heritable but not transferable. That clearly implies that if under the express condition of the lease the right is made transferable it would be transferable. We have already mentioned that such an express power was given by the *zemindar*. The tenancy in the present case is, therefore, in the first place distinguishable from the tenancy which was the subject-matter in dispute in the Full Bench case. Under the old law the occupancy holding could be transferred by way of a usufructuary mortgage, but in that case there was no express agreement or consent by the *zemindar*. In the present case the rights of the tenant were not transferable under the law. They became transferable because of the express contract between the *zemindar* and the tenant. It is clear, therefore, that in this case the *zemindar* must be deemed to have been an *actively consenting party* to the mortgages because he gave an express authority to the tenant to make such a mortgage. The observations in the Full Bench case, therefore, cannot be held binding on us when we have to consider the facts of the present case.

We may mention that in the Full Bench case of *Tulshi Ram Sahu* v. *Gur Dayal Singh* (2) a mortgage had been made by a fixed rate tenant after which he was ejected; the *zemindars*, however, instead of claiming absolute possession of the property on the ground that the mortgage had been extinguished, instituted a suit for redemption and were ready and willing to redeem the mortgage. The learned Chief Justice at page 116* remarked that the plaintiffs *zemindars* were clearly entitled to redeem the mortgage held by the respondents if they are not entitled to possession of the holding without redemption but the question whether the plaintiffs are bound to discharge the mortgage itself does not arise, because they are willing and have offered to do so. That case, therefore, left this point altogether open.

It must be conceded that these leases were leases for agricultural purposes and, therefore, under s. 117 of the Transfer of Property Act the provisions of Ch. V of that Act are not applicable. But ordinarily when power is given to a tenant to transfer his land unless we are satisfied that there is some provision in the Tenancy Act which automatically puts an end to a mortgage after ejectment, it would be just and equitable to hold that the mortgage subsists even after such ejectment. The only section on which reliance is placed in order to show that the mortgage is extinguished is s. 18 of the Tenancy Act. Under that section it is provided that a right of occupancy shall be extinguished (*a*) when the tenant dies leaving no heir entitled to inherit it, (*b*) in land from which he has been ejected in execution of a decree or order of a Court, (*c*) in a holding which the tenant has abandoned or surrendered after service of a notice, and (*d*) in land which has been acquired for a public purpose or a work of public utility. It is contended that the provisions of this section are absolute and they necessitate the ex-

(2) 7 Ind. Cas. 231; 33 A. 111; 7 A. L. J. 1011.

*Page of 33 A.—[*Ed.*]

tinction of the right of occupancy when a tenant has been ejected in execution of a decree or order of a Revenue Court.

It is clear that the section cannot be read in that wide and general sense. It has been held in a number of cases by this Court that where a tenant has abandoned or surrendered his holding after having made a mortgage which by law he is entitled to make, the mortgage is not extinguished with the extinction of the right of occupancy, *vide* the cases of *Badri Prasad* v. *Sheodhian* (3), *Birj Kumar Lal* v. *Sheo Kumar Missir* (4) and *Chhiddu* v. *Sheo Mangal Singh* (5). Similarly it has been held at least by the Board of Revenue that when a tenant dies without leaving any heir entitled to inherit and the *zemindar* takes possession of the tenancy he cannot avoid the mortgage and eject the mortgagee without redeeming him, *vide* the cases of *Nand Kishore Pande* v. *Muhammad Hasan* (6) and *Lal Bahadur Rai* v. *Maharaja of Vizianagram* (7). It is, therefore, clear that at least in cases which fall under two sub-clauses of this section it has been held that a mortgage is not necessarily extinguished with the extinction of the occupancy right. Is there then any good ground for holding that the mortgage is extinguished when a case falls under sub-cl. (*b*), that is to say, when the tenant is ejected? In our opinion there is a clear distinction between the extinction of the occupancy right and the extinction of the mortgage. When the *zemindar* has given an express power to the tenant to mortgage his land and a mortgagee takes a mortgage of the land under the assurance that the *zemindar* has authorised it, it seems unjust and inequitable that behind the back of the mortgagee the *zemindar* would be able not only to eject the tenant but also to put an end to the mortgage.

It has been contended that the case of an ejectment stands on a different footing from that of a mere surrender, for it is said that a voluntary surrender involves an idea that a tenant intends to commit a fraud on his mortgagee, whereas ejectment proceedings are the result of an order of a Revenue Court. But when closely examined, the position in the two cases very often may be exactly the same. The tenant voluntarily surrenders the land not only to defraud the mortgagee but sometimes to get rid of his liability to pay rent to the *zemindar* when he finds it to be onerous. On the other hand a person may willingly submit to his ejectment by simply not paying arrears of rent which involves his ejectment. In either case there may or may not be a fraud but on principle it seems to us that there is really no valid distinction. If a tenant is entitled to make a mortgage of his land and thus to transfer his interest in the tenancy to a third party, the interest so transferred under the express authority of the *zemindar* should not be allowed to be extinguished, unless the person who has acquired that interest has had an opportunity to prevent that extinction. This seems to be a just and equitable view which we are bound to uphold unless there is a statutory provision to the contrary. We find nothing in s. 18 which would compel us to hold a contrary opinion.

We are, therefore, of opinion that the ejectment proceedings in the Revenue Court, although they put an end to the tenancy of the defendant No. 2, did not have the necessary effect of destroying the rights and interests of the mortgagees, defendants Nos. 10 and 11. If the interests of the mortgagees, defendants Nos. 10 and 11 subsisted even after the ejectment proceedings, then it is clear that those rights were capable of being put up for sale and purchased by the present plaintiff. The result of the purchase made by the present plaintiff would then be that he would be entitled to occupy the land and hold it on till he is redeemed by the *zemindar* who must be deemed to have stepped into the shoes of the tenant mortgagor whom he has ejected. The view of the Courts below then that nothing passed to the plaintiff by the auction-purchase is not sound and must be overruled.

There were however a number of other defences to the case. One of those was that the present plaintiff was at best a tenant and the defendant *zemindar* having obtained possession more than six months before the suit, the claim was barred by time and was not maintainable in the Civil Court. Reliance has been placed on s. 79 of the Tenancy Act under which a tenant ejected otherwise than in due course

(3) 18 A. 354; A. W. N. (1896) 109; 8 Ind. Dec. (N. S.) 943.
(4) 29 Ind. Cas. 215; 13 A. L. J. 649; 37 A. 444 (F. B.).
(5) 39 Ind. Cas. 585; 15 A. L. J. 44; 39 A. 186.
(6) 29 Ind. Cas. 555.
(7) 33 Ind. Cas. 556.

of law has a remedy against the *zemindar*. It has, however, been held by a Bench of this Court in the case of the *Collector of Benares* v. *Shiam Das* (8) that s. 79 can have no application to the case of an auction purchaser who never actually or constructively was in possession of the tenancy and who in fact acquired his interest at an auction-purchase subsequent to the ejectment. The present plaintiff is not a tenant who has been *ejected by the zemindar*. In fact the person who was ejected was person whose interest he had purchased at the time when ejectment took place. Neither the plaintiff nor the mortgagee had any *locus standi* to obtain actual possession before the ejectment. They were neither in actual nor in constructive possession. The person in possession was the tenant. The present suit, therefore, is maintainable in the Civil Court and would not be barred by the six months' rule of limitation. This was the view clearly expressed in the above mentioned case with which we agree.

The next point raised in the Court below was that defendants Nos. 3 to 9 had already obtained a decree to the effect that two-thirds of the lands sold and purchased by the plaintiff were not liable to be sold because they never belonged to the mortgagor tenant but belonged to these contesting defendants. This point has not been clearly disposed of by the learned Judge. The determination of this question will depend on a number of circumstances which we have not considered. It is, therefore, proper that this matter should be left open for disposal after remand.

There is a third point raised that the present claim was barred by the provisions of s. 42 of the Specific Relief Act. The learned Judge has not dismissed the suit on that technical ground. It might have been possible to allow the plaintiff to recover possession on payment of necessary Court-fees, but that of course would be a matter entirely in the discretion of the lower Appellate Court. As we have said the suit was not dismissed on that technical ground and, therefore, we do not propose to say anything on that matter.

We accordingly allow the appeal and setting aside the decree of the lower Appellate Court and the finding that nothing passed to the plaintiff by the auction-purchase, remand the case to that Court for disposal according to law. The costs of this appeal will abide the event and will include fees in this Court on the higher scale.

Z. K.

Appeal allowed; Case remanded.

(8) 28 Ind. Cas. 302; 13 A. L. J. 329.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 95 OF 1922.

December 10, 1924.

Present:—Mr. Justice Spencer and Mr. Justice Odgers.

KORAPALU HENGSU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOWRI HENGSU AND OTHERS—DEFENDANTS Nos. 1, 7 AND 8—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 69, 72, 90—Execution of decree—Sale—Inadequacy of price, whether ground for setting aside sale—Procedure.

The fact that the price fetched at a Court-sale has since been found to be inadequate is not by itself a ground for setting aside the sale. The inadequacy of the price must be occasioned by some irregularity before the Court will interfere with the sale. [p. 230, col. 1.]

Where a Court is dissatisfied with the highest bid at an auction-sale, it might refuse to knock the property down for that amount and might under O. XXI, r. 69, C. P. C., adjourn the sale so as to enable a higher bid to be offered. But once the sale is concluded the Court is not justified in refusing to confirm it for the mere reason that the price appears to be inadequate and that certain mortgagees who have obtained decrees with respect to the same property but who did not take any steps to secure a proper price at the auction cannot get their decrees satisfied. [*ibid.*]

Appeal against an order of the Court of the Subordinate Judge, South Kanara, dated the 6th October 1921, in R. E. A. Nos. 71 and 72 of 1921, in R. E. P. No. 48 of 1921, in O. S. No. 22 of 1919.

This appeal came on for hearing on the 13th of September 1923, the Court delivered the following

JUDGMENT.—The Subordinate Judge appears to be in error in stating that no notice of the decree-holder's application for leave to bid was given to the other parties. We have referred to the original notices and to their printed translations from which it appears that the fact of permission to bid having been applied for was notified to the defendants in the notices of the sale proclamation and that these notices were returned served.

We must, therefore, call for a fresh find-

ing on this point, and at the same time the Judge will find whether the price obtained at the sale was grossly inadequate and whether the defendants sustained substantial loss in consequence of the want of notice.

Either side may adduce fresh evidence on either point. Finding will be submitted within six weeks, and ten days will be allowed for objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of South Kanara submitted the following

FINDINGS.—1. I am directed by the High Court to submit findings on the following points:—

(1) Whether notice of the decree-holder's application for leave to bid was served on the other parties?

(2) Whether the price obtained at the sale was grossly inadequate?

(3) Whether the defendants sustained substantial loss in consequence of the want of notice)?

2. Point No. 1.—* * * * *

3. I find that all the parties concerned had notice of the execution petitioners' prayer for permission to bid at the sale.

4. 2nd and 3rd points.—* * * *

7. I am, however, of opinion that the properties were sold for an inadequete price and as defendants Nos. 7 and 8 who have to get under their decree a sum almost equal to that due to the present execution petitioners and who have no other means of realizing it the properties in question being all that the judgment-debtors own, they, at any rate, have sustained substantial loss by the sale in question.

I find points Nos. 2 and 3 accordingly.

Mr. *B. Sitaram Rao*, for the Appellants.

Messrs. *C. V. Ananta Krishna* and *A. T. Coelho*, for the Respondents.

This appeal coming on for final hearing on the 5th of December 1924, after the return of the finding of the lower Court upon the issue referred by this Court for trial and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Spencer, J.—The appellants had a mortgage-decree with costs for Rs. 5,578 in O. S. No. 22 of 1919 against the 1st respondent and seven others on the file of the Sub-Court of South Kanara. The respondents Nos. 2 and 3 had another mortgage-decree for Rs. 5,208 in O. S. No. 23 of 1919 against the same properties. The appellants brought the properties concerned in this appeal to sale and obtained permission of the Court to bid at the auction on condition that they deposited the sale price in Court. The sale commenced on 18th July 1921 with an upset price of Rs 3,250 and was continued on the following days and was knocked down on 20th July 1921 to the appellants' Pleader for Rs. 6,000. The Subordinate Judge afterwards set aside the sale on the application of respondents Nos. 2 and 3 for the reason that the respondents did not get notice of the appellants' application of 18th July 1921 to be allowed to bid. It was pointed out to him that the respondents did get notices in March 1921 of the sale proclamation to which was attached a prayer that the execution creditors should be allowed to bid at the auction. These notices were served on respondents Nos. 2 and 3 by affixture, and one of them (2nd respondent) was present at the auction and only abstained from bidding because he had been unable to raise enough money. The Subordinate Judge upon our requisition has now returned findings (1) that all the parties concerned had notice of the execution petitioners' application to bid, (2) that the properties were sold for an inadequate price, as they are worth not less than Rs. 12,000. Both sides have filed memoranda of objections to the findings, but as there is no substance in any of the objections, we must accept the findings. The facts of this case are unlike those in *Thathu Naick* v. *Kondu Reddi* (1) where fraud and breach of the conditions, upon which the decree-holder was allowed to bid for the property, were found, the decree-holder having bid in a false name in order to hide the fact that the bid was below the minimum amount for which the Court had permitted him to bid.

Here the decree-holders applied for leave to bid in February when they took out execution, and again in March when notices were issued to all the parties for settling the terms of the sale proclamation, and lastly a third time in July at the time of sale. The decree-holders in O. S. No. 23 of 1919 (respondents Nos. 2 and 3) certainly

(1) 1 Ind. Cas. 221; 32 M. 242; 5 M. L. T. 248.

had notice of the appellants' application under O. XXI, r. 72, on the second of these occasions, and they must have been aware of it on the third occasion as one of them was present at the auction and they are related to each other. An affidavit such as is required by r. 153 of the Civil Rules of Practice was attached to the last application for leave to bid. It does not appear that this formality was complied with on the earlier occasions.

Mr. Ananatakrishna Ayyar for the respondents argued that this amounted to an irregularity. I am unable to treat it as such. The rules only require that the other parties should be given notice of the application. The affidavit is for the Court's information, and the decree-holder is not required by the rules to supply the other parties with a copy of it. Thus it has not been made out that there was any irregularity in publishing or conducting the sale.

The fact that the price has been since found to be inadequate is not by itself a ground for setting aside the sale—*vide Lakshmi* v. *Krishnabhat* (2). The inadequacy of the price must be occasioned by some irregularity before the Courts will interfere with the sale—*vide Macnaghten* v. *Mahabir Pershad Singh* (3). The final bid of Rs. 6,000 was more than the appellants' mortgage-decree amount and far above the upset price. If the Court had thought fit, it might have ordered the sale to start at a higher figure than Rs. 3,250. If he was dissatisfied with the bid of Rs. 6,000, the Subordinate Judge might have refused to knock the property down for that amount and might have, under O. XXI, r. 69, adjourned the sale in the hope of higher bids being offered next day. Having once concluded the sale the Subordinate Judge was not justified in refusing to confirm it for the mere reasons that the price appears to be inadequate and that other decree-holders having a mortgage over the same property, who did not take any steps at the time to secure that a proper price was realized, have now very little chance of getting their decree satisfied. The appeal is allowed with costs in this Court, and the sale is ordered to be confirmed.

Odgers, J.—I do not find any irregularity in the conduct of the sale in this case. It is further not proved that the alleged inadequacy of price was due to any irregularity which is a condition precedent to setting aside a sale on this ground. *Cf.* P. C. in *Macnaghten* v. *Mahabir Pershad Singh* (3). Further, the sale of property to a purchaser at a price which subsequently appears too low is not a "material irregularity." I am not satisfied that in the present case the price realized was grossly inadequate as found by the Subordinate Court, but accepting that finding it is no ground for setting aside the sale unless as pointed out by the Privy Council the inadequacy was caused by an irregularity. Inadequacy alone is no ground for setting aside the sale either on the application of a decree-holder or judgment-debtor nor a ground for refusal to confirm by the Court [*Lakshmi* v. *Krishnabhat* (2).]

V. N. V. *Appeal allowed.*
Z. K.

(2) 8 B. 424; 9 Ind. Jur. 40; 4 Ind. Dec. (N. S.) 658.
(3) 9 C. 656; 11 C. L. R. 449; 10 I. A. 25; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 242 OF 1921.
June 4, 1925.
Present:—Mr. Justice Harrison and Mr. Justice Jai Lal.

BIJ RAJ, PROPRIETOR OF THE FIRM OF JAI NARAIN-BIJ RAJ OF DELHI—PLAINTIFFS—APPELLANT

versus

THE FIRM GOBIND PERSHAD-WAZIR SINGH OF DELHI—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 107—Sale of goods—Appropriation not communicated to buyer before repudiation—Re-sale—Liability of buyer.

Once a party has by his conduct given an indication of his intention not to abide by a contract, his neglect or refusal to reply to the communications of the other party to the contract thereafter cannot amount to an indication of his desire to keep the contract alive. On the other hand, an express or implied assent to an appropriation of goods towards the contract is an indication of such an intention. [p. 232, col. 1.]

An appropriation of goods towards the contract and the communication of such appropriation to the purchaser should both take place before there has been repudiation or breach of the contract by either party. No assent by the purchaser can be implied by his mere silence after he has actually broken the contract. If appropriation and communication thereof do not take place before there has been repudiation or breach of the contract by the purchaser

the property in the goods does not vest in the purchaser and the seller is not entitled to re-sell the goods and claim the deficiency on the re-sale from the purchaser. [*ibid.*]

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 26th October 1920.

Lala *Moti Sagar*, R. B., and *Lala Jagan Nath Bhandari*, for the Appellant.

Bakhshi *Tek Chand* and Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiff Bij Raj, proprietor of the Firm of Jai Narain-Bij Raj of Delhi, instituted this suit on the 3rd of July 1918 against the Firm of Gobind Pershad-Wazir Singh of Delhi claiming Rs. 6,161-9-9 damages and interest thereon alleged to be suffered on re-sale of goods, which the defendants had agreed to purchase but of which they failed to take delivery on the due date. In the plaint appropriation of the goods by the plaintiff with the assent of the defendants is not alleged, but it was on this basis that plaintiff's case was developed in the lower Court and in this.

The defendants pleaded *inter alia* that there had been no ascertainment of the goods for the contract in dispute and that they never gave their consent for any such ascertainment. After the issues had been framed the plaintiff asked for leave to amend his plaint to include, in the alternative a claim for damages on the ordinary basis of the difference between the contract rate and the market rate at the date of the alleged breach. This prayer was refused by the learned Senior Subordinate Judge on the 25th of November 1918. On the 27th of July 1920, however, his successor was of opinion that the plaintiff should have been allowed to amend his plaint as prayed for. He consequently gave the plaintiff an opportunity to claim damages irrespective of the sale. The plaintiff, however, chose to take his stand on the re-sale and on the action as originally brought. The learned Senior Subordinate Judge has held that there was no appropriation with the assent express or implied of the purchasers and consequently that the re-sale of the goods was not binding on the defendants. He consequently dismissed the plaintiff's suit but left the parties to bear their own costs. The plaintiff has presented an appeal and the defendants have filed cross-objections so far as the order as to costs is concerned.

The contract in suit was entered into on the 30th of September 1917 and was for sale of 40 bales of coloured calico to be delivered to the purchasers on the 16th of November 1917 on payment of the purchase price. The purchasers not having tendered the purchase price on the 16th of November the plaintiff wrote to them on that day in the following terms:—"Please acknowledge receipt of the *parcha* of the goods noted hereinafter and take delivery of those goods at once the due date of which is the 16th of November 1917." He then recited numbers of the bales and the price thereof. This letter was received by the defendants on the 17th of November 1917 but no reply was sent by them. On the 22nd November 1917 the plaintiff again wrote to the defendants pointing out that the performance of the contract was long overdue and that if the goods were not removed within ten days they would be sold and that the defendants would be responsible for the consequences. No reply was sent to this notice also. On the 29th January 1918 a firm of auctioneers under instructions from the plaintiff advertised the bales for sale on account of and at the risk of the defendants. On the 5th of February 1918 they in their turn wrote to the plaintiff repudiating any liability under the proposed sale and asserting that the goods did not belong to them and that they were not in any way responsible for the same as no goods were ascertained for the contract with their consent. The sale took place on the 10th of February and succeeding days.

The question that we have to decide is whether at the date of the sale the property in the bales sold had passed to the purchasers, or in other words whether there had been a valid appropriation of these particular bales to the contract in suit with the assent express or implied of the defendants. The learned Counsel for the respondents contended that an appropriation and assent thereto must both take place before the date fixed for the completion of the sale. The learned Counsel for the appellant on the other hand argued that both appropriation and assent thereto may validly take place after such date. In this case appropriation took place on the 16th of November, the date fixed for the delivery of the goods and was communicated to the purchasers the next day The plaintiff's case is that failure by the purchasers to send a reply to the letter received by them on the 17th of November

amounted to an implied assent. In our opinion such appropriation and communication thereof to the purchaser should both take place before there has been repudiation or breach of the contract by either party. No assent by the purchaser can be implied by his mere silence after he has actually broken the contract. The position is self-contradictory. Once a party has by his conduct given an indication of his intention not to abide by his contract, his neglect or refusal to reply to the communications of the other party to the contract, thereafter cannot amount to an indication of his desire to keep the conract alive. An express or implied assent to an appropriation is an indication of such an intention. Counsel for the appellant relied upon *Pignataro* v. *Gilory* (1). The facts of that case, however, are clearly distinguishable from the one before us. In that case the parties entered into a contract of sale and purchase on the 12th of February 1918 and delivery was to take place in fourteen days. On the 26th of February the sellers wrote to the purchasers pointing out that the fourteen days were to expire on the following day. In reply to the purchasers sent a cheque on the 27th of February and asked for a delivery order. The sellers appropriated the goods on the 28th of February and communicated such appropriation to the other party on the same day. No reply was sent by the purchasers to the sellers. The learned Judges, remarked as follows: "As he (the purchaser) chose merely to say nothing for a whole month in response to an appropriation made in consequence of his own letter we think that comes to precisely the same thing as if he had written saying he would remove them and did not. The learned Judge said that there was no evidence of an appropriation with the assent of the buyer. He could only say this if he was looking for an express assent. As the assent may be implied we think that there was not only evidence of it but that it is the only inference possible upon the facts." Now it would be observed that by sending the cheque on the 27th of February the purchaser clearly indicated his intention of taking delivery after the date agreed upon and, therefore, the appropriation by the seller was made at a time when by mutual consent of the parties the contract was still subsisting. That is not by any means the case here. Here the defendants had actually broken the contract on the 16th of November 1917 as expressly stated in paras. 2 and 5 of the plaint. That being so an implied assent by the defendants cannot be held to have been proved by their not replying to the plaintiff's letter communicating the alleged appropriation of the goods to the contract. In our opinion, therefore, the conclusion of the learned Senior Subordinate Judge is correct that the property in the goods sold had not passed to defendants and, therefore, the plaintiff was not entitled to claim damages on the basis of short proceeds.

The next question is whether in this case the plaintiff should be given his remedy of damages on the ordinary basis of difference between the contract rate and market rate at the date of the breach. In our opinion on the suit as framed the plaintiff is not entitled to this relief and especially so as an opportunity was given to him to amend his plaint and was declined by him.

In view of our conclusion on the question of appropriation and assent it is not necessary to decide the other points involved in the case.

We consider that the order of the learned Senior Subordinate Judge as to costs was fair. The result is that both the appeal and the cross-objections are dismissed with costs.

Z. K. *Appeal dismissed.*

(1) (1919) 1 K. B. 459; 88 L. J. K. B. 726; 120 L. T. 480; 24 Com. Cas. 174; 63 S. J. 265; 35 T. L. R. 191.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 60 OF 1924.

April 22, 1925.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

PIRTHINATH—JUDGMENT-DEBTOR—APPELLANT

versus

RAM SARAN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Oral application for arrest of judgment-debtor, whether step-in-aid of execution—Limitation, extension of.

A decree-holder applied by a written application

for execution of his decree by arrest of the judgment-debtor. A notice was issued to the judgment-debtor under r. 22 and also under r. 37 of O. XXI of the C. P. C. The judgment-debtor appeared and put in an objection which was dismissed. The Court, however, overlooked the fact that it had also to decide the question of the arrest of the judgment-debtor. The decree-holder thereupon made an oral application to the Court for the arrest of the judgment-debtor and the Court thereupon directed the issue of a warrant of arrest:

Held, that the oral application made by the decree-holder was an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to extend limitation.

Raj Dalip Singh v. *Thakur Durga Bakhsh*, Select Case No. 185, *Juggi Lal* v. *Ganga Prasad*, 10 Ind. Cas. 182; 14 O. C. 124, *Manna Lal* v. *Sardar Singh*, 43 Ind. Cas. 342; 20 O. C. 332 and *Malukchand Ratanchand* v. *Bechar Nath*, 25 B. 639; 3 Bom. L. R. 275, referred to.

Appeal against an order of the First Additional Subordinate Judge, Gonda, dated the 26th May 1924, confirming that of the Munsif, Gonda, dated the 12th September 1923, Lucknow, dated the 21st April 1925.

Mr. *S. N. Roy*, for the Appellant.

Mr. *G. N. Misra*, for the Respondents.

JUDGMENT.—This appeal has been referred to a Bench of two Judges by one of the learned Judges of this Court. The question for decision is whether the proceedings of 27th July 1920 in execution of a decree save limitation. On 21st June 1920 the decree-holder applied by a written application for execution by arrest of the judgment-debtor. A notice was issued under O. XXI, r. 22 because the application was made more than a year after the date of the decree and also under r. 37 to enable the judgment-debtor to show cause why he should not be committed to the civil prison. This order was passed on the 23rd of June and the notices were returnable on the 27th of July. The order on the order-sheet under date 27th July 1920 is as follows:—

"Parties are present in person. The judgment-debtor put in an objection under s. 47 of the C. P. C. and this objection was dismissed. The decree-holder desires the issue of a warrant of arrest, therefore, it is ordered that on receipt of process-fee and costs of arrest a warrant of arrest may be issued to the judgment-debtor returnable on 19th August 1920."

It is clear from this order that there was an oral application made for the arrest of the judgment-debtor by the decree-holder on 27th July 1920. The Executing Court appears to have forgotten that on 27th July the notice relating to arrest was to be determined. Its attention was only confined to the objection made by the judgment-debtor which had nothing to do with the question of his arrest. Presumably the judgment-debtor cleared out of Court and the decree-holder had to make an application to get the judgment-debtor arrested. If no such application had been made on 27th July the Court would have forgotten all about the matter and no orders would have been passed with respect to the judgment-debtor's arrest. On behalf of the appellant they have quoted before us the following rulings:—

Raj Dalip Singh v. *Thakur Durga Bakhsh* (1), *Juggi Lal* v. *Ganga Prasad* (2), *Manna Lal* v. *Sardar Singh* (3), *Malukchand Ratanchand* v. *Bechar Nath* (4).

We have examined those cases and in every one of them the Court came to the conclusion that there was no application oral or written to the proper Court to take some step-in-aid of execution of the decree. In the case reported as *Juggi Lal* v. *Ganga Prasad* (2) the learned Judge took special care to note that no fresh application was made on 29th April when the decree-holder's agent merely appeared to support the application for arrest and in the language of the Court pressed it. For this reason the learned Judge was unable to hold that there was an application to the Court on 29th April to take a step-in-aid of execution. In the case reported as *Manna Lal* v. *Sardar Singh* (3), the learned Judge said at page 333*, last para:—

"I may say at once that from the record it does not appear that anything more was done on the 30th January 1914 than depositing in Court of the process-fees by the decree-holder. The record itself does not set out that any application, oral or otherwise, was made to the Court asking the Court to take any step-in-aid of execution".

The learned Judge does go beyond the facts of the case and holds that where there is an application or request made to the Court, by way of jogging the Court's memory or repeating a prayer which had already been made, it should not be considered to be an application to the Court to take steps-in-aid of execution. We are not prepared to go to that length. Under

(1) Select Case No. 185
(2) 10 Ind. Cas. 182; 14 O. C. 124.
(3) 43 Ind. Cas. 342; 20 O. C. 332.
(4) 25 B. 639; 3 Bom. L. R. 275.

*Page of 20 O. C.—[*Ed.*]

the law we have only to inquire whether there was an oral or written application or not to the proper Court to take some step-in-aid of execution. If in the present case the decree-holder had merely been present to press his former application and the Court had passed an order of arrest as a determination of the former application, we would have held that there was no application to take a step-in-aid of execution and that limitation was not saved on 27th July 1920. In the present case, as we have pointed out, there was an oral application and such an application was necessary because the Court had forgotten that it had to decide the question whether the judgment-debtor should be arrested or not. There was the necessity for an oral application on behalf of the decree holder to put the Court in action and such an application was made on 27th July 1920.

In the Full Bench case of the Bombay High Court also the learned Chief Justice who delivered the judgment of the Full Bench pointed out that admittedly there was no written application in connection with the payment of diet money and that there was no trace of any oral application which was pleaded at the Bar. The learned Judge conceded that the application leading upto the order for execution comes within the 179th Article. His objection was that the payment of diet money had not a similar operation for the purpose of limitation that to hold otherwise would be to place a premium on dilatoriness.

We hold that the oral application of the decree-holder on 27th July 1920 was one which saved limitation and dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 411 OF 1924.
March 27, 1925.
Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.
Sheikh AMIR HAIDER AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
ALI AHMAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Suit by minor—Consent of next friend to sale before institution of suit, effect of.

The consent given to a sale by the paternal uncle of a Muhammadan minor who is entitled to pre-empt the sale, does not deprive the minor of his right to enforce pre-emption. It is immaterial that the suit to enforce the right on behalf of the minor is brought by the uncle who had consented to the sale. [p. 234, col. 2; p. 235, col. 1.]

Second appeal from a decree of the District Judge, Furrukhabad, dated the 13th December 1923.

Dr. *K. N. Katju*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This is a somewhat peculiar case. The suit was a suit for pre-emption and was brought by two persons, Sheikh Amir Haider and Ahmad Raza. Sheikh Amir Haider was the uncle of Ahmad Raza, who, in the plaint was described as being a minor 7 years old.

The person who sold the property was a lady named *Musammat* Nawis-un-nissa, who was the step-sister of Sheikh Amir Haidar, the first plaintiff.

The purchasers were the defendants Nos. 1 and 2.

The Court of first instance decreed pre-emption on payment of a sum of Rs. 650.

The lower Court has dismissed the suit entirely.

The reason why the lower Court has dismissed the suit is this. In the Trial Court it was asserted by the purchasers that the negotiations for sale had taken place through the first plaintiff, Sheikh Amir Haidar, who had consented to the sale both on his own behalf and on behalf of his minor nephew, Ahmad Raza.

The Subordinate Judge who tried the suit did not believe this evidence and held that consent was not proved and consequently he gave a decree for pre-emption. The lower Appellate Court, however, does find that the first plaintiff Sheikh Amir Haidar did consent to the sale and consequently he had no right to maintain the suit for pre-emption.

We are bound by the finding of fact of the lower Appellate Court, but the question still remains whether, if it is taken that Amir Haider consented to the sale, the right of the minor to pre-empt has been lost. The argument before us is that Sheikh Amir Haidar had no power to bind the infant by his consent. It has been pointed out that Amir Haider was the paternal uncle of the minor and as such was not a guardian under the Muhammadan Law, nor is he a testamentary guardian, nor has he been appointed a guardian by the Court. In

fact, so far as the Muhammadan Law is concerned, he has no status of a guardian as regards the minor Amir Haidar, and so the argument is that the only finding being that Amir Haidar consented for himself and purported to consent on behalf of the minor, the minor cannot be bound and was entitled to a decree for pre-emption. On the other hand it is argued that inasmuch as Amir Haider was allowed to bring this suit for himself and as the next friend of the minor, the minor should be held bound by the act of Amir Haider. That reasoning does not appeal to us. It seems to us that if Ahmad Raza is entitled to a right of pre-emption, as is admittedly the case, then it must be shown that something in law was done which would be a bar to Ahmad Raza seeking pre-emption in this case. The bar which is held up against him is the consent given by his uncle, and if that consent is not valid in law, then we think it cannot be pleaded as a bar to Ahmad Raza's right to have pre-emption.

We hold, therefore, that nothing is shown to stop the claim for pre-emption being enforced on behalf of the second plaintiff, the minor Ahmad Raza, and we think that he was entitled to a decree accordingly. We, therefore, allow this appeal, set aside the decree of the Court below and give the minor Ahmad Raza a decree for pre-emption on payment of Rs. 650. We allow a period of two months for payment of this sum. If the money is deposited into Court within this period then the plaintiff will be entitled to his costs here and hitherto including in this Court fees on the higher scale. If the plaintiff fails to deposit the money within the time so limited then his suit will stand dismissed with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 57-B OF 1922.

November 14, 1924.

Present:—Mr. Kinkhede, A. J. C.

DATTU—DEFENDANT—APPELLANT

versus

BHAUSINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 10, O. XLI—Appeal in name of minor after attaining majority—Mistake bona fide—*Procedure—Amendment—Guardian* ad litem, *appointment of, effect of.*

If a suit or appeal is presented by a next friend in the name of a minor under a *bona fide* mistake that he is still a minor when the suit or appeal is filed, the suit or appeal is not liable to be dismissed but the plaint or appeal should be allowed to be amended in order to show the plaintiff or appellant as major by striking out the name of the next friend. [p. 237, col. 2.]

The appointment of a guardian *ad litem* once made enures for the whole *lis* in all its ramifications and continues to subsist, whether in the Court of first instance or in the Court of Appeal, unless the guardian takes the necessary steps to have himself discharged from the position which has been put upon him by the Court. [p. 238, col. 2.]

The law gives a large latitude to a litigant who has recently attained majority in the matter of admitting within time an appeal in which he was described as a minor even after he had attained majority. An inadvertent commission to sign a power-of-attorney given to an agent is an irregularity which is cured by subsequent signing. [p. 238, col. 2; p. 239, col. 1.]

Appeal against a decision of the Additional District Judge, Akola, in Civil Appeal No. 146 of 1921, dated the 26th November 1921.

Mr. *A. V. Khare*, for the Appellant.

Mr. *G. G. Hatvalne*, for the Respondents.

ORDER.—The suit out of which this second appeal arises was filed by the plaintiffs in the Court of the Munsif No. 2, Akola, on 14th July 1919, against the present appellant as defendant No. 3 and some other defendants. The plaint describe defendant No. 3 as a minor aged 14 and living under the guardianship of his grandmother *Musammat* Gangu, widow of Khandu Kunbi. She was duly appointed a guardian *ad litem* by an order dated 20th September 1919.

The plaintiffs' suit was dismissed by the First Court on 30th September 1920. They, therefore, on 16th November 1920, filed an appeal against the dismissal. The memorandum of appeal also described the defendant No. 3 as a minor represented by his guardian Gangu. After several adjournments the appeal was heard by Mr. Pathak, Additional District Judge, Akola, on 5th October 1921. The judgment, however, was not delivered until 26th November 1921. The appeal was allowed and the claim decreed against defendant No. 3. The decree of the Appellate Court continues to describe defendant No. 3 as a minor represented by his guardian *ad litem Musammat* Gangu. As a matter of fact it is now admitted before me that *Musammat* Gangu was then dead, her death having taken place on 5th November 1921. Strictly

speaking under O. XXXII, r. 11 (2), C. P. C., where the guardian for the suit dies during the pendency of the suit it is prescribed that the Court *shall* appoint a new guardian in his place. Apparently the fact of the death of the guardian *ad litem* after the hearing of the appeal and before the judgment was actually delivered, was not brought to the notice of the Court of Appeal by the appellants before it. I need not decide at this stage the question as to whether this omission to appoint a new guardian was a mere irregularity or made the decree a nullity as against the present appellant, because that is a question which deals with the merits of the case.

On 7th January 1922 one Ramchandra, a separated cousin of the appellant's father, purporting to act as his guardian under the impression that he was still a minor gave power-of-attorney to Messrs. Khare and Rajwade with instructions to file the appeal against the decree of the lower Appellate Court dated 16th November 1921. In the power-of-attorney as also in the memorandum of appeal the appellant's name is described as Dattu son of Bhakiji Kunbi a minor by guardian Ramchandra Krishnaji Patel. It appears, nobody cared to take notice of the description of Dattu as given in the decree, where the name of Gangu was put down as guardian. A word of explanation was wanted in the memorandum of appeal as to why a person other than the guardian named in the decree was filing the appeal on behalf of the appellant Dattu. It is also noticeble that the fact of the appellant having attained majority on 12th December 1921 had not attracted the attention of anybody concerned with the filing of the appeal. In fact the appeal appears to have been filed under the impression that nothing happened after the hearing of the appeal, in the Additional District Judge's Court, was concluded, and the case was adjourned for judgment, which called for any change in the description of the appellant. The right of appeal which vested in him was exercised for him and in his name by Ramchandra describing himself as his guardian, whereas he having attained majority was *sui juris* and stood in need of no guardian to act for him.

The very first hearing of the appeal in this Court was fixed for 19th March 1923 by an order dated 26th January 1922. The case was, however, adjourned on that day to 24th March 1924, and again adjourned to 29th July 1924, when it came before me for hearing. The appeal was adjourned twice on my file from 29th July 1924 to 18th August 1924 and then to 28th August 1924. On 28th August 1924 an application was made stating that certain documents were relevant to the decision of the case and should be allowed to be filed. It was incidentally mentioned in that petition that the appellant has recently attained majority, and that the case under appeal was being defended for him by his guardian Ramchandra Krishnaji, it was suggested that the documents were not filed through oversight (presumably of the said guardian). The real state of fact was not even discovered as I will show presently. Thinking that Ramchandra was appointed a guardian by an order of the Court I passed an order that since Dattu had attained majority he should first apply for the discharge of the guardian Ramchandra before he could be allowed to figure as major in this appeal. The case, was, therefore, adjourned to 18th September 1924 to await the application. An affidavit was made by Dattu on 17th September 1924 to the effect that his birth took place in 1902 and that he has since attained majority. On 18th September 1924 an application was made purporting to be one under O. XXXII, r. 12 (2), C. P. C., stating that the appellant elects to proceed with the suit (appeal), and it prayed that the appellant may be given leave to proceed with the appeal in his own name, after discharging the guardian *ad litem*. As Ramchandra did not attend on 18th September 1924 the case was taken up on 23rd October 1924, and it was in the course of Ramchandra's statement that the real facts came to light and it was found that several inaccurate statements had been made in connection with these proceedings. The exact date of birth of the appellant was not given in the former affidavit but only the year 1902 was mentioned. Information had by that time been procured as regards the correct date of birth of the appellant which was 12th December 1903.

Ramchandra also formally applied to be discharged from his position of a so-called guardian, and the appellant also applied for permission to amend his declaration as to the year of his birth and expressed willingness "to a lopt the whole of the litigation as had been conducted upto date

on his behalf in the lower Courts and here.....and to proceed with this appeal from this stage onwards and undertook to be bound by the result of this appeal." Dattu's personal attendance was ordered for 3rd November 1924 for a statement and for a revised affidavit by himself. He has appeared in person and his statement and revised affidavit have been respectively taken down, and filed. The respondents oppose the application of the appellant for leave to go on with the appeal in his own name, although they have not objected to the discharge of Ramchandra, and want that the appeal should be dismissed without any amendment of the name of the appellant, and in any case their costs should be saddled on Ramchandra. They admit the correctness of the date of death of *Musammat* Gangu. They, however, contend that the appellant himself was aware as far back as 1922 that the date of his birth was 12th December 1903, and that he alone was, therefore, competent to lodge the second appeal on 23rd January 1922, and that in any case Ramchandra's act of filing the appeal was an unauthorised act, and that as the appellant neglected for so long a time to apply for prosecuting the appeal in his own name, there was no valid ground for excusing this long delay.

The appellant explained that though he was aware of his own majority in July 1922 he did not know that he had to formally apply for the discharge of the guardian or next friend, and that his omission may be treated as *bona fide* and may be excused and the leave applied for granted. The parties were given opportunity to argue this point specifically and I have heard the arguments on both sides.

As already observed above, I am not at present concerned with the validity or otherwise of the decree as passed. All I am concerned with is whether the appellant Dattu should be granted leave to continue the appeal in his own name, as though he himself and not Ramchandra had instituted it. That Ramchandra's action of filing the appeal was *bona fide* and in the interest of Dattu is sufficiently clear as Dattu affirms it and says he adopts the litigation in all its entirety and wants permission to prosecute the appeal. He has agreed to abide by the consequences of the appeal. I am prepared to presume that Ramchandra *bona fide* believed, that Dattu was minor on 7th January 1922 when he gave instructions to Pleaders to file this appeal. If he had then the least idea that the appellant Dattu had attained majority on 12th December 1921, there was nothing to prevent him to get Dattu to sign the power-of-attorney. No one even seriously thought of the exact date of the appellant's birth until the personal appearance of Ramchandra was ordered by this Court. Even the appellant Dattu had a vague idea that he was born in 1902. The plaintiffs-respondents had described him in the plaint dated 14th July 1919, as being 14 only. According to that description he would not have completed his 18 years until July 1923, 18 months after the filing of the appeal, if it be assumed that he had completed his 14 years on or before 14th July 1919. The fact that the defendant Dattu had attained majority just a few days say 1 month 11 days before the second appeal was filed, was not expected to be within the personal knowledge of anybody. His mother who could have given some idea about it at least approximately, had died on 5th November 1921. Under these circumstances I do not think I could regard the action of Ramchandra as that of a mere volunteer. He was the person to whom the defendant Dattu looked in those days for management of his affairs and estate and also litigation. He was thus the *de facto* manager of the estate though strictly speaking he was not the *de jure* guardian of Dattu inasmuch as the latter had become technically major on 12th December 1921. Under these circumstanes I think the principle underlying the case of *Taqui Jan* v. *Obaidulla* (1) and *Shanmuga Chetty* v. *Narayana Aiyar* (2) ought to be applied in this case. In the latter case the plaintiff-appellant was described as a minor in the plaint though he had in fact attained majority four days or so before the suit was instituted. His guardian mother apparently made a *bona fide* mistake that he was still a minor when she filed the suit on his behalf as his next friend. The District Judge was asked for leave to amend the plaint by striking off the description of the plaintiff as a minor suing through his next friend, etc. The District Judge following *Sheorania* v. *Bharat Singh* (3) dismissed the suit. The Madras High

(1) 21 C. 866; 10 Ind. Dec. (N. S.) 1209.
(2) 41 Ind. Cas. 510; 40 M. 743.
(3) 20 A. 90; A. W. N. (1897) 203; 9 Ind. Dec. (N. S.) 417.

Court on appeal by the plaintiff, following the precedent of the Calcutta High Court in *Taqui Jan* v. *Obaidulla* (1) held that the proper procedure to adopt in a case of this nature was to return the plaint so that it might be presented after making the necessary amendments.

They also observed with advertence to r. 10 of O. I, C. P. C., that if under its authority the right person could be substituted where a suit is instituted in the name of a wrong person, much more could the plaint be allowed to be amended where the suit is instituted by the right person, but through another person purporting to act as his next friend.

The same analogy ought to be applicable to the memorandum of appeal filed in this case. The appellant named in the appeal is Dattu and not Ramchandra. Even if Ramchandra's name had been inserted as the appellant the description would have been allowed to be struck out and the name of the right person, *i. e.*, Dattu, allowed to be substituted in his place on the strength of O. I, r. 10 read with O. XLI, relating to appeals. It is needless to point out that under the C. P. C. a suit may be instituted against a minor by the plaintiff for such appointment. The institution of the suit is complete, and saves limitation. The passing of an order of appointment of the minor's guardian at a subsequent date does not affect the date of the institution of the suit against him. Its further progress only is impeded so to say because it depends upon the appointment of a suitable guardian. *Cf. Kham Karan* v. *Har Dayal* (4) and *Bhagwan Dayal* v. *Param Sukh Das* (5). This is why the circular instruction issued by this Court under O. XXXII, C. P. C., cast upon the plaintiff the primary duty of taking steps for the appointment of a guardian *ad litem* for a minor defendant, and where an officer of the Court is appointed a guardian for the suit, they contemplate that the Court can suspend the plaintiff's right to proceed with the suit until the funds necessary for the minor's defence are furnished to such guardian *ad litem*.

The omission of the name of the guardian *ad litem* from the description of a minor respondent in an appeal was treated in *Rup Chand* v. *Dasodha* (6) as being of no consequence, inasmuch as the appeal was held to be within time even though the guardian was made a party after the limitation had expired. It was pointed out that the guardian *ad litem* is not a party to a suit or appeal. He is merely named in the record as the person appointed by the Court to look after the interest of the minor party. The same principle was recognized in *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee* (7). In this case the guardian *ad litem* appointed by the Court was dead on 5th November 1921, and the appointment had thus come to an end. Had the minor not attained majority soon aftar *i.e.*, on 12th December 1921, it would have become necessary to appoint a new guardian as prescribed by O. XXXII, r. 12 (2), C. P. C. Had the guardian not been dead and the minor had not attained majority and still Ramchandra had instituted the appeal purporting to act on behalf of Dattu the matter would have been different because the appointment once made must enure for the whole *lis* in all its ramifications and so long as it subsists whether in the Court of first instance or in the Court of Appeal unless guardian takes the necessary steps to have himself discharged from that position which has been put upon him by the Court—see *Jwala Dei* v. *Pirbhu* (8) and *Kisni* v. *Ghulaji* (9). The appointment here *ipso* came to an end either because of the death of the guardian on 5th November 1921, or because of the minor Dattu having, unknown to Ramchandra, attained majority on 12th December 1921. Ramchandra was the only person who could act on his behalf on the supposition that he was then a minor. No question of limitation, therefore, at all arises in connection with the institution of this appeal nor of any extension of the time under s. 5 of the Indian Limitation Act. If it at all arises, I think that there is sufficient cause for admitting it, *i. e.*, appeal even now as within time in view of the large latitude which the law gives to a minor litigant, who, has attained majority, in matters such

(4) 4 A. 37; A. W. N. (1881) 129; 6 Ind. Jur. 382; 2 Ind. Dec. (N. S.) 667.

(5) 36 Ind. Cas. 366; 39 A. 8 at pp. 10, 11, 12; 14 A. L. J. 818.

(6) 30 A. 55; A. W. N. (1907) 290; 3 M. L. T. 58; 4 A. L. J. 343.

(7) 32 C. 582; 9 C. W. N. 421.

(8) 14 A. 35; A. W. N. (1891) 192; 7 Ind. Dec. (N. S.) 394.

(9) 1 N. L. R. 128.

as these. Compare *Cursandas Natha* v. *Ladkavahoo* (10) and *Bhagwan Dayal* v. *Param Sukh Das* (5).

I, therefore, hold that the appellant Dattu should be given leave to prosecute the appeal filed in his name by Ramchandra, by himself. I accordingly direct that the description "minor through guardian Ramchandra Krishnaji" be struck out as superfluous. He has already given fresh power-of-attorney to his Pleaders as a major appellant. The appellant Dattu's omission to sign the power-of-attorney given to the Pleaders on 7th January 1922 is similar in character to that of an agent who inadvertently failed to sign a power-of-attorney, given by him to a Pleader in the case out of which the Civil Revision No. 130 of 1924, (*Ramkrishna* v. *Motilal*) decided by Kotval, A. J. C., on 16th August 1924 arose, and it was there remarked that the omission was an irregularity which was cured by the subsequent signing. Here also it is cured by Dattu giving a fresh power-of-attorney as major appellant to his Pleaders.

No doubt there was delay in moving this Court to pass this order, but as it will be seen from the order-sheets that several adjournments had taken place and that nobody's attention was attracted to this question until recently in July 1924. The delay is thus excusable and I condone it.

The appellant must himself bear costs of those proceedings. I award Rs. 20 as respondents' Pleader's fee plus Rs. 20 as costs of respondents' expenses of journey for attending additional hearings which these proceedings entailed, irrespective of the result of the appeal on its merits.

G. R. D. *Order accordingly.*

Z. K.

(10) 20 B. 104; 10 Ind. Dec. (N. S.) 628.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS No. 123 OF 1925.

March 16, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Sulaiman.

In the matter of BEGG SUTHERLAND AND CO. LD. OF CAWNPORE.

Income Tax Act (XI of 1922), ss. 2 (14), 55—Registration of firm—Super-tax, liability to pay—Registered firm converted into Company—Company, whether liable to pay super-tax in respect of period before conversion.

Under s. 2, sub-s. (14) of the Income Tax Act a firm may take advantage of the provision therein contained for registering itself, and where it does so, by operation of s. 55 of the Act, the firm, being from that moment a registered firm, is not liable for super-tax. In other words, where a registered firm exists, it is not liable for super-tax on the whole of its profits made as such firm but the individual partners are liable for super-tax if they would be liable for such super-tax as individuals. On the other hand if the firm is an unregistered firm then it is directly chargeable with super-tax if it makes profits at a rate sufficient to create a liability for super-tax and in that event the partners are not chargeable for super-tax if their firm has already paid it. [p. 239, col. 2; p. 240, col. 1.]

There is nothing in the Income Tax Act which would justify the Income Tax Authorities in imposing on a limited liability Company, which is the successor of a registered firm, during the first year of assessment after the conversion of the firm into the Company, a liability in respect of its predecessor firm which its predecessor would not have been liable to pay if it had continued in existence without any conversion. [p. 241, col. 1.]

Reference under s. 66 (1) of the Indian Income Tax Act, 1922.

Mr. *J. M. Banerji*, for the Company.

Mr. *L. M. Banerji*, for the Crown.

JUDGMENT.—This is a reference, or a case stated, under s. 66 of the Indian Income Tax Act of 1922 by the Commissioner of Income Tax for the opinion of the High Court. The facts are very clearly stated in the case and are as follows:—

The business of the well-known Firm of Begg Sutherland and Co. Cawnpore, was carried on by a firm which consisted of certain individual partners under the title of Messrs. Begg Sutherland and Co. up to the 30th of April 1922. On that date that firm, as a commercial or legal person, ceased to exist, and was succeeded by a private limited Company which was known by the same name with the addition of the word "limited". The agreement is not exhibited, but the point taken at one time on behalf of the Company by one of its representatives before the Commissioner, that the Company was not the successor of the firm within the meaning of s. 26 of the Income Tax Act has not been argued by Mr. J. M. Banerji on behalf of the Company, and, therefore, it must be taken to be admitted that it is no doubt because it could not be reasonably contested. In a Company of this prosperity making profits at a rate which involved them in liability for super-tax, some slight complications necessarily arose by reason of the conversion, for this reason. Under s. 2, sub-s. (14) a firm may take advantage of a provision therein contained for registering itself, and where

it does so, by operation of s. 55, the firm, being from that moment a registered firm, is not liable for super-tax. In other words where a registered firm exists, it is not liable for super-tax on the whole of its profits made as such firm, but the individual partners are liable for super-tax, if they would be liable for such super-tax as individuals. On the other hand if the firm is an unregistered firm, then it is directly chargeable with super-tax if it makes profits at a rate sufficient to create liability for super-tax, and in that event the partners are not chargeable for super-tax if their firm has already paid it. The date of the conversion of the firm into a Company, and the date of their annual accounting did not correspond with the dates adopted as the *termini* of the financial year by the Income Tax Authorities. There was, therefore, a broken period to be dealt with and a broken continuity to be dealt after the date of the conversion, and for reasons best known to themselves, by mutual consent, the Income Tax Authorities and the new Company dealt with the profits in respect of which income-tax was payable from 1921 to 1922 and from 1922 to 1923 in one year of assessment, namely, 1923-1924. There was no attempt to shirk any liability, or to dispute the facts as they were. In the result the profits which the firm had in fact made during the last year of its existence were assessed at the maximum rate for income-tax. In addition the individual partners were, in accordance with the law, which we have just described, assessed to super-tax on their shares of the profits, the firm as a registered one, being exempt from super-tax. In addition, for the first eleven months of the existence of the Company which brought the assessment up to the 31st of March 1923, thereby making the Company's accounting year coterminous with the financial year of the Income Tax Authorities the new Company was assessed in income-tax and also charged super-tax at the rate payable by a Company. It is not contended on the part of the Income Tax Authorities that in the ordinary use of language, unless there is some special provision in the Income Tax Act by which they are caught, the new Company and the old firm had not discharged in every way their legal liability, or what might be supposed to be their legal liability up to 31st March 1923. But the case raises the further question whether the Company is to be assessed in respect of the last year of existence of the firm, not merely on what was undoubtedly payable by law by the Company on the profits which the firm had made and on which it would have been assessed if it had continued to exist as a firm, but whether it is not also liable to be treated as a super-tax paying person, because although its predecessor was not a super-tax paying person, it itself is by the express language of the Act, and must be treated as what it is, even in respect of profits made anterior to its existence. We can only say that the proposition is sufficiently startling to cause surprise and to lead one to look for language absolutely unambiguous and positive in its terms to create a special liability of that sort, which it would be unlikely that any Legislature would intend to impose if it really understood what it was doing. The only argument submitted to us by the Government Advocate on behalf of the Income Tax Authorities, is suggested by s. 26. But it certainly cannot be said that s. 26 contains any express provision upon the point, and the answer to the argument on behalf of the Income Tex Commissioner really is that the conversion of the firm into the Company does not in any way affect the profits made by the firm before the conversioner, or the legal liability to income-tax which already existed before the conversion. All that the conversion effects is to cause the Company to step into the shoes of the defunct firm as assessee for the period of assessment, but it goes without saving, and is recognised throughout the scheme contained in the Act, that the liability to assessment is by not conclusive as to the chargeability in respect of the period for which such assessment is made. To make the matter clear—if it is desirable further to do so—it is only necessary to point out that s. 26 provides that where any change in the ownership of business is made, the assessment shall be made on the person at the time of making the assessment. But the assessment has to relate to periodical profits made as defined in the Act, and s. 3 provides that income-tax shall be charged for any year in respect of all profits of the previous year of every firm. What, therefore, was to be assessed amongst other things upon the new Company after the conversion in pursuance of the arrangements comes to, to which we have already referred, were the profits, and the income-tax payable thereon as provided by law, of the year

previous to the conversion. These profits admittedly did not include a super-tax, and there is nothing in the Act which would justify the Income Tax Authorities in imposing on a successor during the first year of assessment after the conversion a liability in respect of the predecessor which its predecessor would not have been liable to pay if it had continued in existence without any conversion.

Our answer, therefore, to the first question is that the profits for the period 1st May 1921 to 30th April 1922 are to be assessed as profits of a firm but the Company is to be called upon to pay the amount which we understand they have done.

To the second question to avoid ambiguity we would say that there is nothing in the Income Tax Act of 1922 which makes a new Company liable to pay super-tax in respect of a year for which its predecessor was not liable for super-tax.

We think that this is a case which required careful handling and that the maximum fees should be payable on either side. We, therefore, direct the Government to pay Rs. 200 the costs of the other side, and we certify that that is a reasonable amount for the Government Advocate.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 96 OF 1923.

August 19, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Reilly.

N. M. RAYULU IYER, NAGASAMI IYER & CO., REPRESENTED BY N. M. NAGASWAMI IYER—PLAINTIFFS—APPELLANTS

versus

THIRUKONDA M. KUPPU IYER AND SONS BY ONE OF ITS PARTNERS M. K. RAMIER—DEFENDANTS—RESPONDENTS.

Contract—Sale of goods—Goods, tender of, in two consignments—Acceptance of portion of one consignment—Goods not of contract description—Non-inspection and non-acceptance of rest—Damages, suit for, maintainability of.

In August 1918, the plaintiffs agreed to sell defendants at Madura 50 bales, each of 20 bundles, of double deer yarn from out of bales already ordered by the plaintiffs from a Bombay firm. No time was fixed for performance of the contract. Plaintiffs gave notice one month later that 20 bales were ready and another month thereafter that the remaining 30 bales were ready for delivery. Defendants took delivery of 10 bales under the first consignment but did not take delivery of or even inspect the rest. The defendants contended that the 10 bales accepted by them were not of the contract description. In a suit for damages by plaintiffs for non-acceptance of the 40 bales:

Held, (1) that assuming that the 10 bales were not of the contract description, the remaining bales which were not even inspected could not be presumed not to be of the contract description; [p. 246, col. 2.]

(2) that as no time had been fixed for the delivery of the bales by plaintiffs, if defendants had inspected these 40 bales and had then found and intimated plaintiffs that they were not of the contract description, they would have had time to supply other bales in place of those rejected; [p. 247, col. 1.]

(3) that the defendants were, therefore, guilty of breach of contract for which plaintiffs were entitled to damages. [p. 246, col. 2.]

Taylor v. *Oakes Roncoroni & Co.*, (1922) 127 L. T. 267; 27 Com. Cas. 261; 66 S. J. 556; 38 T. L. R. 517, relied on.

British & Beningtons Ltd. v. *N. W. Cachar Tea Co.*, (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265, *De Medina* v. *Norman*, (1842) 9 M. & W. 820 at p. 827; 2 Dowl (N. S.) 239; 11 L. J. Ex. 320; 152 E. R. 347; 60 R. R. 912 and *Jones* v. *Barkley*, (1781) 2 Doug. 684 at p. 694; 99 E. R. 434, considered.

Appeal against a decree of the Court of the First Additional Subordinate Judge, Madura, in O. S. No. 22 of 1920.

Mr. *A. Krishnaswamy Iyer*, for the Appellants.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit for damages for non-acceptance of goods agreed to be sold to defendants by plaintiffs. The Subordinate Judge dismissed the suit. The plaintiffs appeal.

The plaintiffs and defendants are merchants of Madura dealing in yarn and cloth. On 20th August 1918, Ex. A was executed for the purchase of 50 bales (each of 20 bundles) of "double deer yarn (Palukka)" at Rs. 21 per bundle, the defendants being represented by broker K. M. Nagaswami Iyer. Exhibit I is the corresponding entry in defendants' *chitta* of the same date. Rs.100 was paid as earnest-money and Rs. 25 was to be paid as advance for each bale. Exhibit B is the letter of plaintiffs dated 24th August 1918 acknowledging the receipt of Rs. 1,250 as advances and promising to intimate the arrival of the bales from Bombay. It shows that the bales contracted for were out of the bales ordered for by the plaintiffs' Bombay firm from the dyeing factory at Pedlad.

The plaintiffs got Pedlad yarn from

Bombay in September 1918. On the 23rd September, by Ex. C, plaintiffs gave intimation to defendants that they had 20 bales ready for delivery out of those contracted for in August. Answer No. 2 to the interrogatories served on the plaintiffs shows that 50 bales arrived in Bombay on 14th August and they arrived in Madras in September, 30 bales on 18th and 20 bales on 22nd September. The defendants waited for sometime and took delivery of 5 of the bales on 5th October and another 5 of the bales on 14th October. The plaintiffs gave notice by Ex. D dated 21st October 1918 that the remaining 30 bales (according to the contract Ex. A) were ready for delivery. The defendants did nothing. By Ex. E, dated 7th January 1919 the plaintiffs gave notice that if the balance of 40 bales were not received, they would be sold at defendants' risk. There was no reply from the defendants. The plaintiffs alleging that the goods have been sold on 9th March 1919, and after a further notice dated 27th March 1919 (Ex. F) filed the present suit on August 6th.

From the above history of the case, it is clear that the defendants' attitude was one of silence. The reason for this was obviously the continuously falling market which was conceded and assumed by both parties in the argument before us. The defendants must be regarded as having broken the contract without giving any reason for the breach.

In the written statement, their plea, is that, after the goods were accepted on 5th October 1918 and 14th October 1918 some of the said bales were opened and it was found "that the packets are not those of 10 lbs., weight which the parties agreed to supply to the defendants. Nor is the yarn of 20 counts. They are of 8½ lbs., weight "....."That matter was reported by the defendants to the plaintiffs on 17th October 1918 and the contract was cancelled". These sentences, I have quoted, practically constitute the whole defence. It is clear from this that, so far as the balance of 10 bales offered by Ex. C and not accepted and the 30 bales offered by Ex. D, there is no other defence except the cancellation of the contract. But, at the time of the first hearing, the defendants raised only the third issue, *viz.*, whether the goods tendered were not of the description in the agreement dated 4th August 1918 and no issue was raised about cancellation of the contract by mutual consent.

To prove their plea on the 3rd issue the defendants produced one of the bundles out of the bales supplied to them and this was tested by an expert to whom it was sent by the Court. He examined 12 skeins (1 skein=120 yards; 1 hank=7 skeins=840 yards. A bundle contains 10 packets. A packet weighs 1 lb. The number of hanks in a packet determines the count. If there are 20 hanks in a packet so that the weight of hank is 1 lb. by 20 and the weight of a skein is 1000 grains by 20 or 50 grains the count of the yarn is 20. If the skein weighs less, the count is higher). The expert found in the present case that the average of the weight of the skeins examined by him is 40.8 grains and the count is, therefore, 24·4. When we remember that a bale consists of 20 bundles, or 200 packets or (according to the average of the expert) 4,880 hanks or 34,160 skeins, it is difficult to regard an examination of 12 skeins as a test of 34160 skeins. If a bale is of the right kind of yarn of No. 20 count, it ought to contain 4,000 hanks or 28,000 skeins. Even if one may assume that the bale out of which the 12 skeins examined by the expert is all of yarn of an average 24.4 count, it is difficult to assume that the other nine bales, contained yarn of the same average count. Even the 12 skeins examined by expert show considerable variety ranging from 23.2 to 25.5.

We are not dealing with the 10 bales accepted and paid for by the defendants. We are informed as to those, a separate suit has been filed by the defendants for breach of warranty.

But as to the other 40 bales, the Subordinate Judge having regard to the fact that the 10 bales actually delivered did not contain yarn of No. 20 count and seeing that plaintiffs have not produced samples of packets from the 40 bales, held that the plaintiffs have not proved that the 40 bales answered to the description in the contract and found the issue against the plaintiffs. He also held that there is no proof that the goods were from Pedlad factory. As to this, it is enough to observe that no such plea was raised in the written statement even as to the 10 bales delivered and the only complaint made related to the count and weight.

On these facts the plaintiffs' Vakil first contended that the goods tendered in pursuance of Ex. C complied with the terms of the contract. He relied on the evidence of P. W. No. 2 and D. W.s Nos 2 and 3 and sought to draw the following inferences:—That the Pedlad factory was only turning out one kind of orange dyed yarn marked count 20, a bundle of which is marked as weighing 10 lbs. That, as a matter of fact, its count, is not exactly 20 but over it. That, for all practical purposes counts from 20 to 25 are regarded as the same by the people who deal in them. That, the subject of the contract before us is really not yarn of exactly 20 counts or bundles of 10 lbs., but what the Pedlad factory was turning out with labels of 20 counts and 10 lbs. I have a strong suspicion that this contention of the appellants is probably true, but unfortunately the pleadings have not been framed on such a basis. As soon as the defendants pleaded that the goods delivered on 5th and 14th October did not answer to the description in the contract, the plaint must have been suitably amended or the issues should have been made to cover what the plaintiffs now suggest. This was not done. Another difficulty is that the evidence is far too meagre to justify findings in favour of the appellants. The point raised by them require that more persons engaged in the trade should be examined to prove the trade usage. Incidentally, I am also constrained to observe that evidence is not recorded so as to make the evidence intelligible. For instance, I would refer, to P. W. No. 2. His master sells count No. 20. The packet goes by the name of 10 lbs. packet. There is no other goods of that denomination." Now seeing that a packet of count 20 must weigh 10 lbs., the words 'goes by the name of' are meaningless. Nor can there be other goods of that denomination. What was meant was: 'A yarn marked "count 20" whether it is really that count or not is the only thing available in the market and there is no other; if we find it actually to be count 24.4 this does not matter. This is all that is known as count 20 and 10 lbs. weight.' This meaning is not brought out in the deposition. Similar sentences in the evidence of D. W. No. 1 and D. W. No. 3 are similarly recorded. But, as I said on the pleadings and the meagre evidence, it is not possible to record the finding the appellants require. One can only hope that he will gain by this experience in the other case.

The next question is: whether the defendants by their breach in not taking delivery of the other 10 bales (relating to Ex. C.) after accepting the first 10 bales and not caring to respond to the offer in Ex. D., have committed such a breach of the contract as to amount to a waiver of all conditions precedent binding on the plaintiffs. The appellants rely on *Braithwaite* v. *Foreign Hardwood Co., Ltd.* (1). In that case there was a repudiation by the defendants on October, 5, long before the goods arrived. The Bill of Lading arrived on October 30, and the plaintiffs not accepting the repudiation by the defendants, (dated 5th October) tendered two Bills of Lading to the defendants who refused to accept it or pay for the rosewood comprised in it. The goods arrived on November 9, and were sold by the plaintiffs, as against the defendants. Collins, M. R. said with reference to the second repudiation at page 551*: "In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them....The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make. We must in such a case look to see whether, at the time of each alleged breach, each side was ready and willing to perform the conditions of the contract which it lay upon them to perform, and there was clearly a breach by the defendants, for they had by their own act absolved the plaintiff from the performance of the conditions of the contract." Mathew, L. J., said at page 554*: "But they repudiated the whole contract, and by so doing clearly absolved the plaintiff from the per-

(1) (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 21 T. L. R. 413; 10 Com. Cas. 189; 10 Asp. M. C. 52.

*Pages of (1905) 2 K. B.—[*Ed.*]

formance of conditions precedent which in the ordinary course he would have been obliged to perform." Cozens Hardy, L. J., agreed. Mr. Anantakrishna Iyer who appeared for the defendants contended that *Braithwaite's case* (1) cannot apply for two reasons: (1) In that case there was an express repudiation on 5th October, and at or about October 30th. The anticipating breach of 5th October is the crux of that case; (2) the case was also disapproved by the House of Lords. As to the first point, the distinction sought somewhat resembles the distinction sought to be made out in *Taylor* v. *Oakes Roncoroni & Co.* (2), Bankes, L. J says at page 271*: "But Mr. Merriman seeks to distinguish this case,...by endeavouring to convince us that a distinction must be drawn where the repudiation consists of a curt and impolite disclaimer of the existence of a contract and a very polite statement that, under circumstances over which the buyer has no control, he is unable to take the goods." Mr. Ananthakrishna Iyer's distinction is not between 'Impolite' and 'polite' repudiation but between "express" and 'Implied' repudiation. The implied repudiation by silence resembles a 'polite' repudiation. But it stands on the same footing as an express repudiation. The second point raised by him requires more careful consideration. It is clear that, according to Collins, M. R. the contract was kept alive upto October 30th by the plaintiff's non-acceptance of the earlier repudiation and the waiver of the conditions precedent is the result of the latter act. Mathews, L. J., seems to be of the same opinion though his view is not very explicit. In *Taylor* v. *Oakes, Roncoroni Co.* (2) Greaves, J., seems to have felt some difficulty as to the application of *Braithwaite's case* (1). His view seems to be that, if specific goods were actually tendered on the second occasion and were not substantially of the kind contracted for, the defendants i *Braithwaite's case* (1) would not have been liable. For this view, he relies on *Ridgway* v. *Hungerford Market Co.* (3) and *Boston Deep See Fishing Co.* v. *Ansell* (4) which are cases of master and servant and thinks that the principle applies equally to a contract for the sale of goods. He gets over the difficulty by explaining that, in *Braithwaite's case* (1,) the second offer by plaintiffs, was not an actual tender of the goods but a mere offer to tender them and, therefore the offer is not an actual breach of contract. One may observe here that the second offer is of the actual Bills of Lading relating to certain specific goods on the "*Spheriod*" and the goods were not only ascertained but were afterwards identified and their nature known. I confess that the difficulties in understanding *Braithwaite's case* (1) are not solved by Greer, J.'s explanation of it. On appeal Scrutton, L. J., and Atkin, L. J., refused to be drawn by Greer, J., into a discussion of *Braithwaite's case* (1). They were of opinion that, on the facts of the case before them, the point did not arise. In that case, by letters which passed between the parties in December, the defendants stopped delivery of the balance of the goods and refused to accept them. There was neither tender of specific goods nor tender of a Bill of Lading relating to actual specific goods, the nature of which was afterwards known. Such a repudiation was held to be, 'anticipatory.' Bankes, L. J., said: "It seems to me, after the decision in *Braithwaite's case* (1) which binds this Court, that where there has been a repudiation by way of anticipatory breach, etc." His view seems to be that the second repudiation in *Braithwaite's case* (1) is also an anticipatory breach, and he agreed with Greer, J.'s view —a point into which, the other Lord Justices refused to be drawn. According to them on the facts it was a clearer case than *Braithwaite's case* (1) and that was enough. In my opinion, the present case is an *a fortiori* case and the difficulties in understanding *Barithwaite's case* (1), need not affect it. It is, in my opinion, on all fours with the facts of *Taylor* v. *Oakes, Roncoroni Co.* (2).

The next case I need discuss is *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Co.*(5). Only Lord Atkinson and Lord Sumner delivered judgments. Lords Buckmaster and Carson agreed with Lord Summer. Lord Wrenbury merely concurred. On the disposal of the case before them, there was no difference of opinion. It was only about the proper interpretation of *Braithwaite's case* (1) that Lord Sumner thought some criticism had to be made. Lord

(2) (1922) 127 L. T. 267; 27 Com. Cas. 261; 66 S. J. 556; 38 T. L. R. 517.

(3) (1835) 3 Ad. & E. 171; 4 N. & M. 797; 1 H. & W. 244; 4 L. J. K. B. 157; 111 E. R. 378; 42 R. R. 352.

(4) (1888) 39 Ch. D. 339; 59 L. T. 345.

*Page of (1922) 127 L. T.—[*Ed.*]

(5) (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265.

Atkinson after pointing out that "readiness" and "willingness" includes the capacity to perform (citing Lord Abinger in *De Medina* v. *Norman* (6) proceeds to cite Lord Mansfield in *Jones* v. *Barkley* (7) and Lord Campbell in *Cort* v. *Ambergate, etc., Railway Co.* (8) for the position that the condition of "readiness and willingness" is satisfied by the offer of the plaintiffs to perform. The latter case is of a case of "Railway chairs" which were not actually made but which presumably could be made at short notice. He then refers to *Braithwaite's case* (1) and quotes Collin's M. R.'s opinion with approval. Lord Mansfield's sentence in the case of *Jones* v. *Barkley* (7) was then quoted: "The party must show he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further." Lord Sumner after remarking at page 70* that the decision in *Braithwaite's case* (1) is not quite easy to understand and that his re-collection of it is not as clear as Scrutton, L. J.'s (both appeared in the case) says at page 71.* "Further more it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right." This sentence shows that, far from disagreeing with *Braithwaite's case* (1), Lord Sumner applies its principle and does not go, in favour of the defendants even as far as Greer, J., in the Law Times case. The only reservation he makes is. "If the sellers had become wholly and finally disabled from performing essential terms of a contract altogether," at the time of breach, such a fact is open to the defendant in defending a suit for damages, though he did not state it at the time of the repudiation and this is all that he could have meant when earlier he said "If he had repudiated, giving no reason at all, I suppose all reasons and defences in the action, partial or complete, would be open to him." He then adds, "what he says is of course very material upon the question whether he means to repudiate at all, and, if so, how far, and how much, and on the question in what respects he waives the performance of conditions still performable in futurs or dispenses the opposite party from performing his own obligations any further" (page 72)*.

In my opinion Lord Sumner has not dissented from *Braithwaite's case* (1) and the last case is good law. The present case is a clearer case. There is no evidence to show the nature of the goods in the 10 bales (offered by Ex. C. but not received by the defendants), and in the 30 bales (offered by Ex. D) I cannot assume in favour of the defendants that the yarn in these bales is of 24 counts only. The only reason for such an assumption is that no other yarn (orange dyed at Pedlad) exists—an assumption I refused to make at an earlier stage of the case in favour of the appellant. I must assume that Pedlad Factory can supply all counts of yarn (orange dyed) and it does not follow from the fact that the 10 bales accepted on 5th and 14th October are of 24 count that the other bales which have never been identified since could be only of 24 count and 30 bales offered by Ex. D would also turn out to be of 24 count. It follows that plaintiffs were always not only willing to perform the contract but if, at any time, the goods they delivered turned out not to be of the correct kind could have set it right. All conditions were waived by the defendants by their repudiation. In this case, there is no evidence to support any suggestion that the plaintiffs were totally unable and disabled to perform the contract altogether.

It follows that plaintiffs are entitled to a decree for damages in respect of the 40 bales.

On the terms of Ex. B the dates of breach were 23rd September 1918 (for the 10 bales) and 21st October 1918 (for the 30 bales) and it is not open to the plaintiffs to argue that the breach was at a later date. On the 23rd the price was Rs. 19 per bundle. We have nothing to do with the results of the re-sale in March. It follows that plaintiffs are entitled to a decree for 200 × 2 *plus* 600 × 5-14-0, *i. e.*, Rs. 3,925 *minus* Rs. 1,000 (given as advance), *i. e.*, Rs. 2,925 with the subsequent interest at 6 per cent. up to this date and 6 per cent. on the aggregate amount from this date to the date of payment, getting and paying proportionate costs throughout.

Reilly, J.—It is admitted that the contract with which we are concerned in this

(6) (1842) 9 M. & W. 820 at p. 827; 2 Dowl (N. S.) 239; 11 L. J. Ex. 320; 152 E. R. 347; 60 R. R. 912.
(7) (1781) 2 Doug. 684 at p. 694; 99 E. R. 434.
(8) (1851) 17 Q. B. 127 at pp. 143; 144; 20 L. J. Q. B. 460; 15 Jur. 877; 117 E. R. 1229; 85 R. R. 369.

*Pages of (1923) A. C.—[*Ed.*].

case was made on 20th August 1918 and was to the effect that plaintiffs should supply to defendants at Madura 50 bales of 20 count yarn from the Pedlad factory, each bale to contain 20 bundles and each bundle to weigh 10 lbs., and that defendants should take delivery of the bales on payment at the rate of Rs. 21 a bundle, that is Rs. 420 a bale. Defendants pleaded that one of the terms of the contract was that the 50 bales should be delivered within a month from the date of the contract. An issue was framed on that plea but was not pressed by defendants at the trial. The Subordinate Judge's finding in effect was that no time was fixed for the performance of the contract by plaintiffs. It was, therefore, plaintiffs' duty to supply the 50 bales within a reasonable time. There is undisputed evidence that by their notice Ex. C plaintiffs informed defendants on 23rd September 1918 that 20 bales were ready for delivery at Madura and by Ex. D on 21st October 1918 that the remaining 30 bales were ready for delivery there. Defendants took delivery of 5 bales out of the first lot of 20 bales on 5th October 1918 and of 5 other bales out of the same lot of 20 on 14th October 1918. Defendants did not take delivery of the remaining 10 bales of the first lot of 20 bales or of the second lot of 30 bales; they did not even inspect these 40 unaccepted bales, nor did they sent to plaintiffs any written communication about them.

There is evidence that out of the 10 bales of which defendants took delivery some of the yarn was not of the contract description. D. W. No. 2, a weaver, has given evidence that he bought 10 bundles of this yarn from defendants and found it to be 24 count yarn, not 20 count. D. W. No. 3 another weaver says that he bought 10 or 20 bundles of the yarn and found it to be 24 count yarn. There is also expert evidence that a bundle from one of the 10 bales accepted by defendants was found to contain yarn of 24 count or 26 count, according as the dye was taken into consideration or not, and that the bundle weighed only 8½ lbs., instead of 10 lbs. D. W. No. 1, the manager of defendants' firm, says that he complained on 17th October 1918 to Rayulu, the senior partner of plaintiffs' firm (who died before the trial) that the yarn in the 10 bales accepted was not of the contract description and cancelled the order for the remaining 40 bales, to which cancellation Rayulu agreed. The Subordinate Judge says in his judgment that there is good ground for believing that D. W. No. 1 complained to Rayulu about the yarn but that he does not believe that the contract was cancelled by consent, as alleged by D. W. No. 1. It has been argued here for plaintiffs that D. W. No. 1's evidence that he complained to Rayulu about the yarn should not be believed at all, as no question about this was put at the trial to plaintiffs' two *gumasthas*, P. Ws. Nos. 1 and 2, who are said by D. W. No. 1 to have been present at his conversation with Rayulu. Mr. Ananthakrishna Iyer for defendants has said nothing about this part of the case, and I think that D. W. No. 1's evidence that he complained about the yarn to Rayulu may be disregarded.

It appears that there was another suit between the parties in respect of the 10 bales accepted by defendants. In this suit plaintiffs claim damages for breach of contract in respect of the remaining 40 bales. It is contended for defendants that no damages are due from them as the 40 bales were not of the contract description and in effect, therefore, it was plaintiffs who were guilty of breach of contract in respect of these bales. It is admitted that defendants never even inspected the 40 bales, and the evidence offered in support of this contention is that which I have mentioned to the effect that some of the yarn and one of the bundles in the 10 bales which they accepted were not of the contract description. I agree with my learned brother that from the evidence that a comparatively small part of the 10 bales accepted by defendants was not of the contract description, we cannot infer anything regarding the other 10 bales of the first lot of 20 or regarding the 30 bales of the second lot. It is true that in the course of arguments here and also before the Subordinate Judge a contention has been put forward for plaintiffs that the subject of the contract was, not bales of yarn literally of the contract description, but bales of yarn commercially known under that description but actually varying from it. The evidence to which plaintiffs' Vakil points to support this contention is clearly insufficient, and there is no mention of such a contention in the pleadings. I think this contention must be regarded as a false move in argument, for which plaintiffs cannot be penalised. On the evidence we do not know

whether the 40 bales in question were of the contract description or not. All we know is that plaintiffs tendered them in performance of their part of the contract and that defendants failed to accept them and even to inspect them and merely ignored the tenders.

But, even if we assume for the sake of argument that the 40 bales in question were not of the contract description, the defendants' position is not really improved. As no time had been fixed for the delivery of the bales by plaintiffs, if defendants, had inspected these 40 bales and had then found that they were not of the contract description, plaintiffs would have had time to supply other bales in place of those rejected, and on the evidence there is no reason to suppose that they would have found it impossible or even difficult to do so.

It is clear that defendants by their conduct refused to accept the 40 bales tendered by plaintiffs without even troubling to inspect them or to ascertain whether they were or were not of the contract description. Defendants were, therefore, guilty of breach of contract, for which plaintiffs are entitled to damages. In the circumstances I do not think it is necessary for plaintiffs to call in aid the decision in *Braihtwaite's case* (1). But I may add that, in my opinion, the weight of the decision in *Braithwaite's case* (1) as an exposition of law has not been affected by either of the later cases mentioned before us. As I understand it, the principle of *Braithwaite's case* (1), is that if A contracts to buy goods of a certain description from *B* and refuses for other reasons to accept goods tendered by *B* as in performance of the contract, he cannot escape liability to pay damages by proving afterwards that the goods tendered were not of the contract description. It is true that Lord Sumner in *British and Benningtons Ltd* v. *N. W. Cachar Tea Co.* (5) and Greer, J., in *Taylor* v. *Oakes Roncoroni & Co.* (2) interpreted the decision in *Braithwaite's case* (1) more narrowly; but their remarks, though to be treated, of course with the greatest respect, were *obiter dicta*. On the other hand, Lord Atkinson in *British and Benningtons Ltd.* v. *N. W. Cachar Tea Co.* (5) interpreted in *Braithwaite's case* (1) in effect as I have stated it. But in the present case, as it has not been proved that the 40 bales in question were not of the contract description, and as, even if they were not of that description, plaintiffs had still time to supply others in their stead, the exact interpretation of *Braithwaite's case* (1) does not appear to me of immediate importance to us.

The damages to which plaintiffs are entitled are the difference between the contract price of the 40 bales and the market price on the dates of the breach less Rs. 1,000, paid by defendants in advance for those bales. According to Ex. B, defendants were to take delivery on the day on which they received intimation of the arrival of the bales, and in the plaint the dates of the breach in respect of the two lots of bales have been given as 23rd September 1918 and 21st October 1918. Although plaintiffs allowed defendants some time for the removal of the bales and might reasonably do so and although defendants were very dilatory in taking delivery of those bales which they accepted, I do not think plaintiffs can now contend that the breach in each case should be assumed to have occurred at some later date and so increase the amount of damages due to them. I agree that the damages to which they are entitled are the difference between the contract price for 10 bales and the market price for 10 bales on 23rd September 1918 *plus* the difference between the contract price for 30 bales and the market price for 30 bales on 23rd October 1918 *minus* the Rs. 1,000, paid in advance. On principle I should prefer not to allow interest on the amount so calculated before the date of the suit, but I do not wish to differ from my learned brother on the comparatively minor point. I agree that the parties should pay and receive proportionate costs in both Courts.

V. N. V. *Decree varied.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 86 OF 1924.

March 5, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir Theodore Caro Piggott, KT.

AMMAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOVIND AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 167, Sch. IV—

Co-tenants—Declaration of right of co-tenancy, suit for, whether cognizable by Civil or Revenue Court.

There is in the Fourth Schedule to the Agra Tenancy Act no provision for a suit by which a person alleging himself to be a co-tenant can go to a Revenue Court and ask for a declaration that he has a right of co-tenancy joint or co-equal with that of the persons whom he has named as defendants. The jurisdiction of the Civil Courts, therefore, to entertain such a suit is not barred by the provisions of s. 167 of the Act. [p. 248, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Daniels, dated the 22nd February 1924, and printed as 78 Ind. Cas. 628.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—On the 26th of July 1921 five of the present respondents to this appeal brought a suit against Ammar, plaintiff No. 1 in this matter, alleging that they (the respondents) were tenants-in-chief and that he (Ammar) was a sub-tenant. The suit was for arrears of rent. Ten days later Ammar and his three brothers brought a suit in the Civil Court against all the six respondents alleging that they (the four brothers) had joint and equal right of occupancy with the six respondents. On the 28th of September 1921 the Revenue Court passed an *ex parte* decree in favour of the present respondents, thus accepting their statements that they were in fact tenants-in-chief, and that Ammar was a sub-tenant. There the matter rested for the moment, but on the 20th of December the Munsif gave a decision in the case now under consideration. One of the pleas undoubtedly taken was that the suit for a declaration that the plaintiffs were joint in occupancy with the defendants was a matter that was exclusively triable by the Revenue Court, because the Munsif in his judgment says that he has, no doubt, whatever that he has jurisdiction to try this matter. He gave a decision upholding the claim of the four plaintiffs. Sometime after the 20th of December and on a date previous to the 8th of May 1922 the *ex parte* decree was set aside and the suit for the arrears of rent as between tenants-in-chief and an alleged sub-tenant was dismissed. From the decision of the Munsif there was an appeal to the District Judge heard on the 8th of May 1922, and notwithstanding the very difinite statement of the Munsif on the subject of jurisdiction, there was no appeal from the Munsif to the District Judge on this question of s. 167 of the Local Tenancy Act. The District Judge affirmed the finding of the Munsif, and he matter then came before a Single Judge of this Court, who on the 22nd of February 1924 came to the conclusion that s. 167, which had then been put in the forefront of the grounds of that appeal, was a bar to the suit. We have asked the learned Counsel who appears for the respondents to turn to the Fourth Schedule of the Act and to point out to us any suit or proceeding therein described which the plaintiffs in this present suit could have embarked upon in the Revenue Court. He has told us, and frankly that there is in the Fourth Schedule no suit of the character now before us, and that there does not appear to have been in the Fourth Schedule any provision for a suit by which people alleging themselves to be co-tenants can go to a Revenue Court and ask for a declaration that they have a right of co-tenancy joint and co-equal with that of the persons whom they have made defendants. That appears to be right, but it does not quite exhaust the argument for the respondents, because the learned Counsel has laid stress upon the fact that there was in existence at the date of the commencement of the civil suit, which was August 6, 1921, a proceeding pending before the Revenue Court taken at the instance of the present respondents against one of the present appellants which in effect would have determined the question which the present appellants sought to determine by this action. We are not sure that that is right. The real question before that Court was, whether Ammar, the defendant in the Revenue Court was liable to pay rent as sub-tenant? The answer to that might have been a simple negative, but it does not follow at all that there was necessarily any exact definition of his rights or of the position in which he stood as regards the then plaintiffs; nor would it include a definition of the rights of the three other persons who on the 6th of August 1921 allied themselves with Ammar in this declaratory suit. We think that the Munsif was right in holding that he had jurisdiction, and that, unless the Fourth Schedule of the Act was produced before him and a suit or application of a precisely similar kind and parallel in its results was shown to him as being a suit exclusively triable by the Revenue Court, he was within his rights, and it was, indeed, his duty to hear and determine the

matter brought before him by the then four plaintiffs. That being so, we are of opinion, that this appeal must be allowed with costs. We, therefore, set aside the decree of the learned Judge of this Court and restore that of the lower Appellate Court. The cost of both hearings in this Court will include fees on the higher scale.

Appeal allowed;
Decree set aside.

Z. K.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 270 OF 1921.
August 18, 1924.

Present:—Mr. Charles Gordon Spencer, Offg. Chief Justice, and Mr. Justice Srinivasa Iyengar.

RANGAPPA NAYAKAN—PLAINTIFF—APPELLANT

versus

RANGASWAMI NAYAKAN AND OTHERS—DEFENDANTS NOS. 2 TO 17—RESPONDENTS.

Benamidar *and real owner—Right of suit—Nominal and* benami *transaction, difference between—Intention to transfer—Test—Will, suit based on—Secondary evidence, when admissible.*

A *benamidar* can maintain a suit in his own name at any rate against all persons except the person beneficially entitled. [p. 250, col. 2.]

The essence of a sham transaction is that though a deed of transfer is brought into existence, no title of any kind either legal or beneficial is intended to be passed thereby to any person whatsoever, that is, the deed of transfer is not intended to effect any transfer of property. The difference between sham and *benami* transactions is one of intention. If the deed of transfer is made with the intention of placing the property in the name of the third person, the intention clearly amounts to a transfer of the legal title and such transaction cannot be called a sham transaction; but comes directly within the meaning of *benami* transactions properly so-called. [p. 250, col. 2; p. 251, col. 1.]

An intention to transfer a legal title to the transferee would be sufficient to transform what would otherwise be a sham transaction into a *benami* transaction properly so-called. [p. 251, col. 1.]

If a sale-deed is got up to fight certain third parties the intention to be drawn from the transaction is irresistable that the legal title at any rate was intended to be passed by the transaction from the transferor to the transferee, since otherwise the very object of the transfer would fail. [*ibid.*]

If a plaintiff comes into Court setting up a Will and claiming certain properties on the ground of the dispositions contained therein, he is bound to take all steps necessary for the production of the Will and it is only if and when he satisfies the Court about his efforts to get the original of the Will produced, that he can be allowed to adduce secondary evidence especially oral evidence with regard to the contents of the document. [p. 251, col. 2.]

A plaintiff who seeks to rely upon the acquisition of title by adverse possession should expressly plead it in his plaint, at any rate as an alternative ground. [p. 253, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Tuticorin, in O. S. No. 7 of 1919.

Mr. *K. S. Ramabhadra Iyer*, for the Appellant.

Mr. *A. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.—The facts relating to this appeal may be set out very briefly. One Gopal Nayak died in the year 1900, leaving him surviving no son but only his daughter one Koppammal and grandson by that daughter one Ganga Nayak. He left also a brother and his sons. That he also left a Will seems undisputed; but the terms of this Will are in dispute.

Soon after the death of Gopal Nayak, his daughter Koppammal and grandson Ganga Nayak began alienating various items of property pertaining to his estate. Exhibits C series and D series and 34 series and 35 are all deeds of hypothecation of sale so made in the years 1901 and 1902 by registered instrument marked F in the case of Koppammal and Ganga Nayak supported to sell and convey to one Govindappa Nayak all the items of the immoveable property set out in Schs. 1 and 2 to the plaint.

It also appears that sometime after the death of Gopal Nayak, his daughter and grandson applied for succession certificate to the District Court of Tinnevelly and that the petition was opposed by or on behalf of the defendants on the ground that the deceased Gopal Nayak was divided from his brother and nephews and that all the property of the family having survived on his death to his brother and nephews, he had no power of testamentary disposition over any of the properties the subject-matter of the suit. These proceedings, however, were compromised finally by documents Exs. A and B (Ex. B being in form a deed of sale by Koppammal and Ganga Nayak to the defendants of the properties which were under compromise agreed to be given over to them and Ex. A being a release and conveyance by the defendants in favour of Koppammal and Ganga Nayak of all the properties relating to the estate of Gopal Nayak).

Early in the year 1917, both Koppammal and Ganga Nayak died within a few days of each other, and the question who died earlier is one for determination. Ganga

Nayak died issueless leaving only his widow Ovalammal who purported by registered instrument bearing date the 2nd day of August 1917 Ex. G to sell and convey to the plaintiff-appellant all the properties set out in the Schs. 1, 2 and 3 to the plaint. The plaintiff's action is substantially for recovery of these properties from the defendants.

The plaintiff's case is that Koppammal and Ganga Nayak obtained these properties under the Will of Gopal Nayak, that Ganga Nayak was absolutely entitled thereto or at any rate became so after the death of Koppammal and that, therefore, on his death Ovalammal the plaintiff's vendor inherited the properties and then conveyed them to the plaintiff. No question arises now with regard to the capacity of Ovalammal as a Hindu widow to sell and convey the properties the subject-matter of the suit because she is still alive, and if she was entitled to the properties, any alienation by her would be valid for her lifetime. The action is resisted by the main defendants who are the brother's sons of the deceased testator Gopal Nayak on the ground, firstly, that the sale to the plaintiff by Ovalammal was only a *benami* transaction and that, therefore, the plaintiff was not entitled to maintain the suit, and secondly, on the ground, that as regards the properties in Schs. 1 and 2 to the plaint the same having passed to Govindappa Nayak on the sale under Ex. F have been purchased by them under Ex. 8 dated 14th August 1917 from Govindappa Nayak and that as regards items Nos. 4 to 10 in Sch. 3 the same were never the properties of Gopal Nayak but have all along been the properties of the defendants and that as regards items Nos. 1 to 3 in Sch. 3 to the plaint, Ovalammal never succeeded thereto, because her husband Ganga Nayak, as a matter of fact, predeceased his mother Koppammal, the property should be deemed to have reverted to the testator Gopal Nayak and become vested in his reversionary heirs the defendants.

As many as 21 issues were raised in the case and though the learned Subordinate Judge found most of the issues in favour of the plaintiff, he finally dismissed the plaintiff's suit on the ground that the sale to him by Ovalammal under Ex. G was only a *benami* sale, that there was no consideration for the same and that, therefore, the plaintiff was not entitled to maintain the suit.

The law with regard to the maintainability of suits at the instance of *benamidars* has been finally settled and set at rest by their Lordships of the Judicial Committee in the case of *Gur Narayan* v. *Sheo Lal Singh* (1) and followed by a Full Bench of this Court in *Vaitheeswara Iyer* v. *Srinivasa Raghava Iyengar* (2). It has then been held that true *benamidar*, that is a person who has merely lent his name to the transaction and is, therefore, a trustee holding a legal title without any beneficial interest in the property can maintain a suit in his own name against, at any rate, all persons except the person beneficially entitled. The learned Subordinate Judge at the conclusion of his discussion with regard to the sale-deed Ex. G under which the plaintiff claimed observes as follows: "I have no hesitation in holding that this sale-deed was merely got up with a view to fighting the defendants who were setting up their title to these properties and that Ovalammal never intended to pass any property to the plaintiff. It is significant that Ovalammal herself has not been examined in this case. I hold on issue No. 8 that the sale deed dated 2nd August 1918, by the said Ovalammal in favour of the plaintiff though executed by her does not represent a genuine transaction and is not supported by consideration. I think that the mortgage in Ovalammal's favour is equally a sham transaction. This is enough to dispose of the suit according to the decision in *Rajammal* v. *Mahadeva Yogi* (3) which I cited."

It seems to us that in his judgment the Subordinate Judge has confounded a sham transaction in respect of property, that is to say, a transaction in and by which no title of any kind either legal or beneficial is intended to be passed with *benami* transactions properly so-called, namely, transactions where the legal estate becomes vested in a certain person the beneficial interest therein remaining with the transferor or being vested in some third person who is called the real owner. The essence, therefore, of a sham transaction is that though a registered deed is brought into existence no title of any kind either legal or beneficial is intended to be passed thereby to any person what-

(1) 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

(2) 50 Ind. Cas. 309; 42 M. 348; 36 M. L. J. 296; 9 L. W. 362; 25 M. L. T. 351; (1919) M. W. N. 299 (F. B.).

(3) 25 Ind. Cas. 657; 27 M. L. J. 445; 1 L. W. 777; (1914) M. W. N. 717.

soever, that is to say, the deed of transfer is not intended to effect any transfer of property. The difference, therefore, between *sham* transactions and *benami* transactions is one of intention. If the deed of transfer is made with the intention of placing the property in the name of third person the intention clearly amounts to a transfer of the legal title and such transaction can scarcely be called a sham transaction; but comes directly with the meaning of *benami* transactions properly so-called.

Applying these principles to the case before us, we have to determine whether Ex. G under which the plaintiff has claimed as transferee to be entitled to maintain the suit was a sham transaction as the lower Court has termed it. We agree with the Subordinate Judge in considering that the consideration set up for the sale-deed and all the circumstances clearly point to there having been no real consideration for the same. We also agree with him that the sale-deed may have been merely got up with a view to fighting the defendants; but if a sale deed is got up to fight certain third parties the intention to be drawn from the transaction is irresistable that the legal title at any rate was intended to be passed by the transaction from the transferor to the transferee; otherwise the very object of the transfer fails. As already stated, an intention to transfer the legal title to the transferee would be sufficient to tranform what would otherwise be a sham transaction into a *benami* transaction properly so-called. The intention for the transfer found by the learned Subordinate Judge is, therefore, a sufficient finding of the intention to transfer the legal title to the plaintiff. The case of *Rajammal* v. *Mahadeva Yogi* (3) was clearly a case of a sham transaction. After the decision in *Gur Narayan* v. *Sheolal Singh* (1), it is impossible to hold that a mere *benamidar* cannot maintain the suit.

It would, therefore, follow that if we were in a position to accept the findings of the learned Subordinate Judge with regard to the other issues, we would be bound to grant a decree to the plaintiff at any rate with respect to some of the properties. But on behalf of the respondents the correctness of the decision of the lower Court with regard to the other issues has been strenuously canvassed and we have, therefore, to proceed to a consideration of the same. In order to succeed in the action, the plaintiff has not only to show that under the deed of transfer to him he is entitled to maintain the suit but also, the suit being one substantially in ejectment, to establish the title on which he has claimed the properties. This raises the question of the title of his transferor Ovalammal. Ovalammal is said to have inherited all the properties claimed in the suit as the widow of Ganga Nayak. Ganga Nayak's title has been sought to be made out in two ways; firstly, the case of the plaintiff is that under the Will of his maternal grandfather Gopal Nayak, he got an absolute title to the properties the subject-matter of suit. In the second place such absolute title to all the properties is alleged to have accrued to him at any rate on the death of his mother Koppammal who is alleged to have died a few days before him. As regards the title derived from the Will, the Will itself has not been produced nor even any true copy of the Will. The non-production of the Will itself is not properly accounted for in the evidence on behalf of the plaintiff. If the plaintiff comes into Court setting up a Will and claiming certain properties on the ground of the dispositions contained therein, he is bound to take all steps necessary for the production of the Will and it is only if and when he should satisfy the Court about his efforts to get the original of the Will produced, he can be allowed to adduce secondary evidence especially oral evidence with regard to the contents of the document. We are also constrained to observe that the oral evidence with regard to the Will is of a most unsatisfactory character. Though there seems to be no doubt that a Will was left by Gopal Nayak in the absence of satisfactory evidence with regard to the terms of the Will, we are unable to find that Ganga Nayak acquired an absolute title under the Will to the properties the subject-matter of the suit. If, however, the case for the plaintiff should be looked upon as a claim to the effect that Ganga Nayak became on the death of Koppammal absolutely entitled to all the properties in the same manner and to the same extent as if Gopal Nayak died intestate possessed of properties, or that Gopal Nayak's dispositions in the Will were to the same effect, then it becomes necessary to consider the third issue in the case as to whether, as alleged in the plaint, Koppammal died first and Ganga Nayak died only after

Koppammal died. Having regard to the conflict of evidence with regard to this issue, it seems to us that we should point out at the outset that the plaintiff who comes into Court alleging that on the happening of certain events in a certain order certain rights to properties acquired to him, is bound to establish by affirmative and satisfactory evidence the occurrence of such events in such order. The oral evidence adduced on behalf of the plaintiff consisting as it does merely of the bare statements that Koppammal died a few days before Ganga Nayak has failed to carry conviction to our minds.

It is very strange that apart from the death register Ex. XX and Exs. C, C-1 to which we shall refer later, there was no documentary evidence of any kind adduced on either side with regard to the question raised in the issue as to which of the two died earlier. We have also to bear in mind that when two persons died within a very few days of each other, it is easy to manipulate the oral evidence for one side or the other. The death register the original of which was produced before the lower Court clearly shows that it was Ganga Nayak that died earlier on the 12th of March 1917 and that Koppammal died later on the 29th of March 1917. This death register is a public document and would, in ordinary circumstances, be found to have been accepted as conclusive of the matter. But the learned Subordinate Judge rejected the evidence of the death register on two grounds: Firstly, that it was a book kept by the Village Munsif who happened to be the second defendant and, therefore, a person vitally interested in making it out that Koppammal died later than her son. Apart from the vague suggestion that there was some delay in forwarding the death register for the year, there is nothing in the evidence to indicate that the death register was not kept in the proper manner. Even though the Village Munsif at the time was the 2nd defendant, there is no reason to suppose that if, as a matter of fact, Koppammal had died earlier he would then have anticipated that Ganga Nayak would also die within a few days of her and that the death of Koppammal would not have been in the ordinary course recorded in the book. The gratuitous assumption that the whole of the book or a sufficient portion thereof has been torn out and something different inserted in its place is not borne out by the evidence in the case. Apart from this the second ground stated by the learned Subordinate Judge for brushing aside the evidence of the death register is Exs. C, C-1. This is rental agreement executed by some tenant in favour of the 3rd defendant in respect of some lands included in the suit. The bearing of Exs. C, C-1 on the question of the death of Koppammal and Ganga Nayak is, we take it, somewhat as follows: Exs. C, C-1 having been accepted by the 3rd defendant because it was produced by him, shows a dealing with an item of the suit property. Such a dealing with the property could not have been had by the 3rd defendant unless it be that by that date both Koppammal and Ganga Nayak had already died. Therefore Exs. C. C. 1 which bears date 6th March 1917 shows that previous to that date both Koppammal and Ganga Nayak must have died and, therefore, the death register which shows later dates in March as the dates of the death of Ganga Nayak and Koppammal must have been fabricated. If in Exs. C, C-1 a reference had been made to the death of these two persons there might be a great deal of force in the argument, but a mere dealing with the property by the 3rd defendant on the 6th March 1917 may be due to various conceivable causes and the inference that both Koppammal and Ganga Nayak must have died previous to that date is not the only or inevitable inference. There is no reason why the dealing with the property by the 3rd defendant on the 6th of March should not be explained, as it has been tried to be, by the fact that Koppammal was very ill at the time and her son Ganga Nayak was not in a fit state of mind to manage any property. However, that may be, it seems to us while it may be difficult affirmatively to decide as to which of the two died earlier it is sufficient for the purposes of the case to observe that the plaintiff has not discharged the burden that lay on him of proving satisfactorily that it was Koppammal that died first and Ganga Nayak died only after termination of the life of Koppammal.

With regard to the title of Ovalammal to the suit properties the learned Vakil for the appellant who argued the case with great persistence and ingenuity submitted two other grounds on which he contended that Ovalammal's title should be found. The first ground was that the sale to Govindappa Nayak was in 1902, that in spite of the

sale Koppammal and Ganga Nayak continued to be in possession of the lands till their death which took place in 1917 and that, therefore, even though the properties be held to have passed under the sale-deed Ex. F to Govindappa Nayak a title to the properties had been acquired by Koppammal and Ganga Nayak by continued possession for over 12 years. It must be observed that this is not made an alternative ground of attack in the plaint. It being obvious that such a title could, if at all be acquired only by adverse possession and the question whether possession in any given case has been adverse or not being a question of fact, the requirement of the law is strict and imperative that any plaintiff who seeks to rely upon the acquisition of title by adverse possession should expressly plead it in his plaint at any rate as an alternative ground. There is no such ground or plea set out in the plaint in the present suit. The learned Vakil for the plaintiff-appellant contended that the plaint alleges possession to have continued with Koppammal and Ganga Nayak even after Ex. F., and that further the 11th issue which relates to possession of the suit lands has been found by the lower Court in favour of the plaintiff. The possession that has been referred to as remaining with the transferors in respect of Ex. F was pleaded merely as evidence to show that the deed was a sham. The defendants not having had any notice of any contention based on the acquisition of title by adverse possession, it will be obviously unfair to them to allow such a plea to be advanced or sought to be made good now, in the Court of Appeal. Further the evidence as to possession itself has been of such an inconclusive character that no finding of adverse possession for the statutory period could possibly be founded on it. The other contention that was also raised for the first time before us with regard to the title of Ovalammal was that assuming Ganga Nayak died before Koppamal, Ganga Nayak having had a vested interest at any rate in a moiety of the estate of Gopal Nayak under his Will such moiety should be deemed to have passed by inheritance to Ovalammal without any reference whatever to the other moiety which was vested in Koppammal. This contention again depends on the terms of the Will which as we have already observed have not been proved in the case. We may also observe that the absence of all reference to such an alternative claim in the plaint and the keenness of the contest between the parties as to which of the two Koppammal or Ganga Nayak survived the other and died later would seem to show that the possibility of such a claim was not in the contemplation of the parties. However that may be, in the absence of any satisfactory evidence regarding the actual dispositions in the Will, we feel justified in presuming that the testamentary disposition of Gopal Nayak was only in accordance with ordinary notions of Hindu Law that his daughter should take a limited estate and that after her, her son should take the estate absolutely. This disposes of all the contentions of the plaintiff-appellant with regard to the title of Ovalammal including the contentions which were raised for the first time in this Court if Ovalammal had no title to convey, it follows that the plaintiff could have none. In this view it becomes unnecessary to consider the question whether as contended by the plaintiff it has been established that Ex. F was a mere sham and that no title passed under it to Govindappa Nayak. Though it is really unnecessary to decide this question, still as it has been argued at great length, we feel we may as well express our decision with regard to it also. Exhibit F is only one of the large number of transactions consisting of sales and mortgages made by Koppammal and Ganga Nayak in the years that followed close on the death of Gopal Nayak. It has not been suggested that any of the other deeds was a sham. The motive for executing a sham deed like Ex. F is not clear. Though it was suggested that it might have been made for the purpose of averting or defeating the objections taken by or on behalf of the defendants for the issue of succession certificate in favour of Koppammal and Ganga Nayak, it has not been explained how Ex. F could have possibly produced that effect. The subsequent conduct of Koppammal and Ganga Nayak with regard to the sales of the lands included in Ex. F by Govindappa Nayak is more consistent with the view that Govindappa Nayak did acquire a title to the properties under Ex. F. The mere fact that on the compromise proceedings relating to the succession certificate, Koppammal and Ganga Nayak got a release and conveyance in their

favour and that no such release was obtained by or in favour of Govindappa Nayak may be explained by the fact that for the purpose of making good the title of Govindappa Nayak to the properties, it was sufficient that his transferors should obtain an instrument by which the agnates of Gopal Nayak became debarred for even from making any claim in respect of the properties. For these reasons we are unable to hold that it has been established by the plaintiff that Ex. F was a mere sham and was not intended to pass any title. Exhibit F, however, relates only to the properties in Schs. 1 and 2. As regards the properties mentioned in Sch. 3, the title of the plaintiff depending as it does on the title of Ganga Nayak was bound to be established either by satisfactory proof of the terms of the Will or of the allegation that Ganga Nayak died after Koppammal and we have already found that the plaintiff has not proved either. In this view it becomes unnecessary to discuss the finding of the lower Court regarding the title to items Nos. 4 to 10 of Sch. 3. But it is strange that the Judge should have been inclined to hold with regard thereto in favour of the plaintiff inspite of the fact that there is no reference whatever in Ex. A to any of the said items even though Ex. A purports to be a release obtained by Koppammal and Ganga Nayak in respect of all the properties of Gopal Nayak which were to be taken by them as to the result of the compromise.

The case of the plaintiff has thus entirely failed.

We are not, therefore, surprised that in these circumstances of Ovalammal having no title whatever to the suit properties, the plaintiff should have obtained from her a nominal sale-deed for the purpose of fighting the defendants in a speculative litigation.

The appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 249 OF 1924.
February 23, 1925.
Present:—Mr. Baker, J. C.

MANIK RAO—DEFENDANT—APPLICANT
versus
NURHASSAN—PLAINTIFF—NON-APPLICANT.

Provincial Insolvency Act (V of 1920), s. 28 (3)—Insolvency—Bond executed in favour of insolvent's son—Son, whether can sue on bond—Insolvent, whether can be guardian ad litem *of minor—Suit on bond—Consideration, admission of—Re-payment—Burden of proof—Muhammadan Law—Jointness, presumption.*

There is no presumption of jointness in estate between a Muhammadan son and his father. [p. 255, col. 1.]

There is no law that an insolvent cannot be the guardian *ad litem* of an infant. [*ibid.*]

Where a bond is executed in favour of a minor and there is no evidence to show from whom the consideration of the bond proceeded, nor as to whether the minor had any money of his own or not, it cannot be said that the minor is not the owner of the bond and is not entitled to sue on it. [*ibid.*]

Where there is no evidence to show that a bond executed in favour of the minor son of an insolvent was in existence on the date of the order of adjudication passed against the father, there can be no presumption as to the father being the reputed owner of the bond under s. 28 (3) of the Provincial Insolvency Act, so as to disentitle the son from suing on the bond. Even where the property in such a bond is held to have vested in the insolvent the son would be entitled to maintain a suit on the bond so long as the Official Assignee or Receiver did not interfere. [p. 255, cols. 1 & 2.]

Cohen v. Mitchell, (1890) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell 207 and *Alimahmad Abdul Hussein v. Vadilal Devchand Parekh*, 53 Ind. Cas. 197; 43 B. 890; 21 Bom. L. R. 849, relied on.

Where in answer to a suit on a bond the consideration of the bond is admitted and re-payments are alleged the burden lies on the defendant to prove the re-payments. [p. 255, col. 1.]

Application for revision of an order of the Small Cause Court Judge, Nagpur, dated the 30th June 1924, in Civil Suit No. 1317 of 1923.

Mr. *A. N. Chorghade*, for the Applicant.

Mr. *R. N. Padhye*, for the Non-Applicant.

ORDER.—The facts of this case are that the defendant, who is the applicant, executed a bond to the plaintiff-non-applicant, who is a minor. The minor plaintiff's father is a broker in the orange market at Nagpur. It was agreed that the defendant should sell his oranges through the plaintiff's father.

Admittedly fruit worth Rs. 502-2-0 was sold in this manner. The plaintiff sued on the bond and gave the defendant credit

for Rs. 217, out of the price of the fruit. The defendant contended that the whole amount of Rs. 502-2-0 had been paid towards the bond. He further raised the contention that the plaintiff's father was an undischarged insolvent and he was the person who really took the bond, as the minor had no interest in it, and the minor could not, therefore, bring a suit on this bond.

The Small Cause Court Judge held that the payment of Rs. 285-2-0 by the defendant was not proved and he passed a decree for Rs. 960-8-0.

The defendant applies in revision on the same grounds as he urged in the lower Court.

As regards his first contention that the minor has no interest in the bond, there is no evidence to show from whom the consideration of the bond proceeded. The plaintiff is a Muhammadan and there is no presumption of jointness in estate between himself and his father. There is also no evidence that the bond was in existence on the date of the order of adjudication so as to lead to any presumption under s. 28, cl. (3), of the Provincial Insolvency Act, as to the plaintiff's father being the reputed owner. It is very likely that the plaintiff's father is carrying on business in the name of his son; but as the bond is in the plaintiff's name and we do not know whether he has any money of his own or not, it cannot be said to be proved that the plaintiff is not the owner of the bond and as such not entitled to sue. There is no law that an insolvent cannot be the guardian *ad litem* of an infant.

As regards the second point, which is about the credit of Rs. 285-2-0, out of the price of the fruit, towards the bond, it is contended that the burden of proof is on the plaintiff to show that this amount was re-paid to the defendant and not credited towards the bond. This is not so. I agree with the lower Court in holding that the burden of proof is on the defendant. The consideration of the bond being admitted and certain re-payments alleged, the burden of proof is clearly on the defendant to prove certain re-payments.

It is contended that the plaintiff has not produced his books to show that the re-payment was made to the defendant. It appears, however, from the order-sheet that the defendant was given an opportunity of inspecting the plaintiff's books, and if he did not do so or if after inspecting them he did not think fit to put them in, an adverse inference arises against him. The plaintiff subsequently tendered them, but they were rejected as being put in too late.

It may be added that even supposing that the property in the bond vested in the insolvent, the case would be covered by the ruling in *Cohen* v. *Mitchell* (1) as explained in *Alimahmad Abdul Hussein* v. *Vadilal Devchand Parekh* (2), so long as the Official Assignee or Receiver did not interfere.

The application is dismissed with costs.

Z. K. *Application dismissed.*

(1) (1890) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell 207.

(2) 53 Ind. Cas. 197; 43 B. 890; 21 Bom. L. R. 849.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 215 OF 1921.

July 21, 1924.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Mukerjee.

HAR BAKHSH SINGH—DEFENDANT-APPELLANT

versus

DAL BAHADUR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Oudh Estates Act (1 of 1869), ss. 8, 10, 23—Taluqdari *and non*-taluqdari *estate—Owner buying property with income—Subsequently acquired property, character of —Succession—Hindu Law.*

Where an absolute owner of certain *taluqdari* as well as non-*taluqdari* properties buys more property with his income from both sources, which incomes are completely commingled, the subsequently purchased property does not acquire the character and status of a *taluqdari* estate and the succession to this property is governed by the ordinary rules of inheritance. [p. 257, col. 2; p. 263, col. 2; p. 264, col. 2.]

Jagdamba Kumari v. *Wazir Narain Singh*, 77 Ind. Cas. 1041; 50 I. A. 1; (1923) A. I. R. (P. C.) 59; 44 M. L. J. 503; 37 C. L. J. 287; 32 M. L. T. 157; 4 P. L. T. 319; 25 Bom. L. R. 676; 2 Pat. 319; 18 L. W. 555; 28 C. W. N. 98; (1923) M. W. N. 460 (P. C.), relied on.

Per *Kanhaiya Lal, J.*—It is a settled law that a subject cannot make his property descendible in a manner not recognised by the ordinary law; and it appears to follow that he cannot by express declaration, still less by mere volition, whether actual or presumed, subject the property acquired by him to a rule of succession applicable to the property which he had received by a grant to which certain conditions were attached. [p. 261, col. 1.]

Rajindra Bahadur Singh v. *Raghubans Kunwar*, 48 Ind. Cas. 213; 40 A. 470; 21 O. C. 106; 24 M. L. T. 282; 5 O. L. J. 401; 8 L. W. 570; (1918) M. W. N. 831; 28 C. L. J. 456; 23 C. W. 101; 20 Bom. L. R. 1075; 45 I. A. 134 (P. C.), followed.

Where a *taluqdar* holds an absolute estate in his own right and acquires property for his own use

out of the income of that estate or otherwise, any custom relating to the devolution of the property in the family, unless it is limited in its application, would apply equally to the property inherited by him and that acquired by him in his own right. [p. 262, col. 1.]

Where according to the family custom the estate descends to a single heir, there is no necessary presumption that it descends by the rule of primogeniture, and if the heir according to the lineal primogeniture is more remote in degree from the ancestor than other persons, who may be collaterals coming within the line of heirship, then in the absence of any proof to the contrary, nearness of degree prevails over directness of line. [p. 262, cols. 1 & 2.]

Achal Ram v. *Udai Partab Addiya Dat*, 11 I. A. 51; 10 C. 511; 8 Ind. Jur. 272; 4 Sar. P. C. J. 507; Rafique and Jackson's P. C. No. 77; 5 Ind. Dec. (N. S.) 342 (P. C.), *Narindar Bahadur Singh* v. *Achal Ram*, 20 C. 649; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique and Jackson s P. C. No. 128; 10 Ind. Dec. (N. S.) 438 (P. C.), referred to.

Per *Mukerji, J.*—Where property is acquired out of the income of an impartible estate governed by a custom as regards succession and the acquired property is allowed to merge in the main property with a view to its passing to the heir to the main estate, the accreted property is governed by the custom. But where by Statute a special rule of succession is enacted with respect to a particular property, unless there is an express statutory sanction for it, it is not open to the owner of the property to add to it other properties, so that the succession to the added property may also be governed by the Statute aforesaid. [p. 265, col. 2; p. 266, col. 2.]

First appeal from the decision of the Subordinate Judge, Allahabad.

Mr. *Surendro Nath Sen*, for the Appellant.

Messrs. *Peary Lal Banerji* and *Balmakund*, for the Respondents.

JUDGMENT.

Kanhaiya Lal, J.—The dispute in this appeal relates to certain house property situated at Allahabad. The owner of the property was Thakur Bajrang Bahadur Singh, who died on the 16th November, 1900, leaving two widows, *Musammat* Harnath Kuer and *Musammat* Sartaj Kuer and a daughter *Musammat* Bhagwat Partab Kuer He was the *Taluqdar* of the Baispur Estate in the Partabgarh District, Oudh; and besides the Baispur Estate and the house property in dispute, he owned some *zemindari* property in the Partabgarh District known as the Sarai Murar Singh or Ramnagar property some other *zemindari* property and an occupancy holding in the Allahabad District, known as the Bahdaul property, and a house in Partabgarh and another large bungalow in Allahabad.

On the death of Bajrang Bahadur Singh, the mutation of names was obtained in respect of the entire property situated in the Districts of Partabgarh and Allahabad by his senior widow, *Musammat* Harnath Kuer. *Musammat* Harnath Kuer built a new house on a portion of plot No. 130, situated in Colonelgunj, Allahabad, forming a part of the property left by her husband; and that house is also in dispute. *Musammat* Bhagwat Partab Kuer died on the 12th of May 1910 without leaving any issue. *Musammat* Harnath Kuer died on the 27th March 1914 and was succeeded by *Musammat* Sartaj Kuer, the junior widow, who died on the 15th June, 1916. On her death several claimants turned up to claim the Baispur Estate and the other properties left by Thakur Bajrang Bahadur Singh. One of those claimants was Alopi Din Singh, who professed to be the nearest reversionary heir and entitled as such to the estate and other property of the deceased under s. 23 of Act I of 1869, read with the Hindu Law. Another claimant was Har Baksh Singh, who based his title to the property on his being the senior male heir in the senior branch of the family to which Thakur Bajrang Bahadur Singh belonged, under s. 22 of Act I of 1869.

The Revenue Courts directed the mutation of names to be effected in favour of Har Baksh Singh in respect of the Baispur estate and in favour of Alopi Din Singh in respect of the *zemindari* property situated in the Partabgarh and Allahabad Districts and the cultivatory holding situated in the latter. The Municipal Board of Allahabad entered the name of Har Baksh Singh in respect of the lease-hold rights in the plots Nos. 130, 130A and 131 situated in *Mohalla* Colonelganj, Allahabad, on which the house property now in dispute stands.

The present suit was filed by Alopi Din Singh for the possession of the house property, standing in plots Nos. 130, 130A and 131 aforesaid, including the lease-hold rights possessed by Thakur Bajrang Bahadur Singh in the above land, against Har Baksh Singh for a declaration that he was the owner of the said property as the nearest reversionary heir of Thakur Bajrang Bahadur Singh. His allegation was that he was in actual possession of the said property and that the defendant wrongfully got his name entered in the Municipal registers and on the strength thereof was denying the right of the plaintiff and interfering with his possession.

The defendant denied that the plaintiff was in possession of the disputed property and claimed to be entitled to the same as the senior male heir of the senior branch of the family to which Thakur Bajrang Bahadur Singh belonged. He further pleaded that according to the custom of the family and clan to which Thakur Bajrang Bahadur Singh belonged, the entire property, whether ancestral or self-acquired, left by Thakur Bajrang Bahadur Singh, became a part of his estate and the heir to the estate was entitled to get the acquired property too. He also asserted that the house property in question had been purchased by Thakur Bajrang Bahadur Singh on the 13th February 1890 from the income of the Baispur Estate for the benefit and perpetual use of the owner in possession of the Baispur Estate, and that it was treated as a part of the estate and became heritable as a *taluqdari* property. He also mentioned that the house standing on plot No. 130A was built by *Musammat* Harnath Kuer at a cost of Rs. 15,000 from the income of the Baispur Estate and that the said house must also be treated as an accretion to the Baispur Estate.

The Court below found that the house property in dispute had not been purchased or built with the income of the Baispur Estate, that there was no satisfactory proof of a custom applicable to the family or clan to which Thakur Bajrang Bahadur Singh belonged, entitling the defendant to the non-*taluqdari* property left by the deceased; and that as the plaintiff was the nearst reversionary heir of Thakur Bajrang Bahadur Singh and in actual possesssion of the disputed property by the receipt of rent from the tenants occupying the same, he was entitled to the declaration asked for.

The defendant challenges the correctness of those findings; and the main questions for consideration are whether the plaintiff is the nearest reversionary heir of Thakur Bajrang Bahadur Singh and is entitled as such to the property in dispute under s. 23 of Act I of 1869, or the Hindu Law, whether the said property had been purchased or built out of the savings or income of the Baispur Estate, and had, by treatment or otherwise, become an accretion to or a part of that estate, and whether there was any custom in the family or clan by which the self-acquired property of the deceased would devolve on the senior male member of the senior branch of the family along with the estate. It would also be necessary to consider whether the plaintiff was in possession of the disputed property on the date of the suit so as to become entitled to a declaratory relief.

The defendant has filed with his written statement a pedigree which, so far as it is material for the purposes of this suit, is fully corroborated by the evidence adduced.

* * * *

We have no hesitation, therefore, in finding that the plaintiff is the nearest reversionary heir of Thakur Bajrang Bahadur Singh, if s. 23 of Act I of 1869 or the Hindu Law is applicable to the case.

The property now in dispute is not shown to have become an accretion to or formed a part of the Baispur Estate. The Baispur Estate was situated in Oudh and was held by Thakur Bajrang Bahadur Singh and was managed during his minority by the Court of Wards. While the Court of Wards was in possession of the estate, the *zemindari* property, known as the Sarai Marar Singh or Ramnagar property, was acquired by the Court of Wards for the benefit of the minor. Shortly after the release of the estate by the Court of Wards, the Bahdaul villages are stated to have been purchased by Thakur Bajrang Bahadur Singh out of the savings said to have been made over to him, but there is no direct evidence produced on the point. The houses in dispute were purchased long afterwards for a consideration of Rs. 4,500 which according to the account books produced on behalf of the defendant, were paid from the *tahvil* or estate treasury in which the income derived from the estate and the Ramnagar and Bahdaul villages used to be kept .Thakur Bajrang Bahadur Singh had an absolute right as much to the Baispur Estate as to the Ramnagar and Bahdaul villages which he had acquired; and as there was no person to whom he was liable to account for profits, it is but natural that he kept the income of all the different properties, which he owned at the time, together without any particular differentiation or distinction. But such a commingling of the income cannot necessarily imply that he intended to incorporate the villages which he had acquired into the estate and make them descendible as if they had been a part of the estate, from the in

come of which they are said to have been purchased.

An estate as defined by s. 2 of Act I of 1869 means the *taluqa* or immoveable property acquired or held by a *taluqdar* or grantee in the manner mentioned in s. 3, 4 or 5 of that Act. It includes certain estates not confiscated by the Goverment, others specifically granted by it, and those obtained under a *taluqdari sanad* granted after the 1st April 1858 and before the passing of the Act I of 1869, or held under a Summary Settlement made between the 1st day of April, 1858, and the 10th day of October, 1859, inclusive of any other property for which a decree may have been subsequently obtained at the First regular Settlement. By s. 32A, which was inserted by the Oudh Estates Amendment Act, 1910, a power is given to a *taluqdar* or grantee or his heir or legatee to declare that any immoveable property situated in the United Provinces, in which he has a separate permanent heritable and transferable right, shall be a part of his estate for the purposes of the Act, but that provision has no retrospective effect.

A *taluqdar* is defined as a person whose name is entered in the first of the lists mentioned in s. 8. Section 10 provides that no person shall be considered a *taluqdar* or grantee within the meaning of that Act, if he is not named in such original and supplementary lists as have been prepared and notified under s. 8. It also requires that the Court shall take judicial notice of such lists and regard them as a conclusive evidence that the persons named therein are such *taluqdars* or grantees, that is to say, hold their estates under the tenures which the lists respectively ascribe to them.

It is contended on behalf of the plaintiff-respondent that it is impossible that an estate, so entered, could be enlarged by any process of purchase or acquisition of other property not subject to similar conditions, or by any act or volition of the *taluqdar* or grantee in regard to it except a declaration made under s. 7 or s. 32A of the Act, as amended by the U. P. Act III of 1910. Indeed, there was no provision before the above Amending Act was passed under which immoveable property subsequently acquired, otherwise than by a special grant of the British Government burdened with such conditions, could be made descendible as if it were a part of the estate.

The houses in question were obviously acquired from the joint income of the estate and the Sarai Ramnagar and Bahdaul properties, the collections made from which were kept together without any differentiation or distinction. But neither that fact nor the subsequent commingling of the income derived from these houses in the joint stock or the expenditure incurred over their repairs, reconstruction, or improvement therefrom is sufficient to impress that property with the character and the status which the law assigns to the estate as defined in s. 2 and the lists appended to Act I of 1869. In *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1), where a suit was brought for a declaration that the plaintiff was entitled to certain estate, the decree passed by their Lordships of the Privy Council provided that the declaration must be limited to the *taluqa* and what passes with it, and that if the last owner had personal or other property, not properly a parcel of the *taluqdari* estate, that would seem to be descendible according to the ordinary law of succession. Their Lordships went on to add that the plaintiff would be entitled to succeed under s. 22 of Act I of 1869 as *ab intesto* to the *taluqdari* estate of the late proprietor, including whatever was descendible according to the provisions of the said Statute. In *Jagdish Bahadur* v. *Sheo Pertab Singh* (2) the moveable and immoveable property, held by the last female holder was treated as falling in the same category with the *taluqa* itself and governed by the same considerations as were applicable to the whole property, as if it were one corpus, because no differentiation between the two classes of properties was made in the plaint and no issue was directed to any distinction between them.

In *Thakur Sheo Singh* v. *Rani Raghubans Kunwar* (3) where the original proprietor of the estate had died before Act I of 1869 came into force and had made a bequest by which he had devised his property in

(1) 4 I. A. 226 at p. 246; 3 C. 626; 1 C. L. R. 113; 3 Sar. P. C. J. 740; 3 Suth. P. C. J. 458; Rafique and Jackson's P. C. No. 46; 1 Ind. Jur. 679; 1 Ind. Dec. (N. S.) 983 (P. C.).

(2) 23 A. 369 at p. 382; 28 I. A. 100; 5 C. W. N. 602; 11 M. L. J. 178; 3 Bom. L. R. 298; 8 Sar. P. C. J. 19 (P. C.).

(3) 32 I. A. 203; 27 A. 634; 15 M. L. J. 352; 8 O. C. 317; 9 C. W. N. 1009; 2 C. L. J. 194 (P. C.).

favour of his nephew to the exclusion of his brother, the father of the aforesaid nephew, and the said nephew had died childless after Act I of 1869 came into force, their Lordships of the Privy Council, applying the rule of primogeniture embodied in the *sanad*, granted a declaration that the entire *taluqa* as constituted at the date of the *sanad* with the accretions, if any, or properties appurtenant to the *taluqa* passed to the surviving brother of the last proprietor in preference to his widow. That decree led to an elaborate inquiry, the result of which is embodied in *Rajindra Bahadur Singh* v. *Raghubans Kunwar*, (4). The contention there was that the villages purchased with the income of the *taluqa* were accretions to the estate along with the house and certain moveable property left by the deceased. But their Lordships of the Privy Council repelled that contention in regard to such properties as had not been obtained in exchange for those included in the *sanad*, or had not been granted under conditions similar to those applicable to the estate; and some of the villages, which had been purchased by the last holder after the *sanad*, were excluded.

The decisions in *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (5) and *Murtaza Husain Khan* v. *Mahammad Yasin Ali Khan* (6) proceeded on the basis of a family custom as applicable to the subsequently acquired property and have no direct bearing on the present issue.

On the other hand, in *Parbati Kumari Debi* v. *Jagadis Chander Dhobal* (7) where certain villages had been acquired by the Court of Wards on behalf of the proprietor out of the savings of the ancestral estate and the rents of the villages so acquired and of the ancestral estate were collected by the same servants and the collection papers kept with the papers of the parent estate, their Lordships of the Privy Council held that on those meagre facts they would not be justified in holding that the Raja intended to incorporate the villages purchased out of the savings of the ancestral estate for the purpose of succession.

In *Janki Prasad Singh* v. *Dwarka Prasad Singh* (8) their Lordships of the Privy Council pointed out that the question whether the properties acquired by an owner become a part of his impartible estate for the purpose of succession depended on his intention to incorporate the acquisition with the original estate. But that intention can only be gathered in most cases from his declaration, conduct or treatment, or, in other words, from the mode of his dealing with the property or its income; and the mere fact that the purchase of the subsequently acquired property was made from the savings of the impartible estate cannot by itself be always regarded as sufficient proof of his intention to incorporate it. If a person is the absolute owner of the income derived from an impartible estate, it is open to him to spend that income in any way he likes or to invest it in the acquisition of the other property. If he invests it in the acquisition of other property, the property so acquired partakes of the nature of the income which contributed to its acquisition and continues to be his self-acquired property in the same sense as the income of the impartible estate, which is absolutely his. The mere fact that he keeps the income of such subsequently acquired property with the income of the impartible estate does not establish such incorporation as to make the subsequently acquired estate an accretion to or a part and parcel of the impartible estate for the purpose of its succession.

In *Jagdamba Kumari* v. *Wazir Narain Singh* (9) their Lordships of the Privy Council, referring to the purchase of certain properties acquired out of savings of the Sarampur Gaddi, observed:—

"Originally the estate was in debt, and as there is no evidence of any acquisition

(4) 48 Ind. Cas. 213; 40 A. 470; 21 O. C. 106; 24 M. L. T. 282; 5 O. L. J. 401; 8 L. W. 570; (1918) M. W. N. 831; 28 C. L. J. 456; 23 C. W. N. 101; 20 Bom. L. R. 1075; 45 I. A. 134 (P. C.).

(5) 11 I. A. 135; 10 C. 792; 8 Ind. Jur. 331; 4 Sar. P. C. J. 528; Rafique and Jackson's P. C. No. 79; 5 Ind. Dec. (N. S.) 531 (P. C.).

(6) 36 Ind. Cas. 299; 43 I. A. 269; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; 38 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538 (P. C.).

(7) 29 I. A. 82; 29 C. 433; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205 (P. C.).

(8) 20 Ind. Cas. 73; 40 I. A. 170; 17 C. W. N. 1029; 14 M. L. T. 110; 25 M. L. J. 34; (1913) M. W. N. 630; 18 C. L. J. 200; 11 A. L. J. 818; 15 Bom. L. R. 853; 16 O. C. 216; 35 A. 391 (P. C.).

(9) 77 Ind. Cas. 1041; 50 I. A. 1; (1923) A. I. R. (P. C.) 59; 44 M. L. J. 503; 37 C. L. J. 287; 32 M. L. T. 157; 4 P. L. T. 319; 25 Bom. L. R. 676; 2 Pat. 319; 18 L. W. 555; 28 C. W. N. 98; (1923) M. W. N. 460 (P. C.).

of property from other sources, it follows that all the estate possessed by the Raja other than the impartible *Raj* was derived from the income of the *Raj* itself. In the end this income produced very considerable property. There were certain villages, certain mortgages, usufructuary and otherwise, sums due on bonds and decrees, Government promissory-notes to the extent of two lacs, and other moveable and immoveable properties. With the exception of the Government promissory-notes the whole of these have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong, and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact, when the true position is considered, there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the *Raj*. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character".

They pointed out the confusion which was likely to result from the application of the doctrine appertaining to the incorporation of a separately acquired estate into the ordinary joint family property to the question of the incorporation of property subsequently purchased out of the income of an impartible estate, for in the former case the income equally with the corpus forms a part of the family property, and if the owner mixes his own moneys with the moneys of the family, for example, by putting the whole into one account at the Bank or by treating them in his accounts as indistinguishable, his own earnings share with the property, with which they are mingled, the character of joint family property; but no such considerations necessarily apply to the income from impartible property.

The evidence adduced in the present case merely goes to show that the proprietor of the Baispur Estate kept the income of the *zamindari* property with that derived from the Baispur Estate in a common treasury. The evidence of Muhammad Yaqub, who used to write the accounts, shows that the income of all the three properties used to be written in one and the same account books; and the accounts produced show that the money required for the purchase of the house property in dispute was paid out of the common treasury. Thakur Bajrang Bahadur Singh used to live in one of the houses purchased by him at Allahabad and died there. After his death *Musammat* Harnath Kuer, his senior widow, built a new house over a portion of plot No. 130 at a cost of Rs. 10,000 or Rs. 12,000 and that money too, according to the account books for 1316 to 1319 *F* and the evidence of Muhammad Yaqub and Mata Bhik, was paid out of the common treasury. It follows that the income derived from the rent of those houses, such as were not occupied by the proprietor or his widows, was deposited in and the expenses for their repairs and the ground rent and taxes payable for the said property were paid out of the common stock. These facts are not, however, inconsistent with an intention to keep the house property aforesaid separate from the parent estate for the purpose of succession. There is nothing to show that Thakur Bajrang Bahadur Singh dealt with the house property in such a way as to make it a part and parcel of the Baispur Estate. He had another house in Partabgarh, which he had similarly purchased presumably out of the income or savings which he had at his disposal; and that house was held in a suit to which the present defendant-appellant was a party not to have been incorporated with the estate and to be descendible as if it were distinct from the Baispur Estate.

The Oudh Estates Act was intended to define the rights of *taluqdars* and others in certain estates in Oudh and to regulate the course of succession thereto; and s. 1, of that Act limits its operation to the estates therein referred to. Unless by an act of deliberate incorporation or declaration or other method recognised by law any property subsequently acquired becomes a part of the estate itself, the rule of succession prescribed by the Act cannot be applied to regulate its devolution. A transfer of such property, for instance, by a gift or bequest would not attract the provisions of ss. 16, 17 or 18 of Act I of 1869, as they stood before they were amended by the U.

P. Act III of 1910, and unless a declaration is made in the manner required by s. 32 A, which was added by s. 20 of the Amending Act, the provisions of ss. 16 and 18 would still be inapplicable to such property. If that is so, such a property cannot be incorporated with the estate for the purpose of succession, unless it was, prior to such acquisition, held under similar conditions or there is some act or declaration showing an unmistakable intention to incorporate it, and sufficient in law to make it descendible in the same manner as the estate. As pointed out by Chamier, C. J., whose observations were quoted with approval by their Lordships of the Privy Council in *Rajindra Bahadur Singh* v. *Raghubans Kunwar* (4), it is a settled law that a subject cannot make his property descendible in a manner not recognised by the ordinary law; and it appears to follow that he cannot by express declaration, still less by mere volition, whether actual or presumed, subject the property acquired by him to a rule of succession applicable to the property which he had received by a grant to which certain conditions were attached.

It is, moreover, doubtful how far Act I of 1869 can apply to the devolution of property situated outside Oudh except in the cases covered by s. 32A of Act I of 1869, as amended by the U. P. Act III of 1910. It is impossible, in these circumstances, to hold that the house property in dispute was incorporated with the estate so as to be descendible according to the special rules of succession laid down in Act I of 1869.

It, however, remains to consider how far the defendant-appellant has established a custom of the family or clan to which Thakur Bajrang Bahadur Singh and the parties belong, entitling him to inherit the property in dispute in preference to the plaintiff. The word "*taluqdar*" as defined by s. 2 of Act I of 1869 means any person whose name is entered in the first of the lists appended to Act I of 1869. The name of Thakur Saltanat Bahadur Singh, the father of Bajrang Bahadur Singh, was entered at No. 167 in the list No. 1 and at No. 126 in the list No. 2 appended to Act I of 1869 in respect of the Baispur Estate. He was, therefore, a "*taluqdar*" within the meaning of s. 8 and s. 22 of Act I of 1869. Thakur Saltanat Bahadur Singh died some time in 1861, *i. e.*, before Act I of 1869 was passed. That fact is borne out by a narrative prepared by Mr. Walker, an Extra Assistant Commissioner of Partabgarh, which is appended to the printed register of *taluqdars* kept in the office of the Deputy Commissioner of Partabgarh, which was summoned and examined by the Court below (Ex. 38). That narrative shows that Saltanat Bahadur Singh left at his death only one son, Bajrang Bahadur Singh then a minor, and two marriageable daughters. Both under the Hindu Law and under s. 22 of Act I of 1869 subsequently enacted the heir of Saltanat Bahadur Singh was the same; and no question of diverting the succession from him by the application of s. 22 of Act I of 1869, as amended by s. 21 of the Oudh Estates Amendment Act to the estate of Saltanat Bahadur Singh could, therefore, arise.

Under ss. 8 and 10 of Act I of 1869 there is a conclusive presumption that the estate of Saltanat Bahadur Singh according to the custom of the family on or before the 13th February, 1856, ordinarily devolved on a single heir. The provision as to conclusiveness contained in s. 10 cannot apply to property which is not an estate, but unless the family is known to possess different kinds of properties held under diverse tenures, the existence of a custom in the family and governing the devolution of the estate gives rise to a presumption, by no means conclusive, that the entire family property devolves in one and the same manner. Saltanat Bahadur Singh had an absolute right to the property, which he held at the time of his death; and Bajrang Bahadur Singh similarly possessed an absolute right to the property, which he had inherited from his father, and he had subsequently acquired. There is no evidence to show that the family custom, the existence of which received statutory affirmation in 1869, was confined in its operation to the estate, and was inapplicable to the property subsequently acquired; and as observed in *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (6), the same custom of devolution would unless rebutted, be deemed to apply to the acquired property left by Bajrang Bahadur Singh at his death.

In *Ibrahim Ali Khan* v. *Muhammad Ahsan Ullah* (10) a family custom applicable to an impartible estate was similarly

(10) 13 Ind. Cas. 695; 39 I. A. 85; 11 M. L. T. 225; (1912) M. W. N. 316; 50 P. W. R. 1912; 15 C. L. J. 352; 9 A. L. J. 390; 14 Bom. L. R. 270; 22 M. L. J. 478; 16 C. W. N. 625; 168 P. L. R. 1912; 39 C. 711 (P. C.).

applied to the property subsequently acquired by the holder of the estate. Where a family possesses ancestral property, governed by one rule of devolution, and a member of that family acquires other property by his personal exertions and without any detriment to the ancestral estate, different considerations may arise. But when, as in this case, the *taluqdar* holds an absolute estate in his own right and acquires property for his own use out of the income of that estate or otherwise, any custom relating to the devolution of the property in the family, unless it is limited in its application, would apply equally to the property inherited by him and that acquired by him in his own right.

In *Achal Ram* v. *Udai Partab Addiya Dal* (11) a custom of impartibility applicable to the estate was applied to the property subsequently acquired; and in *Parbati Kunwar* v. *Chandarpal Kunwar* (12) a family custom excluding daughters from inheritance from an impartible estate was similarly applied in regard to the devolution of an estate belonging to the same family which was partible.

The defendant has, however, given no evidence to show what the special incidents of that custom were. The custom was one of single heir descent: and whether Bajrang Bahadur Singh inherited the estate under the Hindu Law or under Act I of 1869, it descended, on his death, according to the custom of single heir descent, obtaining in the family, on his senior widow, and after her, on his junior widow; and the person who would be entitled to the property on the death of the latter would be the person who would be the nearest heir under the ordinary law. As pointed out in *Achal Ram* v. *Udai Partab Addiya Dat* (11) and *Narindar Bahadur Singh* v *Achal Ram* (13) where according to the family custom the estate descends to a single heir, there is no necessary presumption that it descends by the rule of primogeniture, and if the heir according to the lineal primogeniture is more remote in degree from the ancestor than other persons, who may be collaterals coming within the line of heirship, then in the absence of any proof to the contrary, nearness of degree prevails over directness of line. The plaintiff being the nearest reversionary heir of Bajrang Bahadur Singh is, therefore, entitled to the disputed property in preference to the defendant both under s. 23 of Act I of 1869 and under the Hindu Law.

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The appeal, therefore, fails and is hereby dimissed with costs including fees in this Court on the higher scale.

Mukerji, J.—The suit out of which this appeal has arisen was instituted by one Babu Alopi Din Singh, the father of the present respondents, against the appellant to obtain a declaration of title with respect to certain house property situate in the town of Allahabad.

It is common ground that the last male owner of the property was one Babu Bajrang Bahadur Singh. He died sometime in 1900 and was succeeded by, one after the other, his two widows. The junior of the two widows, *Musammat* Sartaj Kunwar, died in 1916 and thereupon the question as to the succession to the property arose. Babu Bajrang Singh owned, among other properties, a *taluqa* known as Baispur in the District of Partabgarh in the Province of Oudh. That *taluqdari* property is in the possession of the defendant-appellant. The plaintiff claimed as the nearest male agnate of Bajrang Bahadur Singh. The defendant claims that the right of succession is governed by Act I of 1869 (governing the succession to *taluqdari* estate, and he, as the eldest son in the eldest line, is entitled to succeed. The appellant denied that the plaintiff was in possession of the property and contended that by a family custom the property acquired by the *talqudar* (it being common ground that the property in suit was purchased by Bajrang Bahadur Singh) and other *taluqdars* of the same clan, passed to the person succeeding to the *taluqdari* estate and that, in any case, the property in suit became incorporated with the *taluqdari* property of Baispur.

The learned Subordinate Judge found that the plaintiff was the nearest male agnate, that he was in possession, that the custom alleged by the defendant-appellant was not proved and that Act I of 1869 did not govern the succession to the present property. He did not come to any definite

(11) 11 I. A. 51; 10 C. 511; 8 Ind. Jur. 272; 4 Sar. P. C. J. 507; Rafique and Jackson's P. C. No. 77; 5 Ind. Dec. (N. S.) 342 (P. C.).

(12) 4 Ind. Cas. 25; 36 I. A. 125; 10 C. L. J. 216; 13 C. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 890; 12 O. C. 304; 31 A. 457; 19 M L. J. 605 (P C.).

(13) 20 C. 649; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind Jur. 319; Rafique and Jackson's P. C. No. 128; 10 Ind. Dec. (N. S.) 438 (P. C.).

finding as to whether the property in suit had been incorporated or not with the estate in Oudh. He accordingly decreed the suit.

In appeal the following points have been urged and require consideration :—

(1) Whether the plaintiff was in possession of the property in suit at the date of it?

(2) Whether the plaintiff was the nearest agnate to Bajrang Bahadur Singh at the date of the death of Sartaj Kunwar?

(3) Whether by any family custom property acquired by a *taluqdar* on the Soam Bansi clan passed to the person who inherited the *taluqa* itself?

(4) Whether the property in suit had been incorporated in and had become an accretion to the estate Baispur?

As a second string to their bow the respondent have contended, for the first time in this Court, that even if the property in suit be taken to have become a part of the *taluqdari* Estate of Baispur, the succession to the entire Estate of Baispur would be governed, in the circumstances of the case, not by Act I of 1869 but by the ordinary Hindu Law. In view of this new contention, the following point also requires determination, namely, whether in case the property in suit be found to be an accertion to the Estate of Baispur, the succession would be governed by the ordinary Hindu Law in preference to Act I of 1869.

The case has been very ably argued on both sides and much time has been devoted to the consideration of the facts and the points of law involved.

On the first point, namely whether the plaintiff was in possession at the date of the suit, it appears to me that the evidence is overwhelming and is conclusive.

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Point No. 2. This point is also very clear. The appellant filed a pedigree of the family. It appears that the plaintiff contended himself with filing a short pedigree showing his connection with the deceased.

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I agree with the Court below that the plaintiff has established his relationship as alleged by him in the plaint.

The third point (as set forth above) that requires determination is whether there is any custom by which the property in suit may be regarded as a part of the Baispur *taluqa* estate. At the outset I may point out that the custom as propounded, in para. 11 of the written statement, at page 4 of the printed record is a very wide one. It is said that the custom obtained not only in the family but also in the entire clan and among all the *taluqdars* of Oudh, specially those in the District of Partabgarh. If such a custom existed, it would be easy to prove because the range from which instances could be quoted would be very wide. But evidence on the point consists of the statements of only three witnesses, namely Babuain Sartaj Kanwar, Raja Partab Bahadur Singh and Raghunandan Singh. The evidence of these witnesses is entirely vague and unsatisfactory and it would be sheer waste of time to seriously discuss it. Agreeing with the Court below I hold that this custom has not been established.

In support of the plea that the property in suit has been incorporated into and has become a part of the Estate of Baispur, the learned Counsel for the appellant has relied on certain rulings of the Privy Council as establishing the proposition that if any such accretion or incorporation could be proved, the succession to the accreted property would be governed by the same rule of law as the main estate itself. The learned Counsel, however, admitted that no case would be cited by him in which it had ever been held by their Lordships of the Privy Council that a property subsequently acquired by a *taluqdar* had been treated as an accretion and the succession to that accreted property had been held to follow the estate. It appears to me that there is an essential difference between accretion to an estate, the succession to which is governed by pure custom, and property which may have been acquired by a *taluqdar* out of his savings from the *taluqdari* estate. Speaking broadly, where property is acquired out of the income of an impartible estate governed by a custom as regards succession and the acquired property is allowed to merge in the main property with a view to its passing to the heir to the main estate, the accreted property is governed by the custom. But where *by Statute* special rule of succession is enacted with respect to a *particular property*, it would appear to me that unless there is an express statutory sanction for it, it is not open to the owner of the property to add to it other properties,

so that the succession to the added property may also be governed by the Statute aforesaid. The reason is clear. In the former case it is a custom which governs the entire estate and the properties which constitute the estate may increase or decrease. But where the law imposes particular rules of succession as opposed to the ordinary rule of succession with respect to a certain property, that rule of succession can govern that property alone. It is not in the power of a subject of the Crown to alter the law of the land as to succession even by purporting to add property to his original estate.

There is only one case which has been cited on the point and it related to a property succession to which was governed by the terms of a *sanad* or written grant. It was held that only the properties which were the subject-matter of the grant could be governed by the terms of the grant and any property that was acquired by the grantee out of the income of the granted property could not be made subject to the terms of the grant. This principle, in my opinion, applies to all *taluqdari* properties, the succession to which is governed by the special Statute of law enacted in s. 22 of Act I of 1869.

The case mentioned is that of *Rajendra Bahadur Singh* v. *Raghubans Kunwar* (4).

The view that has been urged for the respondents and which has found acceptance with me is corroborated by the fact that the Legislature thought it necessary to enact a special rule of law as regards properties other than the *taluqdari* property—the succession to which was originally governed by Act I of 1869. By the amending Act. III of 1910 a section was added to the original Act as s. 32A. It authorised any *taluqdar* or his grantee or heir or legatee by a registered instrument to be executed in a certain manner to declare that any property owned by him and situate within the United Provinces, other than his *taluqdari* property, shall become a part of his estate. It is significant that this enabling clause limits the situation of the property to be so added to the estate. The clause does not permit any property situated outside the United Provinces to be made a part of the *taluqdari* estate.

The view taken by me is further strengthened by the fact that the language of the preamble indicates that the Government wanted to enact rules with respect to certain specified properties situate within Oudh. The properties with respect to which the rules were to apply were so described as to be confined within the limits of Oudh.

In the absence of any direct ruling of the Privy Council that it is possible for a *taluqdar* to add to his *taluqdari* property a property succession to which would be governed by the same rules as govern the *taluqa* itself, I am of opinion that it is not open to do so to a *taluqdar*. This point was directly answered, as I answer it, by two eminent Judges of the Judicial Commissioner's Court, namely Mr. (afterwards Sir) Sunder Lal and Mr. (afterwards Sir Theodore Caro) Piggott in the case of *Janki Prasad Singh* v. *Dwarka Prasad Singh* (14). This case went before their Lordships of the Privy Council, but there was no pronouncement on the question whether the self-acquired property of a *taluqdar* would be governed by the same rules of succession as the *taluqdari* property itself [*Janki Pershad Singh* v. *Dwarka Pershad Singh* (8).]

Coming to the question of fact, namely, whether on the evidence it should be held or not that the property in suit was incorporated with the *taluqdari* property, I am emphatically of opinion that the evidence does not justify any answer in the affirmative.

The evidence on the point consists of certain extracts from account books. These show that the consideration for the sale-deed was taken out from the treasury at Baispur, that the income from the property in suit, namely, rents, were entered in the account books of the Baispur Estate and expenditure for the repairs or addition to the buildings were met out of the funds kept at Baispur. It has been urged that this is conclusive evidence showing that there was a complete commingling of the incomes from the properties at Baispur and at Allahabad and that, therefore, it must follow as a matter of law that Bajrang Bahadur Singh had decided that the property in suit should form a part of his estate at Baispur and should descend to the same heir of his as the Baispur Estate.

The income from the Baispur Estate was the absolute property of Bajrang Bahadur Singh and it was entirely at his disposal. He was the absolute owner of his non-*taluqdari* properties, including the property in

(14) 9 Ind. Cas. 83.

suit, and the income from those non *taluqdari* properties would also be entirely at his disposal. Under the circumstances I do not see how he could act otherwise than he did in the matter of keeping the accounts and putting the incomes together and spending monies out of the common stock for the improvement of any such properties belonging to him. Bajrang Bahadur Singh was not accountable to anybody for the incomes of the estate of these properties and it was, as I have stated, no interest of his to duplicate or triplicate the accounts or to keep separate sets of servants for collection of rents and incomes from separate properties and for their supervision. I fail to see then how a natural and only possible conduct open to Bajrang Bahadur Singh can be construed as evidencing an intention on his part that his self-acquired properties should go along with his *taluqdari* properties for succession.

It is difficult to get an authority on matters of evidence which may be of any use. But unfortunately for the appellant there is one and it entirely demolishes his case. In the case of *Jagdamba Kumari* v. *Wazir Narain Singh* (9) a dispute arose as to succession to an impartible estate known as Serampur Raj. The last owner of the property was one Raja Saroda Narain. The plaintiff in the suit was his widow and the defendant was the late Raja's undivided cousin. By custom, the Serampur Estate was impartible and went to a single male owner. It was held under the circumstances that the main estate was bound to go to the defendant, the parties being subject to Mitakshara Law. But there was considerable amount of *zamindari* and moveable property which had been acquired out of the income of the main estate by Saroda Narain. It was found, to quote the words of the Counsel for the respondent in the case, that "the collections were made by one set of servants and the entries were made in one set of books." Both the Courts in India had found from this fact that there was an intention of incorporation on the part of the late Raja Saroda Narain, of the *zemidari* properties with the main estate. Their Lordships of the Privy Council quote in their judgment the statement of the Manager—the statement which was supposed to have been made in the interest of the respondent—and came to the conclusion that that evidence did not justify an inference of any intention of incorporation. After this pronouncement of opinion it is impossible for the appellant to contend sucessfully that the property in suit has become an accretion to the Baispur Estate and it must go to the party who should succeed to the latter.

This contention, therefore, fails.

In view of my finding on point No. 4 it seems to be needless to discuss whether in the circumstances of the present case the succession to the Baispur Estate would be governed by the Hindu Law or by Act I of 1869. It was stated at the Bar that the respondents contemplated a litigation with the appellant for the Baispur Estate. In view of this proposed litigation, it is all the more desirable to a void any pronouncement of opinion an any matter, the decision of which is not an absolute necessity for the disposal of the present appeal. I, therefore, decline to express any view on the fifth point raised.

In view of my finding, the present appeal should fail and I would dismiss it.

BY THE COURT.—The appeal is dismissed with costs including fees in this Court on the higher scale.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 111 OF 1924.
March 13, 1925.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

Dr. HAR PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

GULZARI LAL—PLAINTIFF—RESPONDENT.

Landlord and tenant—Agreement to plant grove—Covenant against sale to stranger, whether prohibits mortgage.

By an agreement between a landlord and a tenant the latter was permitted to plant a grove of the one-quarter of which he was to become owner, one of the conditions of the agreement being that he should not sell his one-quarter share to any stranger, but only to the proprietor by whose permission the grove was to be planted or to co-sharers of such proprietor:

Held, that the prohibition contained in the agreement was directed against a sale to an outsider and did not affect the power of the tenant to mortgage his share of the grove.

Letters Patent Appeal from a judgment and decree of Mr. Justice Daniels, in Second Civil Appeal No. 1571 of 1922, dated the 3rd April 1924, and printed in 85 Ind. Cas. 99.

Dr. *K. N. Katju* and Mr. *Gulzari Lal*, for the Appellants.

Mr. *Bhagwati Shankar*, for the Respondent.

JUDGMENT.—The only question raised by these two connected appeals is as to the interpretation of a document. That was an agreement between a tenant of the name of Bhola and his land-holder as to the terms on which Bhola would be permitted to plant a grove. The parties are agreed that Bhola was to become the owner of one-quarter of the grove, subject only to such restrictions as were laid down in the agreement itself. One of these restrictions was that he should not sell this one-quarter share to any stranger, but only to the proprietor by whose permission the grove was to be planted, or to co-sharers of such proprietor. As a matter of fact there has been no sale of the share in question but only a mortgage, and the whole point for us to determine is whether this prohibition, in terms directed only against a sale must be read either by necessary implication, or on a view of the position of the parties and the terms of the document as a whole as being also a covenant against mortgaging. The learned Judge of this Court has held that the prohibition is directed against a sale to an outsider and that the proprietary rights which Bhola was to take under the agreement could not be further modified except by express covenant. He holds that there was no covenant against mortgaging. In our opinion he was right in so deciding. This finding determines both the appeals, which we dismiss accordingly with costs.

Z. K. *Appeals dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 189 OF 1925.

May 20, 1925.

Present:—Mr. Justice Addison.

LEKH RAM—DECREE-HOLDER—APPELLANT

GURDIAL AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Step-in-aid of execution—Application, defective, whether operates to extend limitation,

Appellant obtained a decree and applied for execution of it by attachment of immoveable property. A report was made on the application that the number of the suit given in the application was not correct. The Court thereupon passed an order that the application should be returned for amendment. The application, however, was not taken back by the decree-holder and remained on the record and nothing further was done in connection with it:

Held, that the application, although defective, was a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and was sufficient to keep the decree alive. [p. 268, col. 1.]

Second appeal from an order of the District Judge, Karnal and Rohtak, dated the 25th November 1924, reversing that of the Subordinate Judge, Fourth Class, Jhajjar, District Rohtak, dated the 19th May 1924.

Mr. *Shamair Chand*, for the Appellant.

Mr. *K. J. Rustomji*, for the Respondents.

JUDGMENT.—The facts leading up to this second appeal are as follows:—

The plaintiff obtained a decree on the 22nd November 1919. He applied for execution of that decree on the 4th November 1920, and that application was in order. He next applied, on the 16th August 1923, for execution by attachment of immoveable property. A report was made upon this application, on the 28th August 1923, that the number of the suit given in the application, namely, 816 of 1919, was not correct. Accordingly the Court passed an order, on the 30th August 1923, that the application should be returned for amendment. No one seems to have been present on that occasion and, as a matter of fact, the application was never taken back but remained upon the record. The next application put in was on the 18th January 1924.

It was argued before the First Court that the application of the 16th August 1923, being defective, could not be considered as a step-in-aid so as to save limitation. The Court, however, held that the application of 18th January 1924, was within time. On appeal the District Judge reversed this decision and held that the application of the 16th August 1923, was not a step-in-aid and that the subsequent application was, therefore, barred by time.

There are numerous rulings on the subject, some before the passing of the new C. P. C., and some later. An attempt was made to argue before me that O. XXI, r. 17 of the new Code is not the same as s. 245 of the old Code and that, therefore, the previous rulings are not applicable. The only distinction, however, between the two

Codes in this respect is that now there is an addition that if the application is amended within the time fixed it shall be deemed to have been an application in accordance with law and to have been presented on the date when it was first presented. Formerly it was held that the date of the filing of the application was the date of the amendment. This new provision therefore, *prima facie* only altered the old law in so far that now the amended application takes effect from the date when it was first filed and not from the date when it was amended.

I shall refer to three Madras rulings. In *Ramanandan Chetti* v. *Periatambi* (1) it was held that an application for execution of a decree which did not comply in every particular with the requirements of s. 235 of the C. P. C. and which having been returned to the judgment-debtor for amendment, had not been proceeded with, might still suffice to keep the decree alive. Section 235 of the C. P. C. corresponds to O. XXI, r. 11 of the new C. P. C., and it was as regards the provisions of this latter section that the application in dispute was defective. As there is no material difference between the two Codes, this ruling, therefore, supports the appellant.

The next Madras ruling is *Vadivelu Pillai* v. *Maruda Pillai* (2). This was decided under the new C. P. C. and lays down the same principles as the previous ruling.

The third Madras ruling is *Kamatchi Ammal* v. *Pichu Iyer* (3). Again it was held that an execution petition returned for amendment but not represented may yet give a fresh starting point for limitation. It was pointed out in this judgment that r. 17 of O. XXI, C. P. C., was an enabling one, which allowed certain defective application subsequently amended to be deemed applications in accordance with law with effect from the date of the first presentation. This ruling, therefore, supports the view taken by me above that there is no material distinction in this respect between the old and the new Code.

The same view was taken in the Full Bench Reference of the Calcutta High Court, *Gopal Chundar Manna* v. *Gosain Das Kalay* (4). In the application discussed in that ruling right number of the suit and the date of the decree were not given, just as is the case in the application under my consideration. It was held that material defects only could vitiate an application, and that the above defects were not material, and that the application was good as a step-in-aid of the execution.

In *Joyanuddin Khan* v. *Jamiruddin Sarkar* (5) the Calcutta High Court, however, held that if an application for execution was rejected under O. XXI, r. 17 as not being an application in accordance with law, it would not operate to save limitation under Art. 182 of the Limitation Act. This was under the new C. P. C. No reference seems to have been made in the ruling to the previous Calcutta ruling quoted.

The Calcutta High Court in *Ishan Chandra Samui* v. *Dulal Chandra De* (6) took the same view as in *Joyanuddin Khan* v. *Jamiruddin Sarkar* (5). The later Calcutta rulings are, therefore, in favour of the respondents.

The Patna High Court in *Keshawesarindra Sahi* v. *Debendra Bala Dassi* (7) held that an execution proceeding can only be vitiated by material defects and that a mistake in entering the date of the decree in an application for execution is not a material defect so as to vitiate the proceedings.

The Bombay High Court in *Janardan Govind Karguppikar* v. *Narayan Krishnaji Karguppikar* (8) held that an application made to a British Indian Court to transfer its decrees for execution to the Court of a Native State was a step-in-aid of execution within the meaning of Art. 182 of the Indian Limitation Act, although such an application was not provided for in the C. P. C. This ruling goes very far in favour of the appellant.

On the other hand the Court of the Nagpur Judicial Commissioner in *Meghraj Ramkaran* v. *Abdul Majid Khan* (9), held that if an application was not duly amended within the time given by the Court, it was not an application "in accordance with law" within the meaning of Art. 182 of the Limitation Act so as to save limitation. This is in favour of the respondents.

The first Punjab ruling is *In re Sri Ram*

(1) 6 M. 250; 2 Ind. Dec. (N. S.) 453.
(2) 26 Ind. Cas. 413.
(3) 35 Ind. Cas. 876; 4 L. W. 103; (1916) 2 M. W. N. 152; 31 M. L. J. 561.
(4) 25 C. 594; 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392.
(5) 37 Ind. Cas. 916; 21 C. W. N. 835.
(6) 44 Ind. Cas. 220.
(7) 48 Ind. Cas. 245; at pp. 254, 256: 4 P. L. J. 213; (1919) Pat. 121.
(8) 46 Ind. Cas. 56; 42 B. 420; 20 Bom. L. R. 421.
(9) 63 Ind. Cas. 971; 17 N. L. R. 179.

v. *Majid-ud-din* (10), where it was held that an application for execution of a decree not in accordance with the terms of the decree is not a step-in-aid of execution as contemplated by the old Art. 179 of the Limitation Act. This, however, is not quite in point.

The next Punjab ruling is *In re Shankar Lal* v. *Zorawar Singh* (11). This followed *Gopal Chundar Manna* v. *Gosain Das Kalay* (4), *Kalka Dube* v. *Bisheshar Patak* (12) and rulings of various High Courts and it was held that if an application for execution defective in form contained a prayer for the issue of a notice under s. 248 of the C. P. C. and such notice issued it should be treated as an application to take some step-in-aid of execution within the meaning of the old Art. 179 of the Limitation Act. This also is in favour of the appellant.

The latest Punjab ruling to which I was referred was *Baldeo Sahai* v. *Kanhaya Lal* (13). It was held there that in considering whether an application for execution of a decree is within time, it was not necessary to examine the previous applications to ascertain whether they in all respects complied with the provisions of law. It was further held that the previous applications even if defective were still effectual to keep the decree alive.

The bulk of the authority thus is in favour of the appellant. I, therefore, hold that the application of the 16th August 1923, was step-in-aid of execution sufficient to keep the decree alive.

I accept the appeal and setting aside the order of the District Judge restore that of the Court of first instance which will proceed with the execution in accordance with law. There will be no costs.

Z. K. *Appeal accepted.*

(10) 98 P. R. 1901.
(11) 116 P. R. 1907; 143 P. W. R. 1907.
(12) 23 A. 162; A. W. N. (1901) 31.
(13) 34 Ind. Cas. 955; 65 P. L. R. 1916; 202 P. W. R. 1915.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 286-B OF 1923.
March 29, 1924.
Present:—Mr. Kinkhede, A. J. C.

SHAMPURI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAMCHANDRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 6, 7, Sch. I, Arts. 44, 144—Hindu Law—Joint family—Mother, whether lawful guardian of minor sons—Alienation by mother—Suit to challenge alienation—Limitation—One of several co-parceners attaining majority, whether entitled to give discharge—Limitation, extent of.

Under the Hindu Law the mother is the lawful guardian of her infant sons where the sons are the sole owners of their property. [p. 269, col. 2.]

Although a person, who manages the estate whether of a minor, who is the sole owner of the property, or of a co-parcenary in which he has a joint interest with the minor, is entitled to be styled a manager, in matters of alienation the position of each is different. In one case the alienation is by a manager who has no joint interest with the minor while in the other case he has. It is to an alienation of the latter kind that the description "alienation by a *karta* or manager" would strictly apply, as the alienation is by a person having an interest in the joint property. [*ibid.*]

A Hindu mother is the guardian of her sons but not the manager or *karta* in the technical sense of the term. Consequently, a suit by a minor to challenge an alienation made by his mother as his guardian is governed by Art. 44 and not by Art. 144 of Sch. I to the Limitation Act. [*ibid.*]

Where there are several persons jointly entitled to institute a suit, and some of them are under a disability, the running of time against all depends upon proof of the fact whether there is at least one of them who can give a discharge without the concurrence of the persons under disability. If there is no such person time does not begin to run against any of them until one of them becomes capable of giving a discharge without the concurrence of the others or until cessation of the disability. [p. 270, col. 1.]

It cannot be predicated of every Hindu family that an adult brother as soon as he becomes a major becomes the manager of the family and, therefore, necessarily competent to give a discharge without the concurrence of the other members. Such competence depends upon several questions of fact and upon a variety of circumstances varying with different families, and unless the necessary facts are properly alleged and proved by the party who wants to deprive the persons under disability of the benefit of s. 6 of the Limitation Act, the claim cannot be thrown out as barred by limitation. [*ibid.*]

The right of avoidance or of challenging an alienation is a personal right which every co-oparcener enjoys in virtue of his position as such co-parcener in a joint family owning joint or ancestral property and its non-enforcement does not depend upon the sweet will of any particular individual. It is the birth-right of every member and cannot be taken away by anything done or omitted to be done by another member of the family, unless that other could bind the rest. [p. 270, col. 2.]

A minor co-parcener in a joint Hindu family is not bound by the mere failure of a major co-parcener to avoid an alienation made by their guardian within three years of his attainining majority, especially where the alienation is found not to be supported wholly by necessity and, therefore, not binding as against the minor. [p. 271, col. 1.]

Although every act done by a joint tenant for the benefit of himself and his companions binds the others, it does not follow that a joint tenant is similarly bound by acts done by the others which prejudice him. [p. 270, col. 1.]

Case-law considered.

Appeal against a decree of the Second Additional District Judge, Amraoti, in Civil Appeal No. 25 of 1923, dated the 28th June 1923.

Mr. *D. T. Mangalmoorti*, for the Appellant.

Mr. *E. E. Sanjana*, for the Respondents.

JUDGMENT.—I think this case is not approached from the correct stand point of view so far as the question of limitation is concerned and after forming a proper conception of what is material to be decided in a case of the character. The main question is whether granting Art. 44 to be applicable it is to be read with s. 7 of the Limitation Act, 1908, in the circumstances of this case. The plaintiffs Nos. 1 to 4 had an elder brother Rampuri. They all lived under the guardianship of their mother Tulsabai. The latter alienated their property by means of a sale-deed, Ex. 1-D-13 or 1-D-14 dated 16th December 1911, in favour of defendant No. 4 Deopuri for a consideration of Rs. 1,500 out of which it has been found, that there was legal necessity for Rs. 600 only, the balance of consideration of Rs. 900 not being binding on the minors. The alienation was thus for legal necessity only partially. The defendants Nos. 1 to 3 exercised their right of pre-emption as against defendant No. 4 and got a decree and entered into possession on 16th August 1913 (Exs. 1-D-10 to 1-D-12).

It is found as a fact that Rampuri was born on 5th December 1897 and that he attained majority on 5th December 1915, and that he was major when he died. Both the Courts hold that time began to run from 1915 under Art. 44 and that as he failed to sue within 3 years of his attaining majority the claim of the minor plaintiffs also was barred by time. It is an admitted fact that Rampuri died without suing to set aside the alienation but whether at the date of his death 3 years had elapsed is not clear, on the contrary there is a finding that he died in 1916, which implies that he died before the expiry of the 3 years period. The Courts below have also found that the present plaintiff No. 1 attained majority on 9th April 1918 which is more than 3 years prior to 20th January 1922, the date of the institution of the suit, and that consequently the suit was dismissed as barred by limitation. The plaintiffs appeal.

They urge that mother is not the natural guardian of her minor sons and, therefore, Art. 44 was not applicable. They rely on *Kolhu* v. *Bel Singh* (1), in support of this contention. I have already held in *Ganpat Sambaji* v. *Mahadeo* (2), that mother is the lawful guardian of her infant sons where the sons are the sole owners of their property and have also shown that the point was unnecessary to be decided in the case of *Kolhu* v. *Bel Singh* (1) as the minors were Gonds and were *prima facie* not governed by Hindu Law and that the head-note was rather widely stated. I still adhere to that view and hold that the defendant No. 5 was the natural and lawful guardian of the present plaintiffs and of Rampuri. It is contended that the mother is the manager and, therefore, the longer period of 12 years under Art. 144 should be made applicable to this case of an alienation made by her as a manager as was the case in *Asaram* v. *Ratan Singh* (3). That case is easily distinguishable from the present one. Batten, A. J. C., has pointed out in that case the distinction between an alienation by a manager and an alienation by a guardian. Although a person who manages the estate whether of a minor who is the sole owner of the property, or of a co-parcenary in which he has a joint interest with the minor, is entitled to be styled a manager, in matters of alienation, the position of each is different. In one the alienation is by a manager who has no joint interest with the minor while in the other he has. It is to an alienation of the latter kind that the description *alienation by a* karta or manager would strictly apply, as it is by a *person having an interest* in the joint property. For this distinction I refer to the passage at p. 18 of *Asaram* v. *Ratan Singh* (3). The mother was thus a guardian but not the manager or *karta* in the technical sense of the term. Consequently the longer period cannot be made applicable. The alienation being, therefore, by a lawful guardian, Art. 44 applied to it and the same has been rightly applied in this case.

The next question is whether the suit of the present plaintiffs is barred by limitation by reason of the inaction of Rampuri or of plaintiff No. 1 after each of them attained majority. This depends upon the applicability of s. 7 of the Indian Limi-

(1) 66 Ind. Cas. 303; 17 N. L. R. 183; (1922) A. I. R. (N.) 201.
(2) 78 Ind. Cas. 946; (1924) A. I. R. (N.) 354.
(3) 32 Ind. Cas. 242; 12 N. L. R. 12 at p. 18.

tation Act, to the facts of the case. It is in this connection that I made my remark in the opening portion of my judgment that the case was decided without forming a clear conception of what is material for the decision of this point.

I have pointed this out in more cases than one. Section 7 contemplates two cases (1) where there are several persons jointly entitled to institute a suit but one of such persons is under a disability, limitation will run against all provided a discharge can be given without the concurrence of such person, and (2) where no such discharge can be given, time will not run as against any of them (*a*) until one of them becomes capable of giving such discharge without the concurrence of the others, or (*b*) until the disability has ceased. The running of time against all, therefore, depends upon proof of the fact whether out of several persons *jointly* entitled to sue, there is at least one who can give discharge without the concurrence of the persons under disability. If there is no such person time does not begin to run against any of them until one of them becomes capable of giving discharge, such discharge without the concurrence of other or until the cessation of the disability. It cannot be predicated of every Hindu family that an adult brother as soon as he becomes major becomes the manager and, therefore, necessarily competent to give discharge. Payment to one may not in every case operate as full discharge. This depends upon several questions of fact and upon a variety of circumstances varying with different families, and unless the necessary facts are properly alleged and proved by the party who wants to deprive the person under disability of the benefit of s. 6 of the Limitation Act the claim cannot be thrown out as barred by limitation. In this connection following *Ganga Dayal* v. *Mani Ram* (4) and *Bai Keval* v. *Madhu Kala* (5) I have pointed out in some of my previous decisions that unless the questions as to whether the major brother was or was not a manager, as a fact, and whether and if so when he became capable of giving discharge without the concurrence of others and whether the right of suit was of such a nature as could be enforced *jointly*, are decided as questions of fact, it is not possible to decide upon the applicability or otherwise of the 1st or the 2nd part of s. 7 of the Limitation Act, to such a case. If these questions are raised by the defendants and are admitted by the plaintiffs then that may be a sufficient basis for the Court to base its decision thereon. But a Court cannot assume facts without any admissions of parties or proof or other materials on record.

It may not be out of place to point out here that the right of avoidance or of challenging an alienation is a personal right which every co-parcener enjoys in virtue of his position as such co-parcener in a joint family owning joint or ancestral property, and its non-enforcement does not depend upon the sweet will of any particular individual. It is the birth-right of every member and cannot be, therefore, taken away by anything done or omitted to be done by another member of the family, unless that other can bind the others. But here comes into play another principle of law which says that although every act done by one joint tenant for the benefit of himself and his companions binds the others, it does not follow that he is similarly bound by acts which prejudice him. See observations of Lord Ellenborough, C. J., in *Right* v. *Cuthell* (6), quoted by Sir Henry Drake-Brockman in *Bapu* v. *Temsa* (7).

Moreover as pointed out by Sir Bose, A. J. C, in *Moti* v. *Kanhaiya* (8), the right to challenge is a personal right and it dies with the man. The right of Rampuri to challenge, therefore, died with him. But that had not the effect of releasing his interest in favour of the alienee. It enlarged the interest of the rest of the coparcenary. Each co-parcener's right of avoidance being an independent right like the right of redemption, it must be enforceable at his own instance. Once he makes his election to affirm an alienation he is personally bound by it; he cannot thereafter repudiate it. In other words it only creates a personal estoppel. I fail to see how the inaction of one co-parcener, even if he be the manager (other than the father) will bind the other minor co-parceners, if such manager cannot bind them even by his positive acts of alienations, much less would they be bound by the so-called ratification of the alienation already made by a guardian which may, at the most, be said to

(4) 1 Ind. Cas. 824; 31 A. 156; 6 A. L. J. 62.
(5) 64 Ind. Cas. 972; 45 B. 535 (540); 23 Bom. L. R. 1191; (1922) A. I. R. (B.) 319.
(6) (1804) 7 R. R. 752 at p. 754; 5 East 491; 2 Smith 83; 5 Esp. 149; 102 E. R. 1158.
(7) 13 Ind. Cas. 982; 8 N. L. R. 29 at p. 31.
(8) 4 Ind. Cas. 797; 5 N. L. R. 181.

follow from such inaction. Moreover, where an adult brother sues for himself and on behalf of his minor brother he cannot give a valid discharge without the leave of the Court duly given by the Court after full consideration of the question whether such discharge is for the benefit or in the interest of the minor plaintiffs. I fail to see why the position should be in any way different when the discharge has to be given outside Court. Can it successfully be argued that once a discharge is given by the person who is the manager of the joint family the validity, scope and extent of such discharge or of the authority to give one becomes unquestionable? Do we not come across hundreds of cases where such questions have been raised and discharges given by one of the persons jointly entitled to the property have been successfully impeached, and they (discharges) have been upheld only partially to the extent of the interest of the individual giving them? Questions of benefit or legal necessity to the minors sought to be bound by such discharges given by manager have not been treated as irrelevant for the disposal of the question of the validity and the binding character of such discharges, even though the fact of the discharge may be an admitted or a proved fact in any such cases. I do not see any valid reason for holding that a minor co-parcener is bound by the mere failure of the major co-parcener to avoid the alienation within 3 years of his attaining majority, especially where it is found to be not supported wholly by necessity and, therefore, not binding as against him.

As I do not find any material on record either in the pleadings or in the evidence to support the findings in para. 8 and 10 of the judgment of the First Court that plaintiff No. 1 was as a matter of fact the *de jure* and *de facto* manager from the date of his attaining majority, they appear to me to be based on mere assumptions and not on legal testimony. I cannot, therefore, accept the finding of the lower Appellate Court as binding as against me in second appeal as there is no evidence to support it. I do not find anything to show what has happened since plaintiff No. 1 attained majority to deprive the rest of the plaintiffs of their right to avoid the alienation. There is nothing before me except plaintiff No. 1's mere inaction which in itself is not sufficient to disentitle the rest of the plaintiffs at any rate from claiming the relief in their own right. I, therefore, set aside the decision on the authority of *Damusa* v. *Abdul Samad* (9).

The real point to be decided in the case having been misconceived by all the parties concerned, and also by the Judges of the lower Courts, I think, I should in justice to them, give to the parties an opportunity to allege and prove or disprove such facts as are necessary for the proper adjudication of the rights of the parties according to law.

I, therefore, remand the case to the First Court with direction to decide it after eliciting the necessary facts relevant to the question of the *de jure* and *de facto* managership of plaintiff No. 1 and his competency to give discharge without the concurrence of the minor plaintiffs with advertence to the above remarks. The appeal succeeds upon a point not pointedly urged in the grounds of appeal. I do not, therefore, think it proper to order refund of Court-fee paid on the memorandum of appeal to this Court. The costs of this Court as also of the lower Appellate Court will be borne as incurred. Those of the First Court will be costs in the suit and abide the result.

Z. K. *Case remanded.*

(9) 51 Ind. Cas. 177; 15 N. L. R. 97; 17 A. L. J. 700; 37 M. L. J. 36; (1919) M. W. N. 505; 21 Bom. L. R. 920; 10 L. W. 310; 24 C. W. N. 81; 47 C. 107; 46 I. A. 140 (P. C.).

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 124 OF 1924.

March 27, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

Babu RAGHUNATH PRASAD SINGH—OPPOSITE PARTY—APPELLANT

versus

Babu LACHHMI NARAIN SINGH—APPLICANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Objections—Application to send for record, whether step-in-aid of execution.

Where in execution of a final decree for partition the judgment-debtor raised certain objections and in order to repel those objections it was necessary for the decree-holder to bring before the Execution Court the record of the suit and the final decree passed therein, and he made an application that the record may be sent for:

Held, that the application of the decree-holder was an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to extend limitation.

Abdul Kadir Rowther v. *Krishna Malamal Nair*, 23 Ind. Cas. 533; 38 M. 695; 1 L. W. 271; (1914) M. W. N. 563; 26 M. L. J. 433; 15 M. L. T. 305, referred to.

First appeal from a decree of the Subordinate Judge, Gorakhpur, dated the 17th November 1923.

Messrs. *B. E. O'Conor* and *Ramnama Prasad*, for the Appellant.

Dr. *M. Wali Ullah* and Mr. *Shiva Prasad Sinha*, for the Respondent.

JUDGMENT.—This is a decree-holder's appeal arising out of an execution of a decree. The application has been dismissed on the ground that it was barred by limitation. The only objection that was considered by the Court below and which has been argued before us is as to whether the step taken by the decree-holder on the 26th of April 1919 amounted to step-in-aid of the execution of the decree within the meaning of Art. 182, sub-cl. (5) of the Limitation Act. The learned Subordinate Judge has come to the conclusion that it did not amount to such a step.

After much trouble we have been able to ascertain what exactly happened. The suit was one for partition of considerable properties and a final decree for partition was passed as early as 1912. About the 26th of April 1919 there were several objections raised by various judgment-debtors to the previous application for execution. On the 26th of April 1919, the decree-holder put in an application praying that the record of the original case should be sent for in order that the various objections may be disposed of. He stated that the record was necessary for the purposes of their disposal. We may mention that among the objections raised there were objections that the amount claimed in the decree was not proper and that for certain items at least the judgment-debtors should have been given credit for. On the 26th of April 1919 the Court first passed an order that it was necessary to examine the final decree which had been sent on to the *amin* along with a *parwana* for delivery of possession and it ordered that the decree should be sent for from him. Later on the Court ordered that the record should also be sent for.

The question before us is whether the application of the decree-holder that the record should be sent for, which he filed on the 26th of April 1919, was an application to take a step-in-aid of the execution. We are far from saying that every application made to send for a record made by a decree-holder necessarily amounts to such a step, for every case must depend on its own facts and circumstances. If an application is not a *bona fide* one or is absolutely unnecessary and futile, it may fall short of amounting to such a step. But in this case in view of the objections which had been raised, it was essential that the record, or, at any rate, the final decree should be before the Court. The Court, before whom the application was made, considered that it was necessary, and actually granted the application. The step taken by the decree-holder was certainly in prosecution of his application for execution and in order to get rid of the objections which were an obstacle in the way. We, therefore, think that it did come under Art. 182 (5) of the Limitation Act.

We may refer to the case of *Abdul Kadir Rowther* v. *Krishna Malamal Nair* (1) which, though not exactly similar to the present case, is somewhat analogous. The present application was filed on the 26th of April 1922 just within three years of the step taken on the 26th of April 1919 and was, therefore, within limitation. The result, therefore, is that this appeal is allowed, the decree of the Court below is set aside, and the case sent back to the Court below for disposal according to law. In view of the trouble which has been caused to us in trying to ascertain for ourselves what the facts are we direct that the parties should bear their own costs of this appeal.

Z. K. *Appeal allowed.*

(1) 23 Ind. Cas. 533; 38 M. 695; 1 L. W. 271; (1914) M. W. N. 563; 26 M. L. J. 433; 15 M. L. T. 305.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 255 OF 1925.

April 3, 1925.

Present :—Mr. Justice Broadway.

ALLAH RAKHA—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 325—Attempt to abduct by persons armed with dangerous weapons —Grievous hurt caused to persons resisting attempt—Common liability of accused.

Accused, four in number, joined together to forcibly carry off a girl while she was sleeping in her own house and proceeded to do so armed with *dangs* and *chhavis*, and in the course of the attempt to carry off the girl grievous hurt was caused to the friends and relatives of the girl:

Held, that it must be assumed that all the accused had the knowledge that in the attempt to carry off the girl it might be necessary to use the *dangs* and *chhavis* that they were armed with, and that, the use of such weapons would in all probability result in grievous hurt being caused to persons attempting to prevent the girl being carried off, and that, consequently, by virtue of s. 34 of the Penal Code, all the accused were guilty of the offence of voluntarily causing grievous hurt. [p. 274, cols. 1 & 2.]

Appeal from an order of the Additional District Magistrate, Amritsar, dated the 30th January 1925.

The Government Advocate, for the Respondent.

JUDGMENT.—On the night between the 6th-7th September, 1924, *Musammat* Zainab Bibi, a potter girl aged about 14 years, was forcibly carried away [illegible] sons while she was sleeping with mem[illegible] of her family in their premises by the Gilwali Gate outside Amritsar City. The abductors were r[illegible]sted and being armed with *dangs* and *chhavis* struck the girl's relatives injuring *Musammat* Rahim Bibi, *Musammat* Jhando and Mehr Bakhsh. *Musammat* Rahim Bibi who is the wife of Rahim Bakhsh had her right arm fractured. *Musammat* Jhando who was on a visit from Lahore to these people, had her eighth rib on the right side fractured. Mehr Bakhsh received injuries on his scapular region and on the foot. These injuries were, however, simple. The matter was reported at once at the Police Station and it was said that four persons had committed the offence.

On the 1st of November 1924, information was given to Pandit Kishori Lal, Sub-Inspector, Hissar District, by one Sobha Singh, a *jat* of Kingra village in that district, to the effect that there was a minor girl who had been abducted and was being kept in confinement by Mehr Singh and Kehr Singh and was to be sold. On receipt of this information the Police went to Kingra, surrounded the house of Kehr Singh and Mehr Singh and in one of the rooms found *Musammat* Zainab Bibi and one Madho. Madho was suffering from small-pox and gave his name as Banta. *Musammat* Zainab Bibi is said at first to have given her name as Santi but subsequently disclosed her identity with the result that on her statement Madho and Allah Rakha were sent up by the Police charged with having abducted *Musammat* Zainab Bibi under s. 366, Indian Penal Code, and with having caused grievous hurt to *Musammat* Rahim Bibi and *Musammat* Jhando. Two other persons, namely, Nur Mohammad and Gama were named in the *challan* as co-accused but shown as absconding. As the result of the trial both Madho and Allah Rakha were found guilty and sentenced. Madho to four years' rigorous imprisonment including three months' solitary confinement under s. 366 and two years' rigorous imprisonment under s. 325, Indian Penal Code, while Allah Rakha was sentenced under s. 366, Indian Penal Code, to three years' rigorous imprisonment and under s. 325, Indian Penal Code, to two years' rigorous imprisonment. The sentences in both cases were to run consecutively.

Against this conviction and sentence Allah Rakha alone has preferred this appeal through the Jail in which he is confined. I have carefully perused the evidence on the record paying particular attention to the testimony of *Musammat* Zainab Bibi. She makes a very detailed statement and gives a graphic account of the way in which she was carried off and taken on foot, travelling by night, all the way from Amritsar to Kingra in the Hissar District where she was ultimately placed in the house of Kehr Singh and Mehr Singh and from where she was later rescued by the Police. According to her statement she was taken away to a plantain grove at about one *kos* from her home in Amritsar and there subjected to rape by all her captors. Apparently on the journey down to Hissar she was raped by all the four persons about every other night. She says that on the night when she was carried off she was asleep in the verandah of her house when she was suddenly seized by Madho

who swung her on his back and carried her off. She has sworn positively that Allah Rakha was one of the four persons who took her away and who subjected her to the treatment referred to above. That she would have had every opportunity of seeing these four persons cannot be denied and nothing has been elicited in cross-examination to throw any discredit on her testimony. *Musammat* Jhando, who was a stranger and was a guest in the house, was unable to identify either of the men sent up for trial. *Musammat* Rahim Bibi who, undoubtedly, came to close quarters with the abductors says that she recognised all the four men as persons who had been visiting the house of one Rustam who lived a few doors off. Bassa, the husband of *Musammat* Zainab Bibi, says that he identified Allah Rakha at village Laliani in the Lahore District. There is no evidence as to how the identification parade was held and I, therefore, cannot attach any weight to evidence of this description. The statement of Rustam, however, who is prosecution witness No. 9 appears to be worthy of credence According to him Allah Rakha, the appellant, used to live in a room at a distance of two rooms from his house. Allah Rakha was a day labourer and used to be constantly visited by Madho while the two absconders also lived with him (Allah Rakha appellant) Rustam does not give any evidence with regard to the actual occurrence, but merely shows that Allah Rakha used to live quite close to where the crime was committed and had left his abode about four or five weeks before the occurrence.

So far as the abduction or kidnapping of *Musammat* Zainab Bibi is concerned, there appears to be no reason whatever to doubt the appellant's participation in the act and the conviction under s. 366, Indian Penal Code, is well founded. When four persons join together to forcibly carry off a girl while she is actually sleeping in her own house and proceed to do so armed with *dangs* or *chhavis*, it appears to me quite justifiable to assume that all of them had the knowledge that it might be necessary to use the *dangs* and *chhavis* they were armed with, and that the use of such weapons would in all probability result in grievous hurt being caused to persons attempting to prevent the girl being carried off, and, therefore, when, as a matter of fact, in the course of the attempt, grievous hurt is caused to more than one of the unfortunate victim's friends and relatives, it seems to me that all must be regarded as being responsible for the grievous nature of the hurt caused. It is not possible from the evidence on the record to say which of the four persons alleged to have taken part in the offence actually struck the blows which fractured the arm of *Musammat* Rahim Bibi and the rib of *Musammat* Jhando. But under s. 34 the appellant must be held responsible for the offence as well *Ranchhod Sursang* v. *Emperor* (1) and, I, therefore, maintain the convictions as well as the sentences under both the sections and dismiss the appeal.

Z. K. *Appeal dismissed.*

(1) 87 Ind. Cas. 600; 26 Bom. L. R. 954; (1924) A. I. R. (L.) 502; 26 Cr. L. J. 1000.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 499 OF 1924.

June 14, 1924.

Present:—Mr. Justice Carr.

NGA MYAING—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Conviction set aside by High Court —Committal to Sessions directed—Procedure in Committing Magistrate's Court.

Where an accused person is tried and convicted by a Magistrate, but the conviction and sentence are set aside by the High Court and the latter directs that the accused be committed to Sessions, all that the Magistrate should do is to re-open the original proceedings, frame a fresh charge, explain it to the accused, require him to give in his list of witnesses for Sessions, examine, if he thinks fit, any of those witnesses, who have not already been examined and then to write a short formal order of committal as under the orders of the High Court. It is not necessary in such a case to open a new proceeding and take all the evidence over again.

Criminal appeal from an order of the Sessions Judge, Bassein, in Sessions Trial No. 10 of 1924.

JUDGMENT.—There has been a great

waste of time and energy in this case. The accused was first tried by the Headquarters Magistrate of Bassein, who convicted him of theft. On a reference by the Sessions Judge I set aside the conviction and sentence and directed that the accused be committed to Sessions.

The Magistrate—the successor of the original Magistrate—then opened a new proceeding and took all the evidence again, ending up by writing a committal order of over four pages of typescript. All this was quite unnecessary. All that he should have done was to re-open the original proceedings, frame a fresh charge and explain it to the accused, require him to give in his list of witnesses for Sessions, examine (if he thought fit) any of those witnesses who had not already been examined, and then write a short formal order of committal as under the orders of this Court.

* * * * * * *

S. D. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 127 OF 1925.

March 17, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Mukerji.

MAHADEO AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

U. P. Excise Act (IV of 1910), ss. 60, 71—Possession of implements for manufacture of liquor—Proof, necessary—Possession of liquor—Liquor found in locked room—Key in possession of accused—Burden of proof.

In order to support a charge under s. 60 (*f*) of the U. P. Excise Act relating to possession of implements for the manufacture of an excisable article, it must be explained to the Court what the implement is and for what purpose, it is supposed, it is in the possession of the accused. The officers of the Excise Department are experts in these matters and Magistrates and other Tribunals are not supposed to be familiar with implements of distillation and require to be instructed in matters which are unconnected with their own work. [p. 275, col. 2.]

Where liquor is discovered from a locked room the key of which was in the possession of the accused, it must be presumed that the accused knew what was inside the room, and the onus is on him of accounting satisfactorily for such possession. [p. 276, col. 1.]

Criminal appeal from an order of the Magistrate, First Class, Azamgarh, dated the 1st November 1924.

Mr. *J. M. Banerji*, for the Applicants.

The Government Advocate, for the Crown.

JUDGMENT.—We have come to the conclusion that this appeal must succeed. It has been brought on a question of principle, and we are bound to say that the Magistrate, no doubt, doing his best to give the accused, as he said, a sort of vague benefit of the doubt, has misunderstood the legal position in a way which would be very serious for the administration of the law under this Act if it were correct. He discusses what would have been likely to have been found in the house of the accused if the accused had been carrying on illicit distillation of liquor. That was not the charge. He says that he also inspected the room and there was no evidence of distillation. That also was not the charge, and he, therefore, allowed his mind to be diverted by irrelevant considerations. He then comes to the conclusion, apparently with great hesitation and as an element of doubt, that the articles discovered in the room were kept there without the knowledge of the accused. That is quite irrelevant. He also holds, contrary to fact and law, that they were not in their possession. It, therefore, appears that the whole foundation of the judgment and the reasoning upon which it proceeded is destroyed, and we have to give an independent consideration to the case. The charge was of being in possession under s. 60 (*a*) of an excisable article, and under s. 60 (*f*) of implements for its manufacture. We are of opinion that the charge under s. 60 (*f*) is not sustainable. One may probably not be far wrong inferring that the pipe which smelt of spirit and one end of which fitted the hole in the pot, was used, as Mr. J. M. Banerji for the respondents properly described, as a sort of strainer. It would appear that the liquor was poured into the tin, and kept there for sale or for storing purposes. If Inspectors of the Department rely upon a charge under s. 60 (*f*) relating to implements, they must explain to the Court what the implement is, and for what purpose they suppose it is in the possession of the accused. They are experts in these matters, and Magistrates and other Tribunals are not supposed to be familiar with implements of distillation, and require to be instructed in matters which are unconnected with their own work. Therefore, that part of the charge must be dismissed. But the liquor was, undoubtedly, excisable liquor, and nobody knew it better than Mahadeo and Baldeo, because they had

originally sold under a license from Government, which appears to be, from what Mahadeo has told us, a very profitable business. The position is this. The Inspectors made a sudden raid in this village and went, quite early on a September morning, to the premises of the accused, and searched their house. The fact that they searched the house for nearly an hour is conclusive to our minds that they had no previous information as to anything stored there, or as to any excisable articles which had been deliberately planted on the accused to the knowledge of the Inspectors. They had suspicions, otherwise they would not have searched, and they were justified, as it turns out, in the suspicions which they had. Having unsuccessfully searched the house, they found a room, adjoining. Now if that room had been cut off from the residence and could be truly described as quite separate and at a distance from the house, it might have raised an element of doubt in the case. But the room is really part of the structure, and connects with the house by a door. The door was locked. The key was in the possession of Baldeo accused. To hold that the owner of the house who was in possession of the key, did not know what was inside the room, in the absence of very strong evidence to the contrary, appears to us strange. At any rate on the production of the key, this liquor and strainer were found inside. The Magistrate was wrong in holding that these were not in possession of the accused. They were, and that threw upon them the onus, by s. 71 of the Excise Act, of accounting satisfactorily for such possession. There is realy no accounting. There is a vague suggestion of planting by a rival in trade but it is to be observed that, so far as we know, the visit of the Inspectors that day to the village was a surprise, and it is difficult to believe that anybody, even a rival in trade, would be so rash as to put his head, so to speak, in the lion's mouth, and go to the spot carrying 3 seers of liquor. The first question to be asked him would be how are you in possession of that liquor. We think this suggestion is somewhat far fetched. The other suggestion is that the dismissed servant Dwarka had done it. It is difficult to reconcile this with the facts of the case. Dwarka could not have known when the Inspectors would visit the village. The suggestion is that he must have placed it there to spite his master days before, but there is no reason why he should have done so, as Dwarka's dismissal took place that very day. We think it is one of those cases in which the accused, having originally held a license and finding it profitable, thought they could put a little extra money into their pockets by the mean act of profiting themselves by robbing the public. If they want to carry on this business they must procure a proper license. On the other hand, they have already successfully defended themselves before the Magistrate, and we know that they must have incurred expenditure by being represented here. We take that into account, and while convicting them of the offence under s. 60 (*a*) we think the justice of the case will be met by inflicting a fine of Rs. 100. We, therefore, allow the appeal convict both Mahadee and Baldeo of possessing excisable articles under s. 60 (*a*) of the Excise Act, and fine each of them the sum of Rs. 50. We allow three weeks for payment. If the amount is not paid within that time they must in default of payment suffer three weeks' simple imprisonment.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 485 OF 1924.

July 3, 1924.

Present:—Mr. Justice Brown.

DAWSON AND ANOTHER—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 530—Trial by Magistrate for offence within his jurisdiction—Facts disclosing offence triable by Court of Session—Procedure—Conviction by Magistrate, whether illegal.

Where the facts disclose an offence within the jurisdiction of a Magistrate, it is not correct to say that he is not empowered by law to try the person charged for the offence which is within his jurisdiction, because the facts disclose a more serious offence which is beyond his jurisdiction. No doubt, it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction has in fact been committed as well as an offence within his jurisdiction, but his proceedings would not be void. [p. 278, col. 1.]

Where a Magistrate in trying an offender for an offence which he is empowered to try discovers that there is a *prima facie* case of an offence triable by the Court of Session, the proper course for the Magistrate

to adopt is to commit the case to the Court of Session and if he fails to do so his proceedings may have to be set aside but they cannot be regarded as being absolutely void. [p. 277, col. 2.]

Mir Moze Ali v. *Emperor*, 54 Ind. Cas. 58; 23 C. W. N. 1031; 20 C. L. J. 132; 21 Cr. L. J. 10, *Lekhraj* v. *Emperor*, 8 Ind. Cas. 389; 31 P. R 1910 Cr.; 194 P. L. R. 1910; 11 Cr. L. J. 639, *Queen-Empress* v. *Gundya*, 13 B. 502; 13 Ind. Jur. 469; 7 Ind. Dec. (N. S.) 333, *King-Emperor* v. *Ayyan*, 24 M. 675; 2 Weir 699, *Subrahmania Ayyar* v. *King-Emperor*, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271 & 712; 8 Sar. P. C. J. 160 (P. C.), referred to.

Criminal appeal from an order of the Western Sub-Divisional Magistrate, Rangoon, in Criminal Regular Trial No. 1588 of 1923.

Messrs. *Keith*, *Vakharia* and *Villa*, for the Appellants.

Mr. *Eggar*, Government Advocate, for the Crown.

JUDGMENT.—In September last the first appellant, Dawson, was a Sub-Inspector of Police in the Detective Department in Rangoon, and the second appellant, Nadan, a Police Constable. They have both been found guilty of causing hurt to a boy, Venkaswamy, and of wrongfully confining him for the purpose of extorting a confession from him. Dawson has also been found guilty of wrongfully confining the boy on a further charge. Dawson has been sentenced to three concurrent terms of one year's rigorous imprisonment under the provisions of s. 323, 342 and 348 of the Indian Penal Code, and Nandan to two concurrent terms of six months' rigorous imprisonment under ss. 323 and 348. Both appellants entirely deny their guilt, and a number of legal points have been raised on their behalf. The evidence on which they have been convicted is to the effect that they caused hurt to the boy for the purpose of extorting from him a confession. If that evidence is believed then the appellants are guilty of an offence under the provisions of s. 330 of the Indian Penal Code. That is an offence which is triable only by a Court of Session, and it is contended that as the Magistrate had no jurisdiction to try an offence under s. 330, his whole proceedings must be regarded as void. Two authorities have been cited in support of this contention. In the case of *Mir Moze Ali* v. *Emperor* (1), the evidence against certain accused persons if believed would have established a charge of rape. A First Class Magistrate enquired into the case, and came to the conclusion that the story of rape was probably an exaggeration. He accordingly tried the case himself and convicted the accused of offences under the provisions of s. 354 of the Indian Penal Code and of various other minor offences.

It was held that the accused ought to have been committed to Sessions, and the Magistrate was directed to draw up charges with regard to the alleged rape and to commit the accused to the Court of Sessions for trial. In the case of *Lekhraj* v. *Emperor* (2), an accused person had been convicted under the provisions of s. 420 and 468 of the Indian Penal Code by a First Class Magistrate for forging a *hundi*. It was held that as a *hundi* is a valuable security, the offence charged really fell under s. 467 which is only triable by the Court of Session. The whole proceedings of the Magistrate were set aside as far back as and including the charge.

The view taken was that the fact that the offence included a minor offence did not give the Magistrate power to deal with the case. In neither of these cases was it definitely laid down that the proceedings of the Magistrate were void, nor is it easy to see how it is possible to take that view. Section 530 of the Cr. P. C., lays down that if any Magistrate not being empowered by law in this behalf tries an offender, his proceedings shall be void. In the present case the Magistrate has tried an offender for offences under the provisions of ss. 323, 342 and 348 of the Indian Penal Code all of which offences he was empowered to try. It may be that the appellants committed a more serious offence punishable under the provisions of s. 330, but it was not an offence under that section which the Magistrate actually did try. If he found that there was a *prima facie* case of causing hurt in order to extort a confession, then the Magistrate's proper course was obviously to commit the case to the Court of Session, and if it can be shewn that the appellants have suffered any injustice from the procedure adopted by the Magistrate the convictions would have to be set aside. But that is a very different thing from the proceedings being absolutely void. This view of the law has been taken by the High Courts of Bombay and Madras in the

(1) 54 Ind. Cas. 58; 23 C. W. N. 1031; 20 C. L. J. 132; 21 Cr. L. J. 10.

(2) 8 Ind. Cas. 389; 31 P. R. 1910 Cr.; 194 P. L. R. 1910; 11 Cr. L. J. 639.

cases of *Queen-Empress* v. *Gundya* (3) and *King-Emperor* v. *Ayyan* (4). In the latter of these cases an accused person had been convicted by a Magistrate of the First Class under the provisions of s. 193, and the convictions were set aside by the Sessions Judge on the ground that the offence disclosed was an offence under s. 195 of the Code which was exclusively triable by the Court of Sessions. Their Lordships in the course of their judgment on revision remarked: "In the present case the Deputy Magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under s. 193, Indian Penal Code, *i. e.*, for an offence triable by a First Class Magistrate and, therefore, within his jurisdiction. His proceedings were not void, and the Sessions Judge was wrong in treating them as void. Where the facts disclose an offence within the jurisdiction of the Magistrate it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the same facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction, as for instance if a Second Class Magistrate should ignore the violence used in committing theft...(s 379) instead of sending the accused before a First Class Magistrate to be tried for robbery (s. 392). Here the action of the Second Class Magistrate would be improper, but his proceedings would not be void."

This is a very lucid and to me very convincing exposition of the law on the subject. It has been suggested on behalf of the appellants that this decision was prior to the ruling of their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v. *Emperor* (5). But I am unable to see how that ruling is in any way pertinent to the point at present in issue. What their Lordships laid down was that a disregard of a clear rule of law as to a mode of trial could not be regarded as a mere irregularity which could be cured by the provisions of s. 537 of the Cr. P. C.

In the present case there is no clear rule of law which has been disregarded. I am of opinion that the proceedings of the Magistrate are not void on this ground * * *

Z. K. *Order accordingly.*

(3) 13 B. 502; 13 Ind. Jur. 469; 7 Ind. Dec. (N. s.) 333.

(4) 24 M. 675; 2 Weir 699.

(5) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271 & 712; 8 Sar. P. C. J. 160 (P. C.).

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 307 OF 1924.
(CRIMINAL REVISION PETITION No. 258 OF 1924.)
November 5, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

V. JANAKIRAMAYYA—COMPLAINANT—PETITIONER

versus

NIMMAGADDA BRAHMAYYA—ACCUSED—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Criminal Appeal filed out of time—Sufficient cause to excuse delay, absence of—Procedure—Appeal, wrong acceptance of—Acquittal—Revision—Interference by High Court.

A criminal appeal filed after the expiry of the prescribed period of limitation may be admitted if the Court is satisfied that the appellant had sufficient reason for not preferring the appeal within the period of limitation. Where the Appellate Court is not satisfied that there was sufficient reason to excuse the delay, it has no power to extend the period and admit the appeal. The proper procedure in such a case would be to move the High Court to exercise its powers of revision.

Surta Singh v. *Emperor*, 59 Ind. Cas. 556; 1 L. 508; 22 Cr. L. J. 124 and *Rehman* v. *Emperor*, 83 Ind. Cas. 499; 5 L. L. J. 477; (1923) A. I. R. (L.) 662; 26 Cr. L. J. 19, relied on.

Where, however, a criminal appeal was wrongly admitted out of time, an order of acquittal will not be interfered with in revision by the High Court, unless there has been any gross miscarriage of justice which ought to be remedied.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, and s. 107 of the Government of India Act, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Bezwada, in Criminal Appeal No. 58 of 1923, preferred against that of the Court of the Stationary, Sub-Magistrate in C. C. No. 565 of 1923.

Mr. *V. Suryanarayana*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.

Wallace, J.—The first point raised in this petition is whether the lower Appellate Court had jurisdiction to admit a criminal appeal which was out of time, that Court itself finding that the appellant had not shown convincing reasons for not presenting it in time. The provision of law applicable is s. 5 of the Indian Limitation Act, and under that provision the Court cannot extend the time unless it is satisfied that the appellant had sufficient cause for not preferring the appeal in time. The lower Appellate Court was not so satisfied and, therefore, had no authority to extend the period and admit the appeal. Its proper procedure would have been to move this Court to exercise its powers of revision.

As to whether we should now interfere and reverse the acquittal, it is a question of whether there has been any gross miscarriage of justice which ought to be remedied. I cannot hold that there is any such question. The appellant had been convicted of theft for removing earth from a village site, said to belong to the *zemindar* of South Vallur Estate. The village site is an open vacant place, used as a latrine, not very obviously in the physical possession of any one. To say that the site belongs to the *zemindar* as village site, is not the same thing as saying that the earth in it is all his private perquisite, which he can dispose of for his own private profit. The intention to cause wrongful loss to the *zemindar*, or the contention that wrongful loss has been in fact caused to the *zemindar*, has not been clearly made out. The matter is more of a civil nature than criminal.

I would, therefore, refuse to interfere and dismiss this petition.

Madhavan Nair, J.—I agree that this petition should be dismissed. I would like to add that, in view of s. 5 of the Limitation Act, it cannot be contended that the Appellate Magistrate has no power to excuse the delay and admit the time-barred criminal appeal. A criminal appeal filed after the expiry of the prescribed period of limitation may be admitted if the Court is satisfied that the appellant had sufficient reason for not preferring the appeal within the period of limitation, [see *Surta Singh* v. *Emperor* (1) and *Rehman* v. *Emperor* (2).] In the case before us the lower Appellate Court was not satisfied from the appellant's affidavit that there was sufficient reason to excuse the delay. It had, therefore, no power to extend the period and admit the appeal. As pointed out by my learned brother, its proper procedure would have been to move this Court to exerise its powers of revision.

V. N. V.
Z. K.

Petition dismissed.

(1) 59 Ind. Cas. 556; 1 L. 503; 22 Cr. L. J. 124.
(2) 83 Ind. Cas. 499; 5 L. L. J. 477; (1923) A. I. R (L.) 662; 26 Cr. L. J. 19.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 50 OF 1924.

July 4, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice

In the matter of MAUNG PO TOK, A PLEADER—ACCUSED.

Legal Practitioners Act (XVIII of 1879), s. 13—Penal Code (Act XLV of 1860), s. 420—Pleader standing surety for accused and taking charge of property—Unprofessional conduct—Acquittal by Criminal Court, effect of.

A Pleader, who stands surety for a man arrested on a charge under s. 420 of the Penal Code and takes charge of certain property on his behalf which subsequently turns out to have been stolen property, is not guilty of unprofessional conduct inasmuch as he does not act as a Pleader in the matter.

Proceedings under the Legal Practitioners Act are *quasi*-criminal and where the facts have already formed the subject of criminal trial which has resulted in an acquittal, the principle of "*autrefois acquit*" must apply.

Criminal miscellaneous case against an order of the District Magistrate, Myaungmya.

JUDGMENT.—Upon reading the proceedings in Criminal Miscellaneous Case No. 31 of 1924 held by the District Magistrate of Myaungmya against Maung Po Tok who was charged under s. 13 (*f*) of the Legal Practitioners Act, it is ordered that in the view of the Honourable Judges the proceedings under s. 13 of the Legal Practitioners Act are misconceived. In standing surety for a man arrested on a charge under s. 420 Maung Po Tok was not guilty of unprofessional conduct and did not act as a Pleader. He was not acting in his professional capacity in taking charge of the property from Rowe & Co.'s Manager and keeping it for Po Hman; nor was he guilty of any criminal offence in so doing. Moreover, he has been acquitted by a Criminal Court of receiving and retaining stolen property while the

Magistrate who tried him on those charges also decided that there was insufficient evidence to justify a charge of cheating with respect to the substitution of the diamonds. Proceedings under the Legal Practitioners Act are *quasi*-criminal and where the facts have already formed the subject of criminal trial which has resulted in an acquittal the, principle of "*autrefois acquit*" must apply.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 71 OF 1925.

March 5, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Boys.

KUTROO—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), ss. 19 (f), 25, 30—Criminal Procedure Code (Act V of 1898), s. 165—Illegal possession of arms—Search, unlawful—Conviction, whether justified—Search, powers of, restrictions on—Interpretation of statutes.

On a search being made of the house of the accused certain arms and ammunition were found therein. The accused was thereupon convicted of an offence under s. 19 (*f*) of the Arms Act. It was found, however, that the search had not been lawful inasmuch as it did not comply with the provisions of ss. 25 and 30 of the Act:

Held, that in spite of the search not being lawful, there being sufficient evidence that the accused was in unlawful possession of the arms and ammunition the conviction was justified. [p. 280, col. 2.]

Per *Walsh, J.*—The words "in the presence of some officer specially appointed" in s. 30 of the Arms Act mean that there must be at least two persons, namely the person making the search and the officer specially appointed within the meaning of the section who is present at the search. [p. 281, col. 1.]

Per *Boys, J.*—Section 30 of the Arms Act does not itself give any power of search to anybody. It is confined to a statement that when a search is being conducted under the Cr. P. C. in the case of any proceedings instituted in respect of an offence punishable under s. 19 (*f*) of the Arms Act, such search is to be conducted in the presence of a particular officer. The section merely places certain restrictions on such powers of search as may otherwise be possessed under the provisions of the Cr. P. C. There is nothing in the Act to limit the powers of an Investigating Officer under s. 165 of the Cr. P. C., except the two qualifications introduced by s. 30 by the words "in the case of any proceedings instituted in respect of an offence punishable under s. 19 (*f*)" and by the requirement of the presence of a particular officer. [p. 281, col. 2.]

The words "in the case of any proceedings instituted" were inserted in s. 30 of the Arms Act with the intention of restricting all powers of an Investigating officer in making searches for arms where there was no known unlawful purpose. [p. 282, col. 1.]

The same meaning must in the absence of any strong reason to the contrary be given to similar words in two contiguous sections of the same Act. [*ibid.*]

Criminal appeal from an order of the Sessions Judge, Kumaun, dated the 6th August 1924.

Mr. *Hamid Hasan*, for the Accused.

The Government Advocate, for the Crown.

JUDGMENT.

Walsh, J.—In our view this appeal succeeds on the merits, but not upon the point of law upon which the Government sought by the appeal to challenge the decision of the learned Judge. This miscreant, as he appears to be, having the reputation of a *badmash*, likely to be engaged in dacoities, was suspected of having arms and ammunition in his house. Thereupon a *patwari*, who, by the rules applicable to Kumaun, is entitled to exercise the powers of a Police Officer, searched his house with witnesses and found gun-powder, some dynamite, and a detonator and fuse. He was thereupon convicted and sentenced to nine months' rigorous imprisonment and a fine of Rs. 50. He appealed and took the point that there had been no proper search because there had been no order under s. 25 of the Arms Act, and because the search was not made in the presence of an officer specially appointed, or by virtue of his office under s. 30. We agree with this view for reasons which we will state in a moment, but the learned Judge overlooked the fact that in spite of the search having been made under circumstances which rendered it not lawful, the appellant had nonetheless been found guilty on perfectly plain evidence of the offence with which he was charged. In allowing the appeal and quashing the conviction the learned Sessions Judge—although he did not say so by implication—committed himself to the further proposition, namely, that where the search is illegal, a person cannot be convicted even though the evidence against him is conclusive. This is not the law. The point is covered by authority particularly in this Court in the case of *Sayed Ahmed* v. *Emperor* (1), a decision of a Single Judge with which we agree. In that case the search was illegal. Cocaine was found in the house of the accused and he was properly convicted. In this case

(1) 22 Ind. Cas. 133; 35 A. 575; 11 A. L. J. 933; 15 Cr. L. J. 19.

the appellant was properly convicted, even although for reasons which I am about to give the search was illegal. In my view the argument upon which the appeal on behalf of Government has been based, overlooks the significance of the terms "in the course of any proceedings instituted." I think it better not to speculate as to why these words are there, except to say that possibly the Legislature thought that where an act, like the possession of arms was equivocal, and might be innocent or might be unlawful, that question depending on the existence of a license, unlimited right of search ought not to be conferred on the Police. But I entertain no doubt that their effect is to cut down the general power of search under s. 165 by a Police Officer. The provision is applicable where a search is to be made under the Cr. P. C. in respect of such an offence as this, in the course of any proceedings instituted in respect of such offence. The ordinary meaning of that language is, in the course of any legal proceedings which have already begun. The use of the expression "instituting proceedings" in this Act is made plain by the preceding section, where it is clearly used in reference to the commencement of some legal proceeding in a Court. That this view is the ordinary meaning of the English legal terminology is supported by the decision in *Thorpe* v. *Priestnall* (2). Under these circumstances I am clearly of opinion—no proceedings have been instituted that the *patwari* who made the search in this case was not legally authorized to make it. I may add, although it is not necessary for our decision, that, in my opinion, the words "in the presence of some officer specially appointed" mean that there must be at least two persons, namely, the person making the search, and the officer specially appointed within the meaning of s. 30 who is present at the search.

The appeal must, therefore, be allowed and the conviction restored, but inasmuch as the Government in the special circumstances of this case does not press for further imprisonment than that already undergone, we inflict punishment of one month and uphold the fine of Rs. 50. The accused having already served one month, need not surrender.

Boys, J.—I agree. The first section to which reference has been made is s. 25 of the Arms Act. I entirely agree with the view of Mr. Justice Piggott in the case of *Babu Ram* v. *Emperor* (3), that that section is intended to apply to the particular class of cases where there is some unlawful purpose alleged regardless of whether or not the person whose house is to be searched has a license for the possession of the arms. In this case, however, it is not even suggested that any action was taken under that section. It is necessary, therefore, to look elsewhere for other power of search if actually the search is to be justified. It is clear that s. 30 of the Arms Act does not itself give any power of search to anybody. It is confined to a statement that when a search is being conducted under the Cr. P. C. or the Presidency Magistrates Act "in the course of any proceedings instituted in respect of an offence punishable under s. 19 (*f*), such search shall be conducted in the presence of a particular officer"; it merely places certain restrictions on such powers of search as may otherwise exist under the provisions of the Cr. P. C. We are not concerned with the Presidency Magistrates Act and we have, therefore, to turn to the Cr. P. C. Sections 105 and 96 relate to the powers of a Court and it is not suggested here that any Court conducted or caused to be conducted any search. The Crown have, therefore, to fall back upon s. 165 of the Cr. P. C. There is nothing in the Arms Act to limit the powers of an Investigating Officer under s. 165 except the two qualifications introduced by s. 30 by the words "in the course of any proceedings instituted in respect of an offence punishable under s. 19 (*f*)" and by the requirement of the presence of a particular officer.

It is clear that in the case to which I have already refered [*Babu Ram* v. *Emperor* (3)] no reference was made to the words "in the course of any proceedings instituted." I should be prepared to hold that those words, even if the section stood by itself, meant that the officer appointed by Government could only search when some case had already been instituted in Court. It is the ordinary meaning of the language. But we are further confirmed in that conclusion, and it is rendered inevitable, by the use of similar words in s. 29 drawn to our attention by Mr. Hamid Hasan

(2) (1897) 1 Q. B. 159; 66 L. J. Q. B. 248; 45 W. R. 223; 60 J. P. 821.

(3) 47 Ind. Cas. 801; 16 A. L. J. 721; 19 Cr. L. J. 949.

on behalf of the accused. The same meaning must, in the absence of any strong reason to the contrary and there is no such reason, be given to similar words in two contiguous sections of the same Act; and as to the meaning of the words in s. 29 it is even more clear that there can be no doubt for if a proceeding can be said to have been instituted within the meaning of s. 30 as claimed by the Crown when nothing has happened beyond a report to the Police (in this case the *patwari* having the powers of a Police Officer) as to the suspected possession of arms, that meaning must be also given to the words in s. 25 and would result in holding that section to enact that no report must be made of an offence under s. 19 (*f*) without the previous sanction or the District Magistrate. Further it is clear that the language of s. 30 is analogous to that of the last clause in s. 108 of the Cr. P. C. "no proceedings shall be taken;" in s. 132 of the same Code" no prosecution shall be instituted;" in s. 188 "any proceedings taken." I agree with Mr. Justice Walsh that it seems likely that the words "in the course of any proceedings instituted" were inserted with the intention of restricting the powers of an. Investigating Officer in making searches for arms where, even particularly where, there was no known unlawful purpose. Such restriction does not wholly deprive the authorities of power to search or to cause a search to be made merely because there is no known "unlawful purpose" bringing the case within s 25 and no proceeding already instituted in Court bringing the case within s. 165 of the Cr. P. C. controlled by s. 30 of the Arms Act. A Magistrate acting as a Court could proceed under ss. 96, 105. This is sufficiently clear from the Privy Council case [*Clarke* v. *Brojendra Kishore Roy Chowdhury* (4).]

That is, however, in any case a question only of expediency. I agree with the order proposed by Mr. Justice Walsh.

Z. K. *Appeal allowed.*

(4) 16 Ind. Cas. 501; 39 C. 953; (1912) M. W. N. 760; 12 M. L. T. 171; 10 A. L. J. 193; 16 C. L. J. 231; 16 C. W. N. 865; 23 M. L. J. 32; 14 Bom. L. R. 717; 13 Cr. L. J. 693; 39 I. A. 163 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 201-B OF 1924.

February 7, 1925.

Present:—Mr. Baker, J. C.

SHAMSUDDIN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Joint proceedings—Prejudice to accused—Illegality.

Proceedings under s. 110 of the Cr. P. C. were instituted jointly against two brothers who lived together and against whom there was evidence of joint acts committed by both of them. There was, however, some evidence which was relevant to the case against one of them but was not relevant to the case against the other. An order was made against them by the Magistrate and was upheld in appeal by the Sessions Judge. In dealing with the appeal, however, the Sessions Judge distinguished the evidence which was relevant to the case of each accused from the rest of the evidence and wrote two separate judgments. In revision:

Held, that as no prejudice had resulted to the accused from proceedings having been taken against them jointly and as the Sessions Judge had excluded from his consideration evidence which did not apply directly to the case of each accused, the joint proceedings were not illegal. [p. 283, col. 1.]

Angnoo Singh v. *Emperor*, 71 Ind. Cas. 865; 45 A. 109; 20 A. L. J. 881; (1923) A. I. R. (A.) 35; 24 Cr. L. J. 257, distinguished.

Criminal revision against an order of the Additional District and Sessions Judge, Yeotmal, dated the 22nd November 1924, in Criminal Appeal No. 324 of 1924.

Mr. *M. Y. Sharif*, for the Applicant.

ORDER.—This is an application for revision of an order under s. 110, Cr. P. C., binding over the applicant for one year on his own bond in Rs. 200 with one surety in the same amount for good behaviour. This order was passed by the Sub-Divisional Magistrate, Darwha, and was upheld in appeal by the Additional Sessions Judge, Yeotmal.

It is contended on behalf of the applicant that the order is vitiated because the applicant and his brother were jointly tried, and reference is made to a case of *Angnoo Singh* v. *Emperor* (1) which lays down that it is not permissible to take proceedings under s. 110 of the Cr. P. C. against several persons jointly, unless such persons are confederates or partners as against whom all the evidence is equally applicable. That was a peculiar case, in which 12 men were charged together, the case being really a gang case founded on hearsay evidence. In the present case the

(1) 71 Ind. Cas. 865; 45 A. 109; 20 A. L. J. 881; (1923) A. I. R. (A.) 35; 24 Cr. L J. 257

applicant was charged along with his brother Nizamuddin. They lived together and there is evidence of joint acts committed by them both. The learned Additional Sessions Judge has noted in his judgment that some of the evidence applies to one and some to the other brother. He has distinguished the evidence which is against the present applicant and has written two separate judgments.

I do not think that the applicant has been prejudiced by the joint trial in the circumstances of the present case. The evidence of P. W. No. 12 as to his being threatened by both brothers when impounding their cattle, that of P. W. No. 14 as to both the brothers beating him when he asked for payment for the work done and as to both of them putting pressure on him to withdraw an application he had made against them, and the evidence of P. W. No. 15 as to acts of oppression committed by both the brothers and as to an, attempt of assault upon him by the present applicant, are, in my opinion, sufficient to uphold the order.

The question of confusion of evidence has been considered by the Additional Sessions Judge in his judgment in the case of Nizamuddin and he has carefully excluded from his consideration those witnesses whose evidence does not directly apply to the present applicant, or regarding whom there is any ambiguity.

I see no reason for interference and dismiss the application.

Z. K. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 2-B AND 4-B OF 1925.

February 7, 1925.

Present:—Mr. Baker, J. C.

ISMAIL PANJU AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195 (1), (c), 337, 476—Penal Code (Act XLV of 1860), ss. 463, 467, 471—Forgery of valuable security—Complaint by Court—Section not specified, effect of—"Offence described in s. 463," scope of—Complaint under s. 463—Approver—Pardon, validity of—Inducement offered to approver, effect of—Kabuliyat, *whether valuable security.*

It is not necessary that a Court making a complaint under s. 476 of the Cr. P. C. should state under what particular section the offence complained of falls, and a failure to mention the section does not render the complaint or the proceedings taken on it irregular. [p. 284, col. 2.]

Where a complaint made under s. 476 of the Cr. P. C., after narrating the facts mentions ss. 463 and 471 of the Indian Penal Code, the complaint must be deemed to cover all forms of forgery which the evidence may show to have been committed. [*ibid.*]

The words "any offence described in s. 463" in s. 195 (1) (c) of the Cr. P. C. must be taken to mean all forms of forgery under whatever section they fall. [*ibid.*]

A *kabuliyat* is a valuable security within the meaning of s. 467 of the Penal Code, because it creates a legal right, namely, the right of a tenant to hold the land, and it is also an acknowledgment by the tenant that he is legally bound to pay the rent and to hold the land in accordance with the conditions of the *kabuliyat.* [p. 285, col. 1.]

Semble.—A *kabuliyat* retains the character of a valuable security, within the meaning of s. 467 of the Penal Code, even after the expiry of the period for which it has been executed. [*ibid.*]

All that s. 337 of the Cr. P. C. requires is that there should be an investigation in progress regarding an offence triable exclusively by the High Court or the Court of Session or an offence punishable with imprisonment which may extend to ten years. [p. 284, col. 2; p. 285, col. 1.]

Where on the date of the tender of pardon to an approver proceedings were going on against the accused under ss. 467, 471 of the Penal Code, the pardon granted to the approver is perfectly legal and the approver is a competent witness against the accused. [p. 285, col. 1.]

No analogy exists between the case of a confession obtained from an accused person by an inducement and the case of an approver, and the evidence of an approver does not become inadmissible merely because it is shown that some inducement was offered to the approver to give evidence. [*ibid.*]

In the matter of the petition of Nobin Chundra Banikya, 8 C. 560 at p. 568; 10 C. L. R 369; 4 Shome L. R. 232; 4 Ind. Dec. (N. S.) 360, relied on.

Appeal against the judgment of the Sessions Judge, Amraoti, dated the 12th January 1925, in Sessions Case No. 18 of 1924.

Messrs. *J. K. R. Cama*, K. B., *N. G. Bose*, R. B., and *Desanges*, for the Appellants.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The facts of these two appeals are the same and they may be dealt with together. The appellant Ismail Panju was convicted under s. 467-109, Indian Penal Code, of abetment of forgery of a valuable security by the Sessions Judge, Amraoti, and sentenced to rigorous imprisonment for two years and a fine of Rs. 1,000, and the appellant Yeshwant Bapuji was convicted at the same trial of

forgery of a valuable security under s. 467, Indian Penal Code, and sentenced to rigorous imprisonment for 18 months.

The facts of this case are that Ismail Panju had obtained a usufructuary mortgage from Raoji and was in possession of the mortgaged land, which he let out to a tenant called Mohana. The mortgage was in 1920; subsequently the mortgagor died and in 1923 his sons brought a suit for redemption against the mortgagee contending that the mortgage was paid off out of the profits of the mortgaged property. The prosecution case is that the mortgagee Ismail Panju with the object of showing that a considerable sum was due under the mortgage got five *kabuliyats* forged, showing a less rent than he had actually realized, induced the tenant Mohana to make his thumb-impressions on them, and got them attested by some witnesses who are at present under trial by the Sessions Court, Amraoti. The *kabuliyats* were written by the appellant Yeshwant Bapuji at the instigation of Ismail Panju, and these two persons have been convicted of forgery and abetment of forgery. Mohana was originally charged along with them, but a pardon was tendered to him and he became an approver and has given evidence for the Crown. The proceedings were instituted by the Subordinate Judge in whose Court the alleged forged *kabuliyats* were filed by Ismail Panju, the defendant. The Subordinate Judge being of opinion that the *kabuliyats* were forged took proceedings against Ismail Panju, Yeshwant Bapuji, Mohana and the attesting witnesses under s. 476, Cr. P. C. Several points of law have been raised in this appeal which I will deal with before proceeding to the facts.

The first point raised is that the complaint made by the Subordinate Judge refers only to offences under ss. 463 and 471, Indian Penal Code, that, therefore, the Magistrate was incompetent to try the accused under s. 467, Indian Penal Code, and that consequently the offences under ss. 463 and 471 not being exclusively triable by the Court of Sessions and not being punishable with imprisonment, which may extend to ten years, do not fall under s. 337, Cr. P C., and, therefore, no pardon could be granted to Mohana and his evidence is inadmissible.

It is to be observed that the proceedings taken by the Subordinate Judge were under s. 476, Cr. P. C., and para. 2, of that section lays down that on a complaint made by a Court under s. 476 a "Magistrate shall thereupon proceed according to law, and as if upon complaint made. . . . under s. 200." It is not really necessary that the Court making a complaint should state under what section the offence falls, but even if it be so, it would be apparent that there is nothing irregular in the present proceedings. The Subordinate Judge after narrating the facts has mentioned s. 463, Indian Penal Code, along with s. 471.

It is contended that s. 463 being merely the section which defines forgery, the complaint must be taken to be under s. 465, Indian Penal Code, punishable with a maximum of two years' rigorous imprisonment, and the Magistrate could not convict the accused under s. 467, nor is the offence, described under s. 465, one of the offences for which pardon may be tendered.

Section 195 (1) (c), Cr. P. C., is the section which governs the case and it lays down that no Court shall take cognizance of any offence described in s. 463 or punishable under ss. 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court or of some other Court to which such Court is subordinate.

It will be seen that this section does not expressly mention the aggravated offences of forgery described in ss. 466 and 467, and the words "any offence described in s. 463" must be taken to mean all forms of forgery under whatever section they fall. Section 463 merely defines forgery as making a false document with intent to cause damage or injury, or with intent to commit fraud, etc. Section 464 describes what a false document is. Section 195 (1) (c), in my opinion, is clearly designed to cover all forms of forgery. In the present case we have a complaint by the Court of an offence described in s. 463, which is all that the law requires, and the Magistrate was perfectly justified in trying the accused and convicting them of forgery of the description which the evidence showed to have been committed. This disposes of the first argument.

As regards the second argument regarding the validity of the pardon given to Mohana, all that s. 337, Cr. P. C., requires

is that there should be an investigation in progress regarding an offence triable exclusively by the High Court or Court of Session or an offence punishable with imprisonment which may extend to ten years. The Sessions Judge has shown that at the date of the pardon to Mohana proceedings were going on against the accused under s. 467, Indian Penal Code, which is punishable with 10 years' imprisonment, and under s. 471, which is punishable according to the nature of the forgery committed. The pardon is perfectly legal and the approver was a competent witness against the accused.

It has been argued that the evidence shows that some inducement was offered to Mohana to give evidence, but necessarily in every case where an accused is made an approver it must be ascertained whether he is willing to tell the truth or not. No analogy exists between the case of a confession obtained from an accused person by any inducement and the case of an approver. If it were so, practically all approvers' evidence would be inadmissible. There is authority on this point, *viz.*, *In the matter of the petition of Nobin Chundra Banikya* (1). There is, therefore, no illegality in the trial.

It is next contended that the *kabuliyats* were not valuable securities, and that the offence does not amount to forgery, even assuming that they were all written at the same time. There can be no doubt that a *kabuliyat* is a valuable security, because it creates a legal right, namely the right of a tenant to hold the land, and it is also an acknowledgment by the tenant that he is legally bound to pay the rent and to hold the land in accordance with the conditions of the *kabuliyat*.

It has been contended that as the period for which these *kabuliyats* extend has passed away, they are spent documents and no longer valuable securities. The learned Sessions Judge has pointed out that in the case of some of them at any rate they are not barred by limitation and that a suit for rent based on them would still lie. Apart from this I am of opinion that they could still be used, if genuine, to show the lessor's right to possession and the contract of tenancy during these years between him and the lessee, and that they must be considered to be, or purport to be, valuable securities. In any case this point is not of much importance since the period of imprisonment, to which the accused have been sentenced, is not in excess of that which could be passed under s. 465, Indian Penal Code, which refers to simple forgery.

It has been further contended that assuming the facts alleged by the prosecution to be true, there is no forgery. There cannot be slightest doubt that if these *kabuliyats* were all written at one and the same time in 1923 after the institution of the redemption suit, whereas they purport to have been written and executed in the years 1918-19 to 1922-23, they were prepared with the intention of causing it to be believed that they were executed at a time at which they were not really executed. The dishonest intention is clear from the fact that they were so prepared with the object of showing that a less amount of rent was paid during these years and, therefore, a larger sum was due on the mortgage. This is both dishonest and fraudulent, dishonest because it was done with the object of causing wrongful gain to the mortgagee or wrongful loss to the mortgagor and fraudulent as they were prepared with intent to defraud the mortgagor and incidentally the Court. Hence it is quite clear that if they were prepared, as the prosecution states, there can be no doubt that they fall within the definition of forged documents under s. 464, Indian Penal Code.

Turning to the merits, there is not really much to be said and the learned Counsel for the appellants have said very little about them, relying mainly on the points of law. It is, of course, an axiom that the evidence of an accomplice requires corroboration, but in the present case we have very substantial corroboration of the evidence of Mohana from the appearance of the documents, for several of them appear to have been written at the same time and with the same pen and the same ink, and what is practically conclusive is that the *kabuliyats* for the years 1919 and 1921 are written on the corresponding halves of the same sheet of paper, which is proved by the fact that the indentation on the margin of one-half exactly corresponds with that on the other, showing that these are the two halves of the same sheet, which has been torn in halves.

As the Sessions Judge has pointed out, it is practically impossible that two *kabuliyats*

(1) 8 C. 560 at p. 568; 10 C. L. R. 369; 4 Shome L. R. 232; 4 Ind. Dec. (N. S.) 360.

written at an interval of two years should be written on the corresponding halves of the same sheet of paper.

The learned Sessions Judge has further considered the other manuscript *kabuliyats* and by experiment shown that the water-marks correspond, showing that all these *kabuliyats* were written at one and the same time on sheets of paper which were torn in halves for the purpose. This strongly corroborates the evidence of Mohana that all these *kabuliyats* were written at the same time and his thumb-impressions obtained on them by the appellant Ismail Panju.

Further it appears from Mohana's statement and from the *peri-patraks* that the rent mentioned in the *kabuliyats* is less than the rent which he really paid. There is further evidence, which the Sessions Judge has discussed and which has not been at all shaken in the argument in appeal that the printed form of *kabuliyats* used in the last of the series was not in the possession of Ismail Panju at the date which the *kabuliyat* purports to bear.

So far as the merits are concerned I have not the slightest hesitation in holding that the findings of the Sessions Judge are right, that these *kabuliyats* are forgeries, and that they were forged under the instructions of the appellant Ismail Punju for the purpose of being used in the redemption suit with the object of showing that less rent than was actually the case was received from the land and, therefore, the mortgage was not paid off. The learned Counsel on behalf of the appellant Yeshwant Bapuji now admits that his client wrote these *kabuliyats*, but he contends that he did so innocently, and as the lessor and the lessee were both present and the lessee raised no objection to execution, he had no idea that a fraud was being committed and that as Mohana was admittedly the lessee of the land during the years in question Yeshwant was merely recording what had actually taken place and no offence has been committed. I do not think this argument can be accepted. If Yeshwant had been a school boy, or a person unaccustomed to writing documents, it might perhaps be contended that he was deceived by the lessor and the lessee, but he is a petition-writer, whose business it is to write documents. It would necessarily occur to him that there was something highly suspicious in 5 *kabuliyats* being written and executed simultaneously and ante-dated to the preceding years. Mohana stated at one place that Yeshwant was present at the time when Ismail Punju discussed the matter and mentioned the purpose for which he required him to execute these *kabuliyats*. But even if reliance is not placed on this statement, I do not think the Sessions Judge was wrong in holding that Yeshwant was privy to the plot. He would necessarily have asked why these *kabuliyats* were ante-dated. Inasmuch as the lessee was willing to execute them, there was apparently no dispute between the lessor and the lessee and the natural presumption would be that the *kabuliyats* were fabricated for an illegal purpose. I do not see any reason to differ from the view of the learned Sessions Judge on this point either.

In view of the seriousness of the case the sentences appear to me to be lenient, but this may be due to some doubt as to whether the conviction under s. 467 would stand. The convictions and sentences are confirmed and the appeals dismissed.

Z K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 102 OF 1925.

March 30, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Zafar Ali.

GHULAM JILANI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, 302, 325—Death caused by single blow delivered suddenly—Murder—Grievous hurt.

Deceased and his friend gave a beating to the accused. All three were young men of about 18 years of age. The following day the accused saw the deceased unexpectedly and forthwith formed the design of hitting him in return for the beating which he had received on the previous day. He thereupon struck the deceased a violent blow on the back of the head with a hockey stick which he had in his hand at the time. After striking this blow the accused ran away and the deceased walked on for some 30 paces and then sat down on the ground. He was taken home and became unconscious after about half an hour and died on the following morning as the result of internal bleeding and a clot of blood on the surface of the brain:

Held, that under the circumstances of the case and having regard to the conduct of the accused, it could not be safely inferred that the bodily injury which he intended to inflict was sufficient in the ordinary course of nature to cause death and that the accused

was guilty not of the offence of murder but of an offence under s. 325 of the Penal Code.

Appeal from an order of the Additional Sessions Judge, Shahpur, dated the 5th January 1925.

Mr. *M. Sleem*, for the Appellant.

Mr. *R. C. Soni*, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Additional Sessions Judge, Shahpur, convicting Ghulam Jilani of the murder of Mahbub Alam and sentencing him to transportation for life.

The facts are fully stated in the judgment of the learned Sessions Judge and we need not repeat them at length. In brief it appears that on the previous day Mahbub Alam and his friend one Afzal had beaten Ghulam Jilani and on the day of the occurrence the latter, as he was returning from the *thana* where he had been looking at some recently arrested dacoits, saw Mahbub Alam walking in front of him, ran after him and after challenging him and asking him if he would come again into his *mohalla* and on Mahbub Alam replying that he would, struck him a violent blow on the back of the head with a hockey stick which he had in his hand at the time. After striking him this blow Ghulam Jilani ran away Mahbub Alam walked on for some 30 paces and then sat down on the ground. He was taken home and became unconscious after about half an hour. He died on the following morning. The medical evidence shows that he had two injuries on the head which might be the result of one blow and that this caused internal bleeding and a clot of blood on the surface of the brain. This caused death. The skull itself was not fractured, the medical witness saying that the blow was not strong enough at the age of the deceased to fracture his bone because the skull was compressible at this age. It should be noted that the deceased's age was about 18 years and the age of the accused is the same. The learned Sessions Judge was of opinion that the offence was murder and that it fell within s. 300 *thirdly* and *fouthly* of the Indian Penal Code. In our opinion s. 300 *fourthly* has no application to the present case. Though the blow on the head was violently given, it cannot be said that the appellant who gave it knew that it was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Section 300 thirdly is as follows:—

"If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

Having regard to the fact that the appellant struck only one blow which did not fell Mahbub Alam to the ground, and that then he ran away, we do not think it can safely be inferred that the bodily injury which he intended to inflict was sufficient in the ordinary course of nature to cause death. The case is somewhat similar to that reported in *Sardar Khan Jarid Khan* v. *Emperor* (1), where also one violent blow was struck on the back of a man's head, and the Judges held that the case fell within the second part of s. 304. Indian Penal Code, and sentenced the accused to five years' rigorous imprisonment. In the present case there is no ground for supposing that the appellant after his game of hockey set out with the object of seeking out Mahbub Alam and chastising him. It appears that he saw him unexpectedly and forthwith formed the design of hitting him in return for the beating which he had received on the previous day. He struck only one blow and having regard to the fact that he then desisted and that it did not fell Mahbub Alam to the ground, we do not think it would be safe to hold that he intended to do more than cause grievous hurt to Mahbub Alam.

We, therefore, accept the appeal and alter the conviction to one under s. 325, Indian Penal Code, and bearing in mind the fact that the appellant's age is only 18, we sentence him to three years' rigorous imprisonment.

Appeal accepted.

Z. K.

(1) 36 Ind. Cas. 578; 41 B. 27; 18 Bom. L. R. 793; 17 Cr. L. J. 530.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 775 OF 1924.

December 3, 1924.

Present:—Mr. Justice Young.

C. C. SIRCAR—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 423, 439—Penal Code (Act XLV of 1860), ss. 366, 376—

Rape, charge of—Appeal—Conviction for abduction, whether justified—Acquittal in respect of charge of rape—Revision—Acquittal, whether can be set aside and conviction substituted.

Section 423 of the Cr. P. C. empowers an Appellate Court to reverse *inter alia* the finding and to order the accused to be re-tried by a Court of competent jurisdiction or to be committed for trial. It does not empower an Appellate Court to try the accused person itself.

It is not competent to an Appellate Court to alter a charge under s. 376 of the Penal Code to one under s. 366 of the Code, inasmuch as the charge under the latter section involves different elements and different questions of fact from a charge under s. 376.

Accused was charged with an offence under s. 376 and was convicted. On appeal the Sessions Judge set aside the conviction under s. 376 and proceeded to frame a charge under s. 366 of the Penal Code and called upon the accused to plead to the charge, examined him upon it and allowed him to call witnesses in defence. As a result of the trial the accused was convicted of an offence under s. 366 of the Penal Code:

Held, (1) that the Sessions Judge had no jurisdiction to try the accused as an Appellate Court, without any commitment having been made to it;

(2) that the conviction of the accused by the Sessions Judge under s. 366 of the Penal Code was, therefore, illegal;

(3) that in revision the High Court had no jurisdiction to convert the acquittal with regard to the charge under s. 376 of the Penal Code into a conviction and to convict the accused of that offence.

Criminal revision from an order of the Sessions Judge, Pegu, in Criminal Appeal No. 334 of 1924.

Mr. *Vakharia*, for the Petitioner.

Mr. *Gaunt* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application to revise the order of the Sessions Judge, Pegu, who sitting in appeal from a conviction by the Third Additional Special Power Magistrate, Pegu on a charge of rape under s. 376, Indian Penal Code, held that the charge of rape had no application by reason of the fact that the girl was over twelve and that the act could not be said to have been done without her consent or against her will and proceeded to frame a fresh charge under s. 366 against the petitioner of kidnapping a woman that she might be forced or seduced to illicit intercourse. To this charge he called on the applicant to plead and examined him upon it and allowed him to call one witness in defence. It seems to me that in so trying the case himself the learned Judge exceeded the powers conferred on an Appeal Court by s. 423. This section empowers him *inter alia* to reverse the finding and order the accused to be re-tried by a Court of competent jurisdiction or committed for trial.

A charge under s. 366 is triable by a Court of Session only, under s. 193, only on commitment. Therefore the learned Judge should, after setting aside the conviction, have ordered the petitioner to be committed for trial when he would have been tried before a Court of Session with the aid of Assessors. If he had not tried him but simply altered the finding and maintained the sentence, there is abundant authority for holding that such alteration is not permissible, where its effect would be to convict the accused on his appeal of a charge to which he had never pleaded, and which involved different elements and different questions of fact from those involved in the charge to which he had pleaded. Thus, in *Emperor* v. *Sakharam Ganu* (1), an exactly parallel case, where the Sessions Court had set aside a conviction for rape on the ground of consent and the Sessions Judge had, without trying the case himself, merely altered the charge and convicted the accused under s. 366, it was held that it was incompetent for a Judge in appeal to alter a charge under s. 376, Indian Penal Code, to one under s. 366 of the Code, because a charge under the latter section involves different elements and different questions of fact from a charge under s. 376. In the trial as held there was no evidence that the girl was under the care and in the keeping of her mother or any one. Her mother was called and said that she was a beggar residing at Kayan and merely produced her daughter's horoscope, but the daughter said she was also a beggar but residing at Pazundaung. The conviction, therefore, under s. 366 cannot stand in any event. The Assistant Government Advocate without attempting to defend the procedure of the learned Sessions Judge asked me to restore the conviction for rape, but that would be to convert an acquittal order into one of conviction without an appeal having been preferred from such acquittal, a course forbidden by s. 439, sub-cls. (4) and (5). The acquittal order must stand unless and until Government appeals against it when it can be considered. The rest of the order must be set aside and the accused discharged and I express no opinion as to further proceedings being taken under s. 366 for kidnapping or abduction.

Z. K. *Order set aside.*

(1) 8 Bom. L. R. 120; 3 Cr. L. J. 240.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3064 OF 1924.

May 19, 1925.

Present:—Mr. Justice Abdul Raoof.

MAQSUDAN LAL—PLAINTIFF—APPELLANT

versus

RAM CHANDER-RAM RICHHPAL—DEFENDANTS—RESPONDENTS

Benami ***transaction—Burden of proof—Presumption—Rebuttal.***

Where one person pays the price for the purchase of certain property but the instrument of sale is obtained in the name of another, the presumption is that the person paying the price is the owner of the property purchased and that the person in whose name the sale-deed is obtained occupies the position of a trustee only. The presumption, however, is rebuttable but it is for the person in whose name the sale-deed stands or for persons claiming through him to establish that the intention of the person who paid the purchase-money was to benefit the person in whose name the sale-deed was obtained and that, therefore, the transaction is in the nature of an advancement. [p. 289, col. 2; p. 290, col. 1.]

Case-law referred to.

Second appeal against an order of the District Judge, Karnal, dated the 29th August 1924, reversing that of the Sub-Judge, Fourth Class, Jhajjar, dated the 11th February 1924.

Mr. *Shamair Chand*, for the Appellant.

Lala *Jagan Nath Agarwal*, for the Respondent.

JUDGMENT.—The facts giving rise to this second appeal may be summarised as below:—A shop was purchased on the 17th of May 1897 in the name of Ram Richhpal nephew of the plaintiff Maqsudan Lal. On the 4th of October 1920 Ram Richhpal executed a mortgage in favour of Ram Chunder defendant whereupon the present suit was instituted by Maqsudan Lal for a declaration that Ram Richhpal was only a *benamidar*, that the real owner of the house was the plaintiff himself and that the mortgage in favour of Ram Chander did not affect his interest. The suit was resisted upon various grounds and the following issues were framed, namely, (1) Is the sale-deed in favour of defendant No. 1 *benami*? (2) If Issue No. 1 is proved in favour of the plaintiff what is the effect of the mortgage executed by Ram Richhpal in favour of Ram Chander? and (3) To what relief is the plaintiff entitled?

One of the questions to be considered was as to who had actually paid the purchase-money. The plaintiff alleged that the price had been paid by him and produced evidence in support of his contention. The Trial Court, however, found that the plaintiff had failed to establish his allegation. It, however, appeared that in the year 1912 a mortgage had been executed jointly both by Maqsudan Lal and Ram Richhpal in favour of Murli Dhar. The Trial Court relying upon that circumstance held that the shop in dispute belonged half and half to Maqsudan Lal and Ram Richhpal and made a declaration to that effect.

Both parties appealed. The lower Appellate Court after a consideration of the evidence on the record came to the conclusion that the purchase-money had been paid by the plaintiff but was of the opinion that "merely that fact did not constitute the transaction to be *benami*." The learned Judge appears to have been under the impression that there is some kind of presumption that where a purchase is made in favour of a relation it is intended to be for the benefit of that relation. This view is clearly opposed to the view taken by their Lordships of the Privy Council in several cases, see for example, *Gopeekrist Gosain* v. *Gungapershad Gosain* (1), *Moulvie Sayyud Uzhar Ali* v. *Bebee Ultaf Fatima* (2), *Bilas Kunwar* v. *Desraj Ranjit Singh* (3) and *Kerwick* v. *Kerwick* (4).

The rule deduced from these rulings is that where one person pays the price and the instrument of sale is obtained in the name of another, the presumption is that the person paying the price is the owner and the person in whose name the sale is obtained occupies the position of a trustee only. The view taken by the learned Judge of the Court below, therefore, appears to be wrong upon this preliminary point.

The presumption, however, is rebuttable and it is contended by Mr. Jagan Nath on the other side with reference to the rulings relied upon by the lower Appellate Court that under such circumstances a presumption of advancement arises and it is to be

(1) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth P. C. J. 13; 19 E. R. 20.

(2) 13 M. I. A. 232 at pp. 246, 247; 13 W. R P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538.

(3) 30 Ind. Cas. 299; 37 A. 557 at p. 565; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.).

(4) 57 Ind. Cas. 834; (1920) M. W. N. 738; 39 M. L. J. 296; 28 M. L. T. 194; 47 I. A. 275; 32 C. L. J. 490; 2 U. P. L. R. (P. C.) 153; 13 L. W. 455; 23 Bom. L. R. 730; 48 C. 260; 10 L. B. R. 335 (P. C.).

presumed in this case that Maqsudan Lal intended to benefit Ram Richhpal and had advanced the money to him for the purchase of the shop. These questions are to be decided in the light of the rulings of the Privy Council, mentioned above. The initial presumption being in favour of the plaintiff Maqsudan Lal it lies upon the mortgagee from Ram Richhpal to prove that in this particular case that presumption was rebutted because Maqsudan Lal's intention to benefit his nephew and adopted son was made out.

I accept this appeal and setting aside the question of the lower Appellate Court upon the preliminary point indicated above remand the case under O. XLI, r. 23, to be disposed of according to law. One of the issues which will require consideration and decision by the lower Appellate Court will be whether the plaintiff Maqsudan Lal is estopped from advancing the claim having regard to the fact that Ram Richhpal was allowed to remain in possession as ostensible owner and the mortgage was taken from him in the *bona fide* belief that he was the owner of the house. This rule is clearly indicated in s. 41 of the Transfer of Property Act (IV of 1882). Costs will abide the result.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 123 OF 1924.
March 13, 1925.

Present:—Sir Grimwood, Mears, Kt., Chief Justice, and Mr. Justice Piggott.

RAM PRASAD SINGH—PLAINTIFF—APPELLANT

versus

NEPAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Hindu Law—Widow—Mortgage by widow—Mortgagee put in possession—Ex-proprietary tenancy, whether created—Surrender—Heirs of widow, whether entitled to eject mortgagee.

A Hindu widow who was absolute owner of certain property mortgaged the property and put the mortgagee into possession of the property. The mortgagee neither received any rent from the mortgagor nor did he pay any rent to her. On the death of the widow her heirs, who were the nearest reversioners of her deceased husband, ejected the mortgagee from the property. He thereupon brought a suit to recover possession of the mortgaged property:

Held, (1) that assuming that an ex-proprietary tenancy in favour of the widow had come into existence from the date of the mortgage it must be taken to have been surrendered by her to the only person who could be treated as the land-holder, namely, the mortgagee; [p. 291, col. 1.]

(2) that if any ex-proprietary tenancy did continue up to the date of the death of the widow it did not develve on her heirs under s. 22 of the Agra Tenancy Act, and must be taken to have escheated in favour of the plaintiff who was the land-holder; [*ibid.*]

(3) that, therefore, the plaintiff's suit must be decreed. [*ibid.*]

Tolai Misir v. *Muneshar Koeri*, 84 Ind. Cas. 115; 22 A. L. J. 463; (1924) A. I. R. (A.) 737; L. R. 5 A. 167 Rev., followed.

Letters Patent Appeal against a judgment and decree of Mr. Justice Neave, dated the 9th May 1924.

Mr. *S. P. Sinha*, for the Appellant.

Mr. *S. D. Sinha*, for the Respondents.

JUDGMENT.—This was a suit by which the plaintiff sought recovery of possession as the usufructuary mortgagee of certain plots mortgaged to him under a deed of November 12th, 1914. The mortgage was effected by a Hindu widow of the name of *Musammat* Gaura, but it has been found as a fact that she was the absolute owner of the property mortgaged. She purported to mortgage with possession three specified plots of land. She put the plaintiff into possession and he remained in possession for six years. He neither received any rent from *Musammat* Gaura and still less did he pay any rent to her. On the lady's death the defendants who are her heirs being the nearest reversioners of her late husband succeeded in ejecting the plaintiff. Hence the present suit. It was dismissed by the First Court but a decree for recovery of possession was given by the learned Subordinate Judge in a carefully reasoned judgment with which we find ourselves in substantial agreement. A learned Judge of this Court in second appeal has reversed that decision and restored the decree of the First Court on the strength of certain reported cases referred to in the judgment now under appeal, dealing with the rights of the mortgagee in respect of ex-proprietary holding which has come into existence from the date of the mortgage by operation of law. There has been quoted to us in argument the case of *Tolai Misir* v. *Muneshar Koeri* (1) which is substantially on all fours with the case now before us and is entirely in the plaintiff's favour. With

(1) 84 Ind. Cas. 115; 22 A. L. J. 463; (1924) A. I. R. (A.) 737; L. R. 5 A. 167 Rev.

regard to the rulings relied upon by the learned Judge of this Court in the present case we are content to say that they are all distinguishable on the facts. We do not desire to stand committed to the opinion that an ex-proprietary tenancy in favour of *Musammat* Gaura necessarily came into existence from the date of the mortgage in the present case but if it did it was certainly surrendered by her to the only person who could be treated as the land-holder, supposing an ex-proprietary tenancy to have come into existence, that is, the plaintiff-mortgagee. Moreover, if any ex-proprietary tenancy did continue up to the date of *Musammat* Gaura's death, it certainly did not devolve on the present defendants (*vide* s. 22 of the Local Tenancy Act) and it must be held to have escheated in favour of the land-holder, that is to say, in favour of the present plaintiff. We have no doubt that in this case the lower Appellate Court was right in holding that the plaintiff was entitled to succeed in his claim for possession. We allow this appeal and setting aside the decree of the learned Single Judge of this Court, restore that of the lower Appellate Court. The plaintiff is entitled to his costs of both hearings in this Court.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUE CIVIL APPEAL No. 29 OF 1924.

December 18, 1924.

Present:—Mr. Baker, J. C., and Mr. Prideaux, A. J. C.

BENGAL NAGPUR RAILWAY Co., & EAST INDIAN RAILWAY Co.—DEFENDANTS Nos. 1-2—APPELLANTS

versus

Sheikh DILLU AND ANOTHER—PLAINTIFFS AND KALKA SIMLA RAILWAY—DEFENDANT No. 3—RESPONDENTS.

Carriage of goods—Risk Note, Form H—"Loss of complete package," meaning of—Bags delivered empty—Liability of Railway Company—Unreasonable delay in delivering consignment—Damages, whether can be claimed.

The expression "loss of a complete package" in Risk Note, Form H, means the loss of both covering and contents and there can be no loss of a complete package if the Company delivers the bags in which the goods were packed even though they are empty. [p. 293, col. 1.]

Dasadin v. *Agent, Bengal Nagpur Railway*, S. A. No. 611 of 1916, dated 29th March 1917, C. R. No. 69 of 1910, dated 28th September 1916, followed.

East Indian Railway Co. v. *Nilkanta Roy*, 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 112; 19 C. W. N. 95, *Bombay Baroda & Central India Railway Company* v. *Ambalal Sewaklal*, (1909) Indian Railway Cases 48, *Kali Das Mullick* v. *East Indian Railway Co.*, 40 Ind. Cas. 626; 21 C. W. N. 815, and *Madras & Southern Mahratta Railway Company Limited, Madras* v. *Mattai Subba Rao*, 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49, not followed.

Asfar & Co. v. *Blundell*, (1896) 1 Q. B. 123; 65 L. J. Q. B. 138; 73 L. T. 618; 44 W. R. 130; 8 Asp. M. C. 106, distinguished.

Loss caused to a consignor owing to unreasonable delay on the part of the Railway Company in delivering the goods consigned to it for carriage and not by reason of any loss, destruction, or deterioration of the goods themselves, is not covered by the terms of Risk Note, Form H and the Company is not protected by the terms of the Risk Note from liability for such loss. [p. 293, col. 1.]

Appeal against an order of the District Judge, Nagpur, dated the 8th May 1924, in Civil Appeal No. 40 of 1924.

ORDER.

Baker, J. C.—(*October 14th, 1924.*)—This case raises an important point of law as to whether the expression "loss of a complete consignment or of one or more complete packages forming part of a consignment" in the Risk Note, means the complete dis-appearance of the package or will apply to the dis-appearance of the contents.

The plaintiffs sued the Railway Companies for damages for the loss of a number of sacks of potatoes, the empty sacks being delivered to the plaintiffs minus the contents. They also claimed damages for delay in delivery, by which the potatoes in some other sacks were damaged.

The First Court, Second Subordinate Judge, Nagpur, dismissed the plaintiff's suit on a preliminary issue, holding that the defendants were absolved from all liability by reason of Risk-Note Form H.

On appeal the District Judge, Nagpur reversed the decision and remanded the case for trial on the merits, holding that if empty bags minus their contents were delivered to the plaintiffs, that amounts to complete loss, and, therefore, if the loss was due to wilful neglect on the part of Companies' servants, the Companies were liable under the Risk-Note.

The Railway Companies appeal against this order.

The point is one of importance and there are directly conflicting rulings of the various High Courts on the subject. The High Court of Calcutta has held in *East Indian Railway Co.* v. *Nilkanta Roy* (1) that where a number of tins containing oil were consigned to the defendant Railway Company under Risk-Note, and the tins were delivered to the consignee, but the contents of some of the tins were missing, there was no loss of any complete package and, therefore, the Railway Company could no be liable. This case follows the Bombay High Court case of the *Bombay Baroda & Central Indian Railway Company* v. *Ambalal Sewaklal* (2).

On the other hand, it was held in the *Madras Southern Mahratta Railway Company, Limited Madras* v. *Mattai Subba Rao* (3) that it cannot be said that there is no loss if the outer cover which encloses a parcel is delivered, whatever may happen to the contents, and that the term "loss" would include cases where the article consigned is lost to the consignor as such article or has lost its identity as such.

The point is important and is one of some difficulty. It is also a point which is liable to arise frequently, and in the circumstances I think it might well be decided by a Bench. I, therefore, refer the case to a Bench for a decision of the point whether the expression "loss of a complete consignment or of one or more complete packages forming part of a consignment" occurring in the Risk Note includes the loss of the contents of a package.

The question of the right of the plaintiffs to claim damages for delay may be considered at the same time.

Mr. *J. C. Ghosh*, for the Appellants.

Messrs. *M. R. Bobde* and *P. Lobo*, for the Respondents.

OPINION.—The facts of this case are set out in the Order of Reference. The question referred to the decision of the Bench is whether the expression "loss of a complete consignment or of one or more complete packages forming part of a consignment" includes the loss of the contents of a package.

(1) 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95.

(2) (1909) Indian. Railway Cases 48.

(3) 55 Ind Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 330; 28 M. L. T. 49.

A further question referred is as to the right of the plaintiffs to claim damages for delay in delivery.

We are not here concerned with the loss of a complete consignment but only with the question of whether the loss of the contents of a bag of potatoes, the bag itself being delivered empty, amounts to the loss of a complete package as stated in the Risk-Note.

On this point the views of the High Courts are, as stated in the Order of Reference, conflicting. The Calcutta High Courts has on several occasions held that where the case or outer covering of the package was delivered, there was no loss of a complete package. In *East Indian Railway Co.* v. *Nilkanta Roy* (1) the consignment was of tins of oil, some of which were delivered empty. It was held that there was no loss of complete packages when such material portions of the packages as the tins were delivered. That case follows the decision of the Bombay High Court in *Bombay, Baroda & Central India Railway Company* v. *Ambalal Sewaklal* (2) where some of the cans in a consignment of *ghee* were found empty. A number of cases are quoted at the end of the judgment in *East Indian Railway Co.* v. *Nilkanta Roy* (1). We have referred to them but all of them are under the old form of Risk Note, which exempted the Railway Company from all forms of loss whatever and hence are not applicable to the present case which is under the new form of Risk-Note.

Another case in point is *Kali Das Mullick* v. *East Indian Railway Co.* (4) in which the Calcutta High Court held that the words "package" means both that which is packed and that in which it is packed, its covering or receptacle.

The only cases to the contrary is that relied on by the lower Appellate Court, *Madras & Southern Mahratta Railway Campany, Limited, Madras* v. *Mattai Subba Rao* (3) in which it was held that it cannot be said that there is no loss if the outer cover which encloses a parcel is delivered, whatever may happen to the contents. In this case it was also held that "loss" means loss to the consignor as such article, or that the article has lost its identity as such. This case is based on *Asfar & Co.* v. *Blundell* (5). That, however, was a case of Marine

(4) 40 Ind. Cas. 626; 21 C. W. N. 815.

(5) (1896) 1 Q. B. 123; 65 L. J. Q. B. 138; 73 L. T. 648; 44 W. R. 130; 8 Asp. M. C. 106.

Insurance, and not a Railway case.

The question then is whether we should follow the view of the Calcutta and Bombay High Courts, or the view of the Madras High Court.

No doubt, it seems unreasonable to hold that there has been no loss when the contents of a package are abstracted and nothing is left, but the worthless outer covering, the bag for instance, not the grain within it, as the Madras High Court says. That point, however, was considered in the case just quoted. *Kali Das Mullick* v. *East Indian Railway Co.* (4) where it is stated that it does *prima facie* seem to be hard that the Railway Company can avoid responsibility in such a case by producing empty tins but the Court held that in view of the meaning of the word "package" that could not be helped.

It is argued on behalf of the respondents that if this view is pushed to its extreme limits, the Railway Company can avoid responsibility by producing the smallest fragment of the original package, even the string with which it is tied, or the label attached to it. If, however, we take extreme case, it is possible to take an almost equally extreme case on the other side, *e. g.*, if a man sends clothes by train packed in a valuable suit case or portmanteau and the clothes are abstracted and the portmanteau delivered empty, could it be said that there had been loss of a complete consignment ? We think, not. In these circumstances it would appear that if we adopt the view of the Madras High Court, that view might have to be modified according to the value of the outer covering, which would be an undesirable result.

In these circumstances, although we were at first inclined to take the same view as the Madras High Court, we think there are difficulties in doing so, and as the balance of authority is the other way and this Court has so far followed the view of the Calcutta High Court see *Dasadin* v. *Agent, Bengal Nagpur Railway*, (Second Appeal No. 611 of 1916 decided on 29th March 1917,) and Civil Revision No 69 of 1916, decided on 28th September 1916), I feel constrained to follow the view of the Bombay and Calcutta High Courts that the expression "loss of a complete package" means the loss of both covering and contents, and, therefore, as the Railway Company in the present case delivered all the bags though some of them were empty, there was no loss of a complete "package"

The next question is whether the Railway Company are protected by the Risk-Note from a claim for damages arising from delay in delivery. Although on the view taken on the first point the Risk Note will protect them from any damage to the contents of the consignment, the question of damages caused by a fall in the market price is different.

On this point we have direct authority in *East India Railway Campany* v. *Gopi Krishna Kashi Prasad* (6) where it was held that when a loss was caused to the consignor owing to unreasonable delay on the part of the Railway Company in delivering them and not by reason of any loss, destruction or deterioration of the goods themselves, the Company was not protected from liability under the Risk-Note. In that case the goods were delayed five months and arrived too late for the marriage for which they were required. That case distinguishes *Secretary of State* v. *Firm Jiwan and Abdullah* (7) in which goods themselves were damaged by delay in transit and it was held that the owner could not recover damages under Risk Note Form B. The same view was taken by Kinkhede, A J. C., in Second Appeal No. 345 of 1922 *East Indian Railway Company* v. *Muradali* (8) decided on 11th December 1923 where there was a delay of some months, which was held not to be covered by the Risk Note.

It will appear, therefore, that if owing to the delay, damage was suffered by the plaintiffs independently of any deterioration of the goods themselves, this will not be covered by the Risk-Note.

It has been contended in the present case that there was delay in delivery, resulting in loss, as the goods were not carried by the shortest route, and reference is made to *Vali Mahomed Hamad* v. *G. I. P. Railway* (9).

The question of whether there was any unreasonable delay or not, or whether any damage was suffered by the plaintiffs, in consequence of a fall in the market price

(6) 77 Ind Cas. 1016; 45 A. 534; 21 A. L. J. 488; (1924) A. I. R. (A.) 8.

(7) 71 Ind. Cas. 609; 45 A. 380; (1923) A. I. R. (A.) 426; 21 A. L. J. 220.

(8) 80 Ind. Cas. 1; (1924) A. I. R. (N.) 425.

(9) 67 Ind. Cas. 366; 24 Bom. L. R. 316; (1922) A. I. R. (B.) 74 46 B. 830.

of potatoes, was not gone into at all in the First Court, where the suit is dismissed on the ground that the Company was protected under the Risk-Note. On reconsidering the case above quoted, we are of opinion.

(1) That the plaintiffs cannot claim damages for the loss of the contents of some of the bags because there has been no loss of a complete package;

(2) that they cannot claim damages except those caused by delay in delivery independently of any deterioration in the goods themselves, *i. e.*, damages due to a fall in prices;

and (3) that the case must go back to the First Court for trial on the question whether there was delay in delivery resulting in loss to the plaintiffs owing to a fall in the market price and, if so, to what damages the plaintiffs are entitled on that account.

We direct accordingly. Costs to follow the result.

G. R. D. *Order directly.*

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1070 OF 1923.
March 25, 1925.
Present:—Mr. Justice Stuart.
SULTAN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
HARDHIYAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 99, O. XXXII, r. 3 (4)—Minor defendant—Guardian ad litem *appointed by Court—Notice to minor, absence of, effect of—Irregularity—Decree, whether binding on minor.*

Defendant, who was a mortgagee, brought a suit to enforce the mortgage against the plaintiffs, sons of the mortgagor, who were minors at the date of the institution of the suit. He named the plaintiffs' mother as their guardian *ad litem*. A notice was served on the mother personally but she paid no attention to it and the defendant then applied for the appointment of the Court *Nazir* as guardian *ad litem* of the minors, and the Court proceeded to appoint the *Nazir* guardian *ad litem*, but no fresh notice was served either upon the minors or upon their mother. The *Nazir* tried to communicate with the mother but she gave him no help in the matter and the suit was eventually decreed. The mortgaged property was sold in execution of the decree and was purchased by the defendant. On one of the plaintiffs attaining majority they instituted a suit to set aside the sale on the ground that they had not been properly represented in the mortgage suit:

Held, (1) that the failure to issue the notice required by sub-r. (4) of r. 3 of O. XXXII of the C. P. C. was a mere irregularity which was covered by s. 99 of the C. P. C., and that no prejudice having been caused to the plaintiffs, it did not affect the validity of the decree or the sale which took place thereunder; [p. 295, col. 2.]

(2) that inasmuch as effective defence to the mortgage suit could have been put up by the Court *Nazir* who was appointed guardian *ad litem* of the plaintiffs in the mortgage suit the decree and the sale which took place thereunder were binding upon the minors. [*ibid.*]

Second appeal from a decree of the District Judge, Saharanpur, dated the 18th April 1923.

Mr. *Nehal Chand*, for the Appellants.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—The facts in the suit under which this appeal arises, afford a good illustration of the difficulty to which a person may be put when he is endeavouring to enforce a document which he holds against the heirs of a deceased executant.

The plaintiffs' father Surja had transferred property on more than one occasion. In 1897 he executed a mortgage in favour of a certain Bakhshi. In 1900 he executed a usufructuary mortgage of the same property in favour of Hardhian, the present defendant-respondent. It is not clear how the mortgage of 1897 was satisfied, but it apparently was satisfied, for we hear no more of Bakhshi. Surja, although he executed the deed of usufructuary mortgage, did not give up the possession of the property, and executed another deed in 1905 by which his retention of possession was regularised and by which he mortgaged his equity of redemption under the deed of 1905 in security for the re-payment of the rent due upon the property, the satisfaction of which formed the consideration of the deed of 1905. It will thus be seen that he executed the deed of 1905 in payment of amounts that were actually due to him by way of rent and that, had he not executed that deed, he would have been liable to ejectment from the property in respect of which he had already executed a deed of usufructuary mortgage. Surja then died and Hardhian instituted a suit upon this deed against the present plaintiffs-appellants, who are Surja's sons and who were then minors. It is Hardhian to whom I referred as the plaintiff who has had trouble in obtaining satisfaction of the amount due

on his deed after the death of the executant.

When he instituted his suit in 1909 he nominated the defendant's mother as their guardian *ad litem*. As far as I can gather, she was the most suitable person to be nominated for that position and there does not appear to have been any body else who could have been nominated. A notice was served on her personally to which she did not pay the slightest attention. It appears to me that the plaintiff knew no other relation or friend who could be appointed guardian *ad litem*. Then the plaintiff came to the Court to appoint the *Nazir* of the Court as guardian *ad litem*. It is palpable that a *Nazir* of Judge's Court is not usually a very suitable person to appoint as a guardian *ad litem* of a minor but the question which the few Courts appear to have tackled in the past is what has the plaintiff to do when the person who ought to be guardian *ad litem* refuses to accept the responsibility without any reason at all? The plaintiff has, in these circumstances, to seek the assistance of an officer of a Court.

He applied that the *Nazir* should be so appointed and the Court proceeded to appoint the *Nazir*. Unfortunately overlooking the provision of O. XXXII r. 3 cl. 4., it omitted to serve a fresh notice upon the minors and a fresh notice upon their mother. It is almost certain that, had a fresh notice been served on the mother she would have treated it as she treated the previous notice and paid no attention to it. But the omission was made and undoubtedly an irregularity was committed. I have examined the record of the previous case and am satisfied that the *Nazir* did not in any way neglect his duties He appears to have endeavoured to get into touch with the mother of these minors who refused to have any communication with him. He could receive no information of any sort or kind. On the face of it, the mortgage-deed of 1909 was a good deed actually executed by the minors' father and was executed for binding consideration. On the face of it it would appear that the consideration had been taken for legal necessity. That is how the *Nazir* would ordinarily have read it. When the mother of the minors refused to come near him or to give him any information he could hardly be blamed for taking the position that there was no defence to the suit. He did not defend it accordingly and a decree was passed against the minors. In execution of this decree the property was purchased by Hardhian, the present defendant-respondent, without apparently the slightest objection on the part of of any person representing the minors.

Several years after the sale had taken place (the minors) one of whom has attained majority, instituted the present suit to set aside the sale of the property to Hardhian, which took place in execution of the previous decree. The learned District Judge has dismissed the suit holding that although an irregularity had been committed, it was an irregularity which is covered by present s. 99 of the C. P. C., (corresponding to old s. 578 of the old Code) and that it did not affect the matter because no prejudice had been caused by the irregularity to the present plaintiff. This view appears to be in complete accord with the principles laid down by their Lordships in the Privy Council in *Walian* v. *Banke Behari Pershad Singh* (1). I do not consider that the present appellants were prejudiced in any way by the appointment of the *Nazir* as their guardian *ad litem* without notice to the effect that his name has been proposed being served on their mother or themselves. From what I have seen of the case I am under the impression that no effective defence could have been put in, and that the guardian *ad litem*, had he contested the case, would have merely involved his wards in unnecessary expense. I, therefore, dismiss this appeal with costs on the higher scale.

Appeal dismissed.

Z. K.

(1) 30 I. A. 182 at p. 189; 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 94 OF 1924.

February 7, 1925.

Present:—Mr. Baker, J. C.

DAULAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

GULABRAO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 16—Undue influence, what amounts to—Relationship of master and servant, whether undue influence.

In order to establish a case of undue influence it is not enough to show that one party was in a position to dominate the other. It must also be established that the person in a position of domination has used that position to obtain an unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. [p. 296, col. 2.]

Poosathurai v. *Kannappa Chettiar*, 55 Ind. Cas. 447; 43 M. 546; 38 M. L. J. 349; 11 L. W. 455; 18 A. L. J. 344; (1920) M. W. N. 317; 2 U. P. L. R. (P. C.) 62; 22 Bom. L. R. 538; 13 Bur. L. T. 28; 47 I. A. 1; 27 M. L. T. 316 (P. C.), followed.

The mere fact that one party to a transaction is the servant of the other is not sufficient, in the absence of other evidence, to show that undue influence was used. [*ibid.*]

Appeal against a decree of the District Judge, Nagpur, dated the 18th September 1923, in Civil Appeal No 100 of 1923.

Mr. *D. T. Mangalmurti*, for the Appellants.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—The only question that arises in this appeal is whether the mortgage-deed in suit is void for undue influence.

The facts are set forth in the judgments of the Courts below. The mortgage in suit was passed to pay off a debt due by the defendants to one Sardar Khan and on a previous bond. Under the mortgage in suit Rs. 1,000 was payable by the mortgagees to Sardar Khan, and the Courts below have found that it was paid.

It is contended that the defendant No. 2 was a servant of the plaintiffs, that defendants Nos. 1 and 3 are his brothers, that defendants are also tenants in the village, of which the plaintiffs are *Malguzars*, and that undue influence was used to induce them to enter into an unconscionable bargain.

The learned Pleader for the appellants relies on *Kashi Nath Ray* v. *Raja Durga Prasad Singh* (1) and *Kamawati* v. *Digbijai Singh*, (2). The latter of these cases is that of a deed executed by a *pardanishin* lady, relinquishing her right of succession to a share in the estate substantially without consideration, and will have no application to the facts of the present case.

It is to be observed that the defendants Nos. 2 and 3 did not make any appearance, and defendant No. 1 made a vague pleading of undue influence in his written statement without giving any of the details which are required to be given by O. VI, r. 4, of the C. P. C.

The main contention of the appellants as to the unconscionable nature of the bargain is that under no circumstances does the debt due by them to Sardar Khan amount to Rs. 1,000. Their contention is that the accounts were not explained to them, but it has to be admitted that if stipulations as to compound interest in Sardar Khan's bond were enforced, the debt would amount to about Rs. 2,000.

The original plea of the defendant No. 1 was a denial of the consideration which has been held proved. The most salient feature in this case is that there is no evidence that the plaintiffs derived any undue benefit from the bargain. If anybody derived any benefit it was Sadar Khan, and there is no allegation or proof of any collusion between the plaintiffs and Sardar Khan.

Relying on the Privy Council judgment in *Poosathurai* v. *Kannappa Chettiar* (3), on which the lower Appellate Court has relied, which lays down that where it has been shown that one party was in a position to dominate the other, it must also be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid, I find that there is no evidence that the plaintiffs obtained any unfair advantage for themselves, or even that Sardar Khan obtained any unfair advantage.

The defendant No. 1 has made inconsistent statements, at one time admitting the execution and denying consideration, and in his further pleadings denying even the execution. Both the execution and consideration have been held proved.

I agree with the lower Appellate Court in holding that the mere fact that defendant No 2 was a servant of the plaintiffs, is not sufficient in the absence of other evidence to show that undue influence was used, nor have any particulars of the alleged undue influence been given. There is nothing to show that there was any collusion between the plaintiffs and Sardar Khan and, as I have already said, the ad-

(1) 38 Ind. Cas. 235; 1 P. L. J. 604; 2 P. L. W. 415.

(2) 64 Ind. Cas. 559; 43 A. 525; 15 L. W. 1; 30 M. L. T. 47; 42 M. L. J. 87; 26 C. W. N. 490; 24 Bom. L. R. 626; 4 U. P. L. R. (P. C.) 27; (1922) A. I. R. (P. C.) 14; (1922) M. W. N. 336; 48 I. A. 381 (P. C.).

(3) 55 Ind. Cas. 447; 43 M. 546; 38 M. L. J. 349; 11 L. W. 455; 18 A. L. J. 344; (1920) M. W. N. 317; 2 U. P. L. R. (P.C.) 62; 22 Bom. L. R. 538; 13 Bur. L. T. 28; 47 I. A. 1; 27 M. L. T. 316 (P. C.).

vantage, if any, was obtained by Sardar Khan and not by the plaintiffs.

In these circumstances the view of the lower Appellate Court appears to me to be correct and the appeal will be dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 332 OF 1925.

March 6, 1925.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Lindsay.

SARJU PRASAD—DEFENDANT—APPELLANT

versus

BHAGWATI PARSAD—PLAINTIFF—RESPONDENT.

Government of India Act, 1919, (9 & 10 Geo. V, c. 101), s. 80—Local Legislature, power of, to repeal laws passed by itself—Agra Pre-emption Act (XI of 1922), ss. 5, 12—Agra Pre-emption (Amendment) Act (VIII of 1923)—Pre-emption—Custom, proof of—Wajib-ul-arz, *entry in—Classes of pre-emptors, whether successively entitled.*

Under s. 80, sub-s. 1 of the Government of India Act the Local Legislature of any Province has power, subject to the provisions of the Act, to make laws for the peace and good government of the territories for the time being constituting that Province and this power includes the power to amend and alter, or, if necessary, repeal laws previously enacted by that Local Legislature. [p. 298, col. 1.]

The Agra Pre-emption (Amendment) Act of 1923 was not *ultra vires* of the U. P. Legislature. [*ibid.*]

Under s. 5 of the Agra Pre-emption Act a right of pre-emption is to be deemed to exist in *mahals* in respect of which any *wajib-ul-arz*, and not necessarily the latest *wajib-ul-arz*, prepared prior to the commencement of the Act, records a custom of pre-emption. [p. 297, col. 2.]

Section 12 of the Agra Pre-emption Act lays down the classes of persons who are successively entitled to exercise the right of pre-emption. [p. 298, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge, Gorakhpur, dated the 20th November 1924.

Dr. *M. L. Agarwala*, for the Appellant.

JUDGMENT.—This appeal is up for admission under O. XLI, r. 11 and from the date of the sale which took place in November 1923, it appears that the law to be applied is that contained in the Agra Pre-emption Act XI of 1922.

Two *wajib-ul-araiz* were filed in the case, one of the year 1833 and the other of 1860, and Dr. Agarwala who appears for the vendee-appellant informs us that the *wajib-ul-arz* of 1860 contains no provision for pre-emption. He, therefore, refers us to the language of s. 5 of the Agra Pre-emption Act, XI of 1922, as it stood before it was altered by the amending Act, Act VIII of 1923. According to the former state of things s. 5 laid down that a right of pre-emption should be deemed to exist only in *mahals* or villages in respect of which *the wajib-ul-arz* prepared prior to the commencement of this Act recorded a custom, contract or declaration, etc.

On the language of this section as it stood it necessarily followed that the *wajib-ul-arz* to be considered was the last one prepared prior to the commencement of the Act. The amending Act, Act VIII of 1923, however, altered the language and laid down that the right was to be deemed to exist in *mahals* in respect of which any *wajib-ul-arz* prepared prior to the commencement of the Act records a custom, etc., and it is to be observed that this Act was given retrospective effect so as to apply from the date on which the Agra Pre-emption Act came into force, that is to say, from the 17th of February 1923.

As the Act now stands, therefore, it seems quite clear that in the case with which we are concerned the Court below was entitled to refer to the *Wajib-ul-arz* of 1833 which admittedly contains a record of the custom of pre-emption.

Dr. Agarwala, however, has argued that the amending Act, Act VIII of 1923, was *ultra vires* of the Local Legislature, and in this connection he refers to s. 80 (*a*) sub-s. 2 of the Government of India Act. Sub-s. 2 of the section just mentioned, gives authority to a Local Legislature to repeal or alter, as to its own Province, any law made either before or after the commencement of the Government of India Act by any authority in British India other than that Local Legislature.

From the words "other than that Local Legislature" Dr. Agarwala desires us to infer that no Local Legislature can, by reason of these words, repeal or alter any enactment of its own.

We do not think that s. 80 (*a*) sub-s. 2 is to be construed in this sense. Without sub-s. 2 no Local Legislature would have authority to repeal or alter, as to its own Province, any enactment made by the Legislature of any other Province, and it was for that express purpose that powe

was given under sub-s. 2. But under s. 80 sub-s. 1 we find that the Local Legislature of any Province has power, subject to the provisions of the Act, to make laws for the peace and good government of the territories for the time being constituting that Province, and we have no doubt whatever that the power to make laws for peace and good government, includes the power to amend and alter or, if necessary, repeal laws previously enacted by that Local Legislature. We cannot, therefore, accept the argument that the amending Act, Act VIII of 1923 was *ultra vires* of the Legislature of these Provinces.

The only other question which is raised is with regard to preference. The contention for the vendee-appellant is that the pre-emptor in this case had no better right to pre-emption than he had.

Section 12 lays down the classes of persons who are successively entitled to exercise the right of pre-emption. The second class consists of co-sharers in the subdivision of the *mahal* in which the property is situated.

In the present case the pre-emptor and the vendor are co sharers in *khata* No. 21. The vendee is a co-sharer in another *khata* and is also a joint sharer in a third *khata* which we understand to be a joint *khata* relating to *shamlat* lands.

It is clear to our minds, therefore, that the pre-emptor is a person who falls within class 2 and that the vendee, whatever class he falls in must be in some class below class 2 and that being so, we think that the plaintiff, as a person in class 2, has the better right. It has been sought to be argued that these classes only lay down an order of preference when the sale has been to a stranger, but we do not think that is the meaning of the section and we have interpreted it already in a different sense. We think that s. 12 lays down an order of preference by which any person in class 1 is entitled to pre-empt as against any person in any of the other classes, namely, classes 2, 3, 4 and 5. We dismiss the appeal under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1174 OF 1923.

March 26, 1925.

Present:—Mr. Justice Sulaiman.

R. B. ABHAINANDAN PRASAD—PLAINTIFF—APPELLANT

versus

BHAGWAN DATT PATHAK AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 165—Co-sharers—Sale of property with arrears of profits—Pre-emption—Suit to recover arrears, whether maintainable—Jurisdiction of Revenue Court.

Where two properties are sold under a sale-deed one of which is capable of pre-emption and the other is not, and the property capable of pre-emption is pre-empted the vendee cannot lose his rights in the property which was not capable of pre-emption and that property must be deemed to remain vested in him. It is immaterial whether the pre-emptor paid the whole or only a part of the total consideration for the sale. [p. 299, col. 1.]

Arrears of profits which have accrued due already are capable of being sold but are not capable of being pre-empted. [*ibid.*]

An assignee of arrears of profits is entitled to sue to recover those profits in the Revenue Court. [p. 300, col. 1.]

Second appeal from a decree of the District Judge, Gorakhpur, dated the 29th of March 1923.

Mr. *Sankar Saran*, for the Appellant.

Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for arrears of profits. The position has arisen in a curious way. On the 15th of January 1920 one Ram Samujh executed a sale-deed in favour of the plaintiff Rai Bahadur Abhainandan Prasad under which he sold a certain share in village together with the arrears of profits in respect of *sir* and *khudkasht* lands due from the co-sharers on account of the previous years 1324, 1325 and 1326 *Fasli*, for a total sum of Rs. 1,000. A suit for pre-emption was brought by the present defendants with regard to the share sold and was ultimately decreed. The judgment in the pre-emption suit is not on this file but it is admitted that the decree for pre-emption was with regard to the share and it was on payment of the full consideration of Rs. 1,000.

The plaintiff instituted the present suit in the Revenue Court claiming arrears of profits against the co-sharers. The Court of first instance granted the plaintiff a decree but on appeal the learned District Judge has dismissed the suit. In the First Court a point was raised that the plaintiff being a legal practitioner had purchased

an actionable claim, but that objection was overruled by that Court and the matter was not pressed any further, nor has that point been argued before me in this appeal.

The main ground on which the learned Judge dismissed the suit was that under the pre-emption decree the whole of the sale consideration which had been advanced by Rai Bahadur Abhainandan Prasad had been paid back to him by the pre-emptors who happen to be the present contesting defendants Nos. 1 and 2, and the payment "must have the effect of destroying any rights which the plaintiff obtained under that decree". The learned Judge thought that inasmuch as there remained no consideration for the transfer of the arrears of profits that right no longer existed.

I am unable to agree with the view taken by the learned Judge. If two properties are sold under a sale-deed one of which is capable of pre-emption and the other is not and the property capable of pre-emption is pre-empted the vendee cannot lose his rights in the property which was not capable of pre-emption. That property must be deemed to remain vested in the vendee. It is immaterial whether the plaintiff did pay the whole or only a part of the total sale consideration. It would have been open to the plaintiff to ask the Court to apportion the consideration and reduce the amount in view of the fact that part of the property sold was not being pre-empted, but if for some reason or other a pre-emptor omitted to do so and submitted to a decree for pre-emption of a part of the property on payment of the whole amount, that could not destroy the rights of the vendee in the property which had not and could not have been pre-empted. It follows, therefore, that if the arrears of profits were capable of being sold separately and were not capable of being pre-empted and have not been pre-empted, then they remain vested in the vendee quite irrespective of the fact that the vendee has received back the entire consideration which he had originally paid for the sale. The effect of the decree for pre-emption cannot be said to destroy his rights in the arrears of profits which also he had purchased.

I can find no law under which arrears of profits which have accrued due already are not capable of being sold. As a matter of fact there is considerable authority for the view that such arrears are saleable.

The main question however to consider in this case is whether the assignee of such arrears can maintain a suit in Revenue Court for these profits although he has no longer any interest left in the property itself. This question is certainly of considerable difficulty and curiously enough there appears to be no reported case under the new Tenancy Act which has decided this ponit, at least none has been brought to my notice by Counsel on either side.

It cannot be denied that under the old Rent Act there was some divergence of opinion between the Board of Revenue on the one hand and the Allahabad High Court on the other. Although the rulings in either Court were not absolutely unanimous yet it may be said broadly that the Board of Revenue inclined to the view that assignees of rent or profits can maintain a suit in the Revenue Court because such suits were suits for rents or profits and came exclusively within the jurisdiction of the Revenue Court. On the other hand the Allahabad High Court took a strict view of the sections of the Rent Act and held that assignees of such lease or profits were neither land-holders nor co-sharers within the meaning of those sections and that their remedy, therefore, lay only in the Civil Court.

The learned Vakil for the respondents has drawn my attention to the cases collected by Dr. Agarwala under s. 102 in his learned Commentary on the Tenancy Act and has pointed out that the learned author is inclined to favour the view taken by the High Court in the earlier cases. But the author has had to note that as regards suits brought by assigns of arrears of rent there is a ruling of a Single Judge of this Court reported as *Kanhai Ram* v. *Sukh Deo* (1) laying down that a suit was cognisable by the Revenue Court only, and not following the cases of the Allahabad High Court under the old Rent Act. Cases of assigns of rent however may be distinguishable because s. 102 does not specifically use the word "landlord or co-sharers" whereas s. 165 expressly contains the words "co-sharer."

But even as regards the old Act there was a passage in the judgment of the learned Chief Justice in the Full Bench case of *Lekhraj Singh* v. *Rai Singh* (2) to the effect that there was nothing in the

(1) 22 Ind. Cas. 337; 12 A. L. J. 98.
(2) 14 A. 381 at p. 396; A. W. N. (1892) 143; 7 Ind. Dec. (N. S.) 612 (F. B.).

Rent Act, so far as it related to suits for arrears of rent, to indicate that the section applied only where the person suing was the person who was the land-holder or landlord at the time when the rent became due, nor was there anything in the section to indicate that the person to be sued in a suit for arrears of rent must necessarily be the person who occupied the position of tenant at the time when the rent, the arrears of which were sued for, became due. Knox. J., at page 404* also referred to a number of cases where the Revenue Court had been held to have jurisdiction where a rent-decree had been purchased from the landlord and the purchaser of the decree found it necessary to continue the litigation in the Revenue Court or where a sharer in possession of his share at the time of his suit was allowed to claim in the Revenue Court the profits of his share for a previous period during which he was not in possession.

The present Tenancy Act, however, has a new section, s. 166, corresponding to which there was no section in the old Act. It seems to me that this section was expressly added in order to put an end to this apparent conflict of opinion. Under the new section the word "co-sharer" in Ch. XI includes also "the heirs, legal representatives, executors, administrators and assigns of such person". *Prima facie* it would seem that an assign of a co-sharer would be entitled to maintain a suit for settlement of account and his share of the profits under s. 165.

The point which has been pressed before me very strongly is that though an assign of the property of a co-sharer has a right to maintain a suit for profits a mere assign of arrears of profits has no such right. The contention is that the person who is suing must have not only acquired the arrears of profits but must have also acquired the share in the village itself before he can be called an assign of the co sharer within the meaning of Ch. XI. After careful consideration of the various sections I have come to the conclusion that this contention cannot be upheld.

If an assign of a co-sharer is suing for profits which have accrued since the assignment then he is not suing as an assign of a co-sharer at all but he is suing as a co-sharer himself for the profits which have accrued during the time when he is a share-holder. On the other hand a suit for profits by an assign of a co-sharer must of necessity relate to arrears of profits for the period during which the assignor was the co-sharer and the assignee was not, and which profits have been transferred to the assignee. This position must be conceded.

It is, however, further contended on behalf of the respondents that there is a distinction between the case where there has been an assignment of profits as well as the property and the case where there has been an assignment of profits only. It is argued that in the former case the arrears of profits go with the property and, therefore, the assignee may have a right to sue for them but it is urged that a mere assignee of profits must bring a suit in the Civil Court and not in the Revenue Court. On principle I am unable to see any such distinction. In the present case if no suit for pre-emption had at all been brought it would be difficult to contend that Rai Bahadur Abhainandan Prasad would not have been entitled to maintain a suit for arrears of profits against the other co-sharers in the Revenue Court in respect of the years prior to his assignment. He would have been suing for a period when he was not a co-sharer at all. Nevertheless his suit was bound to have been decreed. Does it make any difference that subsequent to his assignment he has lost the property, though not the profits, by virtue of the pre-emption decree? In my opinion his right to sue for the profits has not been lost at all, nor has the *forum* where he can maintain such a suit been altered.

The learned Judge has said that this was the only point argued before him. I have already come to the conclusion that the view taken by him on this point was wrong. I accordingly allow the appeal and setting aside the decree of the lower Appellate Court restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

*Page of 14 A.—[*Ed.*]

LAHORE HIGH COURT.
FULL BENCH.

CIVIL REVISION PETITION No. 613 OF 1924.
June 5, 1925.

Present:—Sir Shadi Lal, Kt., Chief Justice, Mr. Justice Broadway and Mr. Justice Abdul Raoof.

RAM CHAND—PLAINTIFF—PETITIONER
versus
CHHUNUN MAL—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 102—Unregistered document—Execution proved or admitted—Consideration—Burden of proof.

Where an unregistered document, such as a bond, receipt or an entry in an account book, the execution of which is admitted or proved, contains an admission or recital of the payment of consideration, the onus lies on the person executing the document to prove that he did not receive the consideration, and not on the opposite party to prove payment of the consideration. [p. 305, col. 2.]

Case-law referred to.

Per *Shadi Lal, C. J.*—If *A* sues *B* for money due on a document such as a bond, a receipt or an entry in an account-book, the burden of proving the existence of facts upon which the legal liability of *B* depends lies on *A*. When *A* has proved the execution of the document by *B* either by producing evidence or by an admission made by the latter, and the document contains an acknowledgment of the receipt of consideration it is the duty of *B* to show that what he himself admitted in the document to be true was, as a matter of fact, false, and that he did not receive the consideration. [p. 306, col. 1.]

Petition, under s. 25, Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Delhi, dated the 29th July 1924.

ARGUMENTS.

Mr. *Shamair Chand* (with him Mr. *Zafrulla Khan* and Lalas *Amar Nath Chona* and *Gobind Ram Khanna*), for the Petitioner.—Where an unregistered document such as a bond, a receipt or an entry in an account-book, the execution of which is admitted or proved contains an admission or recital of the payment of consideration, the onus lies on the person executing the document to prove that he did not receive the consideration. Section 102, illustration (*a*) of the Evidence Act is a clear authority for this view. Section 92, proviso (1) of the Evidence Act allows fraud, illegality, want or failure of consideration to be proved. This obviously means that fraud or want of consideration is to be proved by the party who would fail if no evidence were given.

Wazir Singh v. *Jai Gopal* (1) which is supposed to lay down the law in this Province is really no authority. In that case the suit was based on a registered document and the observations in regard to unregistered documents were merely *obiter*. That ruling is not based on correct legal principles and is contrary to the view of all the High Courts.

For Calcutta authorities see *Manick Lall Baboo* v. *Ram Dass Mozoomdar* (2), *Foolee Bibee* v. *Bassiruddy Mirdha* (3), *Kalicharan Bose* v. *Amar Chand Das* (4), *Rughoonath Doss* v. *Luchmee Narain Singh* (5) and *Kurufool Kooer* v. *Rajkalee Kooer* (6).

For Madras ruling see *Sivaramaiyar* v. *Samu Aiyar* (7).

For Allahabad see *Rajeswari Kuar* v. *Rai Bal Krishan* (8), *Mahabir Prasad Rai* v. *Bishan Dayal* (9), *Makund* v. *Bahori Lal* (10), *Behari Lal* v. *Makhdum Bakhsh* (11).

For Bombay see *Davlata* v. *Ganesh Shastri* (12).

For Privy Council see *Chowdry Deby Persad* v. *Chowdry Doulut Singh* (13).

For Oudh see *Lachhman Prasad* v. *Hardeo Bakhsh* (14).

The admission shifts the onus see *Vir Singh* v. *Harnam Singh* (15), *Chandra Kunwar* v. *Chaudhri Narpat Singh* (16). *Ghulam Sarwar Khan* v. *Mohammad Ali Khan* (17).

If the admission is contained in the entry itself the onus must be on the person executing the document. The Punjab view being merely *obiter* and being opposed to the views of all the High Courts and the Privy Council is not good law.

Mr. *Sunder Das*, for the Respondent.—No doubt all the High Courts have held that the onus in such cases is on the person exe-

(1) 17 P. R. 1888.

(2) 10 W. R. 132; 1 B. L. R. A. C. 92; 1 Ind. Dec. (N. S.) 182.
(3) 12 W. R. F. B. 25; 4 B. L. R. F. B. 54.
(4) 41 Ind. Cas. 44.
(5) 10 W. R. 407.
(6) 17 W. R. 439 at p. 440.
(7) 1 M. H. C. R 447.
(8) 9 A. 713; 14 I. A. 142; 5 Sar. P. C. J. 80; 5 Ind. Dec. (N. S.) 912 (P. C.).
(9) 27 A. 71; 1 A. L. J. 423.
(10) 3 A. 824; A. W. N. (1881) 86; 6 Ind. Jur. 321; 2 Ind. Dec. (N. S.) 537.
(11) 18 Ind. Cas. 744; 35 A. 194; 11 A. L. J. 221.
(12) 4 B. 295; 5 Ind. Jur. 150; 2 Ind. Dec. (N. S.) 703.
(13) 3 M. I. A. 347; 6 W. R. P. C. 55; 1 Suth. P. C. J. 161; 1 Sar. P. C. J. 288; 18 E. R. 531.
(14) 37 Ind. Cas. 31; 3 O. L. J. 473.
(15) 56 Ind. Cas. 191; 1 L. 137; 135 P. L. R. 1920.
(16) 29 A. 184; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P. C.).
(17) 65 Ind. Cas. 398; 8 O. L. J. 609; (1922) A. I. R. O.) 98.

cuting the document but the Punjab view since 1888 has consistently been to the contrary, see *Wazir Singh* v. *Jai Gopal* (1), *Neki Ram* v. *Khushi Ram* (18), *Rulia Singh* v. *Tunia Mal* (19), *Barkat Ullah* v. *Muhammad Hayat Ali Khan* (20).

People in this Province being ignorant the rule followed here should continue. The principle of *stare decisis* is in my favour. No change should be made.

Mr. *Shamair Chand* in reply. The Punjab rulings have followed the rule laid down in *Wazir Singh* v. *Jai Gopal* (1). If that ruling is not sound then the other rulings cannot improve the position of the respondents. The rule laid down in *Wazir Singh* v. *Jai Gopal* (1) is merely *obiter* and is opposed to the authority of all the High Courts and the Privy Council. The principle of *stare decisis* applies to substantive rights so that vested rights may not be interfered with. It does not apply to mere rules of procedure. Rules relating to the law of evidence deal with procedure and not with substantive rights. If the Court finds that the rule enunciated in *Wazir Singh* v. *Jai Gopal* (1) is unsound, it should not persist in error, Ignorance in the Punjab is not greater than ignorance in other Provinces; besides ignorance has nothing to do with the question of onus which is based on the provisions of the Evidence Act. The onus in such a case must be on the party executing the document.

JUDGMENT OF THE FULL BENCH.

Raoof, J.—(*May 28, 1925*).—The circumstances under which this Reference to a Full Bench was made and the question which we have to answer are stated in the following Order of Reference by the learned Chief Justice:—

On the 1st September 1921 the defendant Chhunun Mal made an entry in the account-book of the plaintiff Ram Chand by which he acknowledged the receipt of Rs. 300 in cash. The plaintiff has now brought an action for the recovery of the principal and interest, but the defendant, while admitting the execution of the entry, denies the receipt of consideration.

The learned Judge of the Small Cause Court has placed the onus of proving consideration on the plaintiff, and, after holding that the onus has not been discharged, he has dismissed the suit. Mr. Shamair Chand for the plaintiff contends that the onus has been wrongly placed, and that it was the duty of the defendant to prove that the admission of payment contained in the entry was wrong and that he did not receive consideration. Now, the judgment of the Punjab Chief Court in *Wazir Singh* v. *Jai Gopal* (1) supports the view taken by the lower Court, but the correctness of that judgment has been impeached, and there can be no doubt that there are several judgments of the High Courts to the effect that, when, a document contains an admission or a recital that the person executing the document has received consideration, the onus is on him to prove that the admission or recital is incorrect and that he did not receive consideration. These judgments are collected at pages 814 to 816 of Sarkar's Commentary on the Indian Evidence Act and need not be examined at present.

The question of onus in cases of this kind is one of considerable importance and requires an authoritative decision by this Court.

Accordingly I refer the following question to a Full Bench:—

"Where an unregistered doument, such as a bond, a receipt or an entry in an account-book, the execution of which is admitted or proved, contains an admission or recital of the payment of the consideration, does the onus lie on the person executing the document to prove that he did not receive the consideration, or on the opposite party to prove the payment of the consideration?"

In the case of *Wazir Singh* v. *Jai Gopal* (1) it was held that "in suits to enforce a bond, the execution of or consideration for which is denied by the defendant, the general rule is that, as the plaintiff has to prove his case, the proof of the payment of the consideration lies upon the party who asserts it, that is to say, upon the plaintiff". The facts of the reported case were shortly these: The defendant in that case had executed a mortgage-deed on the 13th July 1872 which was registered in favour of the plaintiff's father, whereby he had mortgaged a certain property in consideration of Rs. 500 and had agreed to pay Rs. 40 annually to the mortgagee in lieu of profits, stipulating at the same time that in case of default in payment the mortgagee

(18) 51 Ind. Cas. 579; 39 P. L. R. 1919; 14 P. W. R 1919.

(19) 60 Ind. Cas. 730; 4 L. L. J. 73; (1922) A. I. R. (L.) 305.

(20) 84 Ind. Cas. 866; 6 L. L. J. 542; (1925) A. I. R. (L.) 272.

would be entitled to take possession of the mortgaged property. The mortgagee having died a suit was brought by his sons to enforce the condition with regard to possession. The defendant denied both the execution of the deed and the receipt of consideration. The execution of the deed by the defendant was proved in the opinion of both the lower Courts. They, however, differed as to the onus of proof relating to consideration. The Divisional Judge being of opinion that as the receipt of the consideration was admitted in the deed the onus of proving non-receipt of the same was on the defendant which he had failed to discharge. Differing from the decision of the First Court he gave the plaintiffs a decree. A further appeal was preferred to the Chief Court and the decision of the Divisional Judge as to the onus of proof was challenged. The learned Judges of the Chief Court upheld the decision of the Divisional Judge particularly on the ground thus stated in their judgment:—

"Remembering also that the acknowledgment of receipt of consideration in bonds and deeds is generally inserted in this country before any actual payment of consideration takes place, and is merely intended to be formal, the simple existence of such an acknowledgment would not affect the application of the general rule to which we have referred. But where the acknowledgment is of a more formal character, made and recorded, for instance, in pursuance of an Act of the Legislature, such as the Registration Act, the presumption ought to be in favour of the truth of such a public declaration. This presumption, however, is not conclusive, and may be rebutted. It merely serves to shift the onus of proof to the party who denies the truth of the acknowledgment."

The case before the learned Judges being of a registered deed it was not necessary in that case to decide the general question raised in the present case. They, however, thought it fit to lay down a general rule affecting cases of unregistered documents also and stated the rule in the following words:—

"We start, of course, with the elementary principle that a plaintiff has to prove his case, and, therefore, speaking generally, the proof of the payment of the consideration lies upon the party who asserts it, that is, to say upon the plaintiff, when he sues to enforce a bond, the execution of or consideration for which is denied."

As it was not necessary in that case to decide the general question the onus so broadly expressed was obviously *obiter* and could have no binding effect.

The general rule as to burden of proof is thus stated in s. 102 of the Indian Evidence Act:—

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Thus in a case where the execution of a document is either admitted or proved and which contains an acknowledgment of receipt of consideration the executant of the deed denying receipt of consideration would fail if no evidence were given on either side. In the case of *Mahabir Prasad Rai* v. *Bishan Dayal* (9) the facts were as follows:—

The plaintiff brought a suit upon a mortgage-bond. The bond, as usual, recited that the consideration therefor had been received by the mortgagors. But in the suit the executants, though they admitted execution of the bond, denied receipt of the consideration. The Court of first instance held that the burden of proving want of consideration was on the executants, and that they had failed to discharge it, and accordingly gave a decree in the plaintiff's favour. On appeal by the defendants the lower Appellate Court reversed the decree of the Munsif and dismissed the plaintiff's suit, holding that as the defendants all along denied receipt of consideration, it was for the defendants to prove that consideration had passed. An appeal was preferred to the High Court and it came up for decision before a Single Judge who upheld the decision of the lower Appellate Court on the grounds thus stated:—

"Ordinarily the rule is that when execution of a document and receipt of consideration has been admitted at registration, the burden of proving non-receipt of consideration falls upon the party who makes such allegation. Here, however, the case is somewhat different. The defendants before the Registering Officer acknowledged, no doubt, that they had executed the bond, and they still admit that such is the case; but before the Registering Officer they broadly and unmistakeably stated that the obligee of the bond had not paid them the consideration money. I think this fact

takes the case out of the general rule, and that in view of this denial of receipt of consideration when the bond was being registered, the burden of proving that as a matter of fact consideration had passed lies on the plaintiff."

This decision of the Single Judge was reversed by a Division Bench in Letters Patent Appeal. The reason for the decision of the Division Bench is thus summed up in the headnote:—

"Where execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has made in the bond."

In the case of *Foolee Bibee* v. *Bassiruddy Mirdha* (3) on a reference to a Full Bench the following judgment was delivered by the Hon'ble Sir Barnes Peacock, Kt., Chief Justice, on behalf of all the Judges:—

"In these two cases, the defendants admit in the bonds that they received the consideration. Those admissions are evidence against them, though not conclusive. If they dispute the consideration, the onus lies upon them to show that the recitals in the bonds which they have executed are not correct."

In the case of *Babbu* v. *Sita Ram* (21) a suit for sale upon a mortgage was brought and the mortgagors, though admitting the execution of the bond, denied receipt of consideration. Richards, C. J., and Tudball, J., thus stated the rule as to the burden of proof:—

"Where a mortgage-deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong *prima facie* evidence that the consideration has been actually received, and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. The presumption of course can be rebutted."

The mortgage-deed in that case no doubt was a registered document, but the decision of the learned Judges was given on general ground without any reference to the fact of registration.

In the case of *Rajeswari Kuar* v. *Rai Bal Kishan* (8), a suit was brought upon a mortgage-bond for recovery of principal and interest. The execution of the bond was not disputed, nor the liability to pay Rs. 13,000 out of the total amount of Rs. 20,000 admitted in bond to have been previously due with interest thereon, but the defendent's contention was that the remaining sum of Rs. 7,000 had not been received. Their Lordships of the Privy Council made the following observation in the course of their judgment at page 718*:—

"The plaintiff relied upon the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action."

In the case of *Sivaramaiyar* v. *Samu Aiyar* (7) a reference was made to the High Court for an expression of opinion on the question of burden of proof. The question submitted was: "Whether, in a suit to recover on a bond, the burden of proving partial failure of consideration lay upon the defendant or upon the plaintiff" and the following opinion was expressed:—

"It was for the plaintiff to prove the amount of the debt in respect of which he sued. This, so far as his case was concerned, he did sufficiently in the first instance by proof of the execution of the bond. It was for the defendant to give evidence in answer, if he could, that the amount was less than the sum claimed by the plaintiff; and, in the absence of any such proof, the Judge rightly gave judgment for the plaintiff."

It is clear from this decision that where a bond contains a recital acknowledging receipt of consideration the plaintiff satisfies the requirements of the onus of proof by simply producing the bond containing admission as to the receipt of consideration.

In the case of *Manick Lall Baboo* v. *Ram Das Mozoomdar* (2) plaintiff sued defendant upon a bond which recited the fact of due consideration having been paid at the time of execution. Defendant admitted the execution of bond but pleaded that consideration had not been paid. The following decision was given by a Division Bench of the Calcutta High Court. "We are of opinion that when the defendant in his bond stated that the money had been received by him, and when he, in his written statement, admitted that the bond was executed by him, it was upon him to prove that the facts stated by him in the bond were really different from what they were recited and stated to be. This is an ordinary rule of law, and according to it we think that the decision of the lower appel-

(21) 25 Ind. Cas. 426; 36 A. 478; 12 A. L. J. 806.

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late Court, which threw the entire burden of proof on the plaintiff when it ought to have been on the defendant, ought to to be reversed."

In the case of *Kurufool Kooer* v. *Raykalee Kooer* (6) Markby, J., stated the rule thus:—

"As pointed out in the order of remand the defendant admitted the execution of the bond which recited that the consideration had passed and, it, therefore, became the duty of the defendant, if she maintained that the consideration did not pass, to establish her allegation in some way or other."

In the case of *Kalicharan Basak* v. *Amar Chand Das* (4) the facts are thus stated in the head-note:—

"In a suit upon a mortgage-deed executed by the dafendant, which contained a definite admission that the consideration recited in it has been received in cash, the defendant in his written statement set forth that the consideration for the deed was not a sum paid in cash but the admission of the defendant as the plaintiff's partner and agent in a business and that the deed was in fact a security bond."

Woodroffe, J., gave the following decision in which Mookerjee, J., agreed:—

"The onus was on the defendant to prove that the bond which he signed contained a recital which was not in accordance with the facts."

In the case of *Davlata* v. *Ganesh Shastri* (12) the facts were as follows:—

"*G* held a decree against *D* who satisfied it out of Court, and obtained a receipt from *G* to the effect that it was satisfied. Notwithstanding this *G* executed the decree and recovered the amount of it through the Court, although *D* pleaded satisfaction in the execution proceedings and produced the receipt. *D* then brought a suit against *G* for refund of the money received by *G* and produced the receipt in support of his claim."

It was held "that the statement contained in the receipt passed by *G* to *D* to the effect that the decree had been satisfied, was sufficient to shift the burden of proof to the defendant to show that it was an incorrect statement."

In the case of *Chandra Kunwar* v. *Chaudhri Narpat Singh* (16) their Lordships of the Privy Council had the occasion to consider the value of an admission generally and at page 191* made the following observation:—

"The learned Chief Justice in his judgment points out that the burden of proving that the adoption relied upon took place, rests on the defendant. That is undoubtedly so, but it is difficult to conceive how she could, as against Mukand Singh—*prima facie* at all events—discharge that burden more effectually than by proving his solemn statement under hand and seal that it did take place. The proof of this admission shifts the burden, because, as against the party making it, as Baron Parke says in *Slatterie* v. *Pooley* (22):—

'What a party himself admits to be true may reasonably be presumed to be so.' No doubt, in a case such as this, where the defendant is not a party to the deeds and there is, therefore, no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done the fact admitted must be taken to be established."

On general principles, therefore, there can be no doubt as to the true rule to be applied to such a case.

My answer, therefore, to the question referred to the Full Bench is that under the circumstances referred to in the question the burden of proof lies on the person executing the document to prove that he did not receive the consideration.

Mr. Sundar Das for the respondent has relied upon the following cases of this Court in which the burden of proof under similar circumstances was laid upon the plaintiff:—

Neki Ram v. *Khushi Ram* (18), *Rulia Singh* v. *Tunia Mal* (19) and *Barkat Ullah* v. *Muhammad Hayat Ali Khan* (20).

The reason for this is obvious. The rule laid down in the case of *Wazir Singh* v. *Jai Gopal* (1), was generally accepted as correct by the Courts in this Province, and the learned Judges apparently followed the recognised rule without raising any question. In my opinion we should not allow our decision to be affected by these rulings as I must hold with all due respect to the learned Judges who decided the case of *Wazir Singh* v. *Jai Gopal* (1) that their decision in respect of unregistered documents was *obiter* and moreover did not lay down the law on the subject correctly.

(22) (1840) 6 M. & W. 664 at p. 669; 1 H. & W. 16; 10 L. J. Ex. 8; 4 Jur 1038; 151 E. R. 579; 55 R. R. 760.

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Mr. Sundar Das has also relied upon the case of *Gadian Chetti* v. *Veerappa Chetti* (23). There are certain observations which support his contention, but the consensus of opinion of the different High Courts on the point is in favour of the contention put forwared by Mr. Shamair Chand, the learned Advocate, for the petitioner.

Mr. Sundar Das has also relied upon the case of *Chiragh Din* v. *Bhagwan Das* (24). The decision in that case does not lay down any general rule and is based upon the special facts of that case.

Shadi Lal, C. J.—(*June 4, 1925*).—I have perused the judgment prepared by Mr. Justice Abdul Raoof and concur in the conclusion reached by him. If *A* sues *B* for money due on a document, such as a bond, a receipt or an entry in an account-book, the burden of proving the existence of facts, upon which the legal liability of *B* depends, lies on *A*. When *A* has proved the execution of the document by *B* either by producing evidence or by an admission made by the latter, and the document contains an acknowledgment of the receipt of consideration, it is the duty of *B* to show that what he himself admitted in the document to be true was, as a matter of fact, false and that he did not receive the consideration.

This rule, which is founded upon principles of natural reason, is also deducible from s. 102 of the Indian Evidence Act. The test prescribed by that section is simple. The burden rests upon the party who would fail, if no evidence at all, or no more evidence, as the case may be, were given on either side. Let us apply this test to the case set out in the order of reference. The document, on which the claim is based is admitted, or proved, to have been executed by the defendant, and it contains an admission by him that he has received consideration. If neither party produced evidence, the Court must decide the case in favour of the plaintiff, as the execution of the document is established and the declaration therein as to payment of consideration is not proved to be false.

Illustration (*b*) to s. 102 is apposite here. That illustration is as follows:—*A* sues *B* for money due on a bond. The execution of the bond is admitted, but *B* says that it was obtained by fraud, which *A* denies. If no evidence were given on either side, *A* would succeed as the bond is not disputed and the fraud is not proved. Therefore, the burden of proof is on *B*." In the illustration the person executing the bond seeks to avoid his liability by alleging fraud, but the same principle would apply if want or failure of consideration is pleaded in order to invalidate the document.

The general test laid down by the Legislature in s. 102 for determining the onus *probandi* in a suit may, therefore, be invoked as an authority for the rule that when a person denies the receipt of the consideration mentioned in a document executed by him, the onus rests upon him to show that, in making the admission in respect of consideration, he was mistaken or was not telling the truth. This rule has also been repeatedly affirmed by the Courts both in England and in India. In the case of *Rajeswari Kuar* v. *Rai Balkrishan* (8) the defendant admitting the execution of the bond pleaded non-receipt of a part of the consideration acknowledged in the document, and their Lordships of the Privy Council, while adjudicating upon this plea, stated the law succinctly in the following words:—

"The plaintiff relied upon the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action."

There are numerous judgments of the High Courts in India which enunciate the same proposition, but, as most of them have already been considered by my learned colleague, I deem it unnecessary to go over the same ground, and propose only to discuss the principle upon which they are founded. I must, however, refer to the judgment of a Division Bench of the Punjab Chief Court in *Wazir Singh* v. *Jai Gopal* (1) which has been assumed to be an authority for the contrary rule. Now, it is beyond dispute that that judgment dealt with a claim on a registered mortgage-deed, and the only question before the learned Judges was whether the onus rested upon the person who denied the truth of the admission made by him in the deed. This question they answered in the affirmative but they also made some observations as to the onus of proving consideration in respect of an unregistered bond. The learned Judges expressed the view that an acknowledgment of consideration in a document of that description does not affect

(23) 26 Ind. Cas. 899; 28 M. L. J. 92.
(24) 32 Ind. Cas. 40; 100 P. R. 1915; 189 P. W. R. 1915.

the general rule that it is the duty of the person seeking to recover money upon the strength of the document to prove the payment of the consideration. Now, it is quite clear that these observations were no more than mere *obiter dicta*, and cannot have the force of a pronouncement which is necessary for the determination of a case.

Nor is there any valid reason in principle for drawing a distinction between an admission in a registered deed and that contained in an unregistered document, in so far as the question of onus *probandi* is concerned. In both cases the person denying the consideration is confronted with his own admission, and it is for him to prove that it was falsely made. It is the self-harming evidence supplied by his own admission, and not the nature of the document embodying it, which determines the allocation of the burden of proof. The quantum of evidence required to discharge the onus may vary with the character of the document, but, in so far as the initial onus is concerned, there is nothing either in principle or in Statute Law which would distinguish one case from the other. The test laid down by s. 102 of the Indian Evidence Act equally applies to both the cases, and the executant of the document would fail in either case, if he does not produce evidence to get rid of his own admission.

Universal experience testifies that, as men consult their own interest, and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears, (Best on Evidence, s. 519). As observed by Baron Parke in *Slatterie* v. *Pooley* (22). "What a party himself admits to be true may reasonably be presumed to be so"; and it is clearly his duty to rebut the presumption arising from the self-harming evidence supplied by him. My answer, therefore, to the question referred to the Full Bench is that where an unregistered document, the execution of which is admitted or proved, contains an admission or recital of the payment of the consideration, the onus lies on the person executing the document to prove that he did not receive the consideration.

Broadway, J.—(*June 5, 1925.*)—I agree.

Z. K. *Answered accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 24, 1925.

Present:—Lord Wrenbury, Lord Phillimore and Lord Carson.

HOPE PRUDHOMME AND COMPANY —PLAINTIFFS—APPELLANTS

versus

HAMEL AND HORLEY, LTD.— DEFENDANTS—RESPONDENTS.

Principal and agent—Agent acting as principal towards third parties and seeking to make undisclosed profit—Indemnity, right to—Principal, liability of.

Plaintiffs were a firm of merchants carrying on business at Madras as exporters of groundnuts and other country produce. Defendants were merchants in London who were intermediaries for the placing of the plaintiffs' merchandize at European Continental ports especially Marseilles. In answer to a telegram from the defendants in October 1916 plaintiffs agreed to despatch three hundred tons of groundnut kernels of a particular brand at a particular price on the usual terms. The letter of acceptance stated that commission would be paid as arranged. Defendants sold the goods on their own account to one *G* of Marseilles through a firm *S*. Plaintiffs took up space on a certain vessel for the despatch of the goods but the Government requisitioned the vessel for War purposes and the plaintiffs did not succeed in procuring any other tonnage and failed eventually to despatch the goods. *G* took proceedings before the Tribunal of Commerce at Marseilles to recover damages from *S* for non-delivery of the goods. Plaintiffs were informed of these proceedings by the defendants in general terms only and supposed that the proceedings were either against themselves or against the defendants as their agents and believing that they had a good defence under French Law, namely, that they had been prevented from fulfilling their contract by *force majeure* gave instructions for this defence to be raised; and when it failed before the Tribunal of first instance they furnished papers and documents for the appeal which the defendants had already started. The defence failed in the Appellate Court also and the plaintiffs were required by the defendants to pay the amount which *G* had recovered from *S* and for which the defendants were liable. When the plaintiffs discovered that in effecting the sale of the groundnuts to *G* through *S* the defendants had acted as principals and had sought to make a profit for themselves over and above the commission which they were entitled to get from the plaintiffs, the plaintiffs repudiated all liability in respect of the transaction:

Held, (1) that the relationship between the plaintiffs and defendants and the terms of the particular contract between them justified the conclusion that the defendants were the agents of the plaintiffs; [p. 313, col. 1.]

(2) that, therefore, when the defendants sought to make an undisclosed profit on the transaction, they became disentitled to claim any indemnity as agents from the plaintiffs, nor could they claim as a link in the chain of buyers and sellers in respect of damages recovered by the ultimate buyer, because there was no contract of sale between the plaintiffs and themselves; [p. 309, col. 2.]

(3) that the conduct of the plaintiffs in helping the defendants to put forward the defence of *force majeure* in the French Courts did not amount to ratification

of the defendants' action and the plaintiffs were not consequently liable for the amount which *G* had recovered from *S* and for the payment of which defendants had become liable to *S*. [p. 314, col. 2.]

Mr. *E. B. Raikes*, for the Appellant.

Messrs. *Alexander Kielson* and *H. O'Hagon*, for the Respondent.

JUDGMENT.

Lord Phillimore.—The appellants who are the plaintiffs constitute a French firm of merchants carrying on business at Madras as exporters of ground nuts, castor seeds and other country produce.

The respondents, the defendant Company, are merchants in London who, from August, 1913, down to the date of the present suit, were intermediaries for the placing of the appellants' merchandise at European Continental ports, especially Marseilles.

The suit was brought for the price of a cargo of castor seeds sold by the appellants to the respondents. The respondents set up certain defences to some of the items in the appellants' claim, but there was no answer to the bulk of it, and their real ground for refusing to pay was that they had a counter-claim against the appellants for a larger amount in respect of the non-delivery of a cargo of groundnuts, which should have been despatched in December, 1916, or January, 1917, to Marseilles.

It was this counter-claim that formed and forms the real matter in dispute. The Trial Judge decided against the counter-claim, but the High Court at Madras in its appellate jurisdiction reversed this decision and gave judgment for the counter-claim—hence the present appeal.

The particular transaction over which the dispute arose began by a telegram of the 12th October 1916, despatched by the respondents to the following effect:—

"Immediate reply bid ordinary three hundred December-January 59.

Hamel."

The expansion of this telegram is to be found in a paragraph of a letter of the same date, which reads as follows:—

"We are much obliged for your offer of 100 tons of ordinary at F. 59·50, for December-January shipment, *c.i.f.* Marseille, which offer we put before our friends, but regret to say that we have not been able to place at your price. On the other hand, we have succeeded in getting a counter-offer (but for 300 tons, instead of 100) at F. 59, which we are cabling you to-night and hope you will be able to accept. If you can do so and can offer us further quantities at the same price, we think we could place them or machine-decorticated kernels at Fs. 2 more."

The telegram in response was not produced at the trial, but there is no doubt that it was an acceptance dated the 14th, and on the same day the appellants wrote to the respondents as follows:—

"In accordance with the cables exchanged between us, we beg to confirm the following sale:—

Quantity.—300 tons (three hundred tons only).
Quality.—Groundnut kernels ordinary, usual quality.
Brand.—H. P.
Price at Frs. 59 per 100 kilos. (francs fifty-nine only).
C.I.F. per steamer from Kernels Ports to Marseilles.
Shipment.—December and or January, 1916, and 1917.
Buyer.—
Payment.—As usual.
Terms.—As usual.
Commission.—As arranged."

This letter was upon a printed form with such words as "quantity, quality, etc.," printed with spaces to be filled up in writing. What is especially to be noticed is that as against the word "buyer." there is a blank and against the word "commission," the words "as arranged." The respondents on the 18th despatched the following note:—

"*Contract (Purchase) Note No. 028.*
Article.—Coromandel kernels new crop.
Quantity.—300 (three hundred) tons, packed in bags.
Quality.—As stipulated in Ref. 031.
Price—Fcs. 59 (francs fifty-nine), less 1 per cent. per 100 kilos., cost, freight and insurance, including War risk, Marseilles.
Shipment.—From Coromandel Coast during December 1916 and or January 1917.
Payment.—As arranged.
Terms.—Marseilles C. Contract 1909.
Your telegram of 14th October 1916.
Our telegram of 12th October 1916."

In compliance with this arrangement, the appllants took up space on the ss. *Seapool*; and if they could have kept this they would have been able to ship to Marseilles in accordance with the contract.

But, it being in the middle of the War, the Government requisitioned the *Seapool*, and the appellants did not succeed in procuring any other ship and failed to send the cargo forward.

The goods were the subject of a sale made on the 16th October by the respondents through a firm of Sydney Harvey and Co., of London at 61 francs per 100 kilos to the ultimate buyer, one Gravier, of Marseilles. Gravier took proceedings before the Tribunal of Commerce at Marseilles to recover damages from Sydney Harvey and Co. for non-delivery.

The appellants were informed of these proceedings by the respondents, but in general terms only, and supposed that they were proceedings either against themselves or against the respondents as their agents, and believing that they had a good defence under French Law, namely, that they had been prevented from fulfilling this contract by *force majeure*, gave instructions for this defence to be raised ; and, when it failed before the Tribunal of first instance, they furnished papers and documents for the appeal which the respondents had already started to the Cour d'Appel at Aix. The defence of *force majeure* failed also in that Court, and the appellants were required by the respondents to pay the amount which Gravier had recovered from Sydney Harvey and Co., and for which the respondents were liable.

This is the outline of the action which was taken with regard to the proceedings in France, but it will be necessary for their Lordships to go into rather more detail later on in this judgment.

Till a late date the appellants were under the impression that the respondents had acted as their agents in the transaction and would make no profit out of it except a commission of 1 per cent., which would be deducted from the price of 59 francs per 100 kilos. But in fact the respondents had acted as principals, re-selling the stuff at a price of 61 francs per 100 kilos. to Gravier through Sydney Harvey and Co., who were in form the sellers to him, but were to have 1 per cent. commission ; the result being that the respondents passed on their 1 per cent. commission which the appellants were going to allow them to Sydney Harvey and Co., and took for themselves a profit of 2 francs per 100 kilos. by their bargain with Gravier.

When the appellants found this out, they repudiated all liability; and, if the respondents were really agents, this repudiation was no doubt right, for, if they were agents, they were making an undisclosed profit and had no authority to sell as principals and, therefore, could not claim indemnity as agents from the appellants their principals; neither could they claim as a link in a chain of buyers and sellers for the damages recovered by the ultimate buyer, because there was no contract of sale between the appellants and themselves.

Hence the main contest in the case has been upon the question whether the respondents were entitled to treat themselves as buyers and sell for whatever profit they could get, or whether they were agents.

Both Courts in India have held that they were agents; but the Appellate Court has considered that the appellants nevertheless fail, because they ratified and accepted the transaction. A consideration of this point will come later in their Lordships' judgment.

Notwithstanding the view taken by both Courts in India, the respondents have insisted, as they had a right to do, in an elaborate and useful argument, that in the legal sense of the word they were not agents but principals.

There is great force in the observations which were made to their Lordships upon the extension which modern business has given to the terms "agent" and "agency." In many trades—particularly, for instance, in the motor-car trade—the so-called agent is merely a favoured and favouring buyer, one who under an over-riding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders; but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is by a special provision in the overriding contract forbidden to sell too cheaply or required not to spoil the market by asking too much.

It would be quite possible that, in the present case, the position of the respondents, though frequently described by both parties as that of agents, was, notwithstanding, merely that of agents according to the modern business extension of the phrase, so that they would be entitled to

treat themselves as buyers from the appellants and to sell at the best price they could get; in which case any damages which they would have to pay to the buyers from themselves on account of the non-delivery of the cargo would be damages which they in their turn could recover as damages from the appellants.

By virtue of a clause in one of the earlier documents, which will be mentioned shortly and which is in conformity with the usual practice in produce markets where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain.

Accepting these submissions from the respondents, their Lordships must now proceed to analyse the documents which constitute this contract, and for this purpose they are prepared to accept the respondents' submission that attention must not be limited to the four or five documents which constitute the contract No. 626, but that the initial letters by which the business between the appellants and respondents was originally started must also be considered.

In the first letter, August 29th, 1913, the respondents, after mentioning the source of their introduction, write as follows:—

"We understand you are largely interested in the export of groundnuts, both undecorticated and decorticated, and, further, that you are not represented in our market. . . .

"We are desirous of taking up the business as selling agents, and would be pleased to hear whether you feel inclined to negotiate sales through us.

"We are selling fair quantities of Chinese and Bombay groundnut kernels, and we are, therefore, in touch with the best buyers.

"We would be interested in other articles exported from Madras, as Seeds, Ricemeal, Tanned Skins (Sheep and Goat) and Cow Hides.

"*Terms.*—We would open the usual D/P credit, through a first-class Bank, you drawing on us at 90 d/s 95 per cent. against *c.i.f.* sales, and 80 per cent. against value of consignments, less freight, and, in the latter case, our selling commission of $1\frac{1}{2}$ per cent.

"We are agreeable to providing our own remuneration on *c.i.f.* transactions or, if preferred, we would do the selling for a commission of $1\frac{1}{2}$ per cent., each side paying their own cable and incidental expenses. Balances *pro* or *con* to be settled by 3 d/s drafts. . . ."

The respondents replied on September 18th as follows:—

"We thank you for your offer to be our agents for groundnuts, both decorticated and undecorticated; oil cakes; castor seeds and other Indian produce and seeds, and accept your proposals on the terms given below against each respective article.

* * * *

"We shall now go to detail the principal terms and conditions for different articles we can offer you.

"*Groundnuts.*—This is always done on the fair average quality, and we accept your drawing terms of bill at 90 d/s for 95 per cent. against *c.i.f.* or *c.f.* sales with usual D/P credits, as it is customary to pay freight on delivered weight we shall deduct the same in our invoice also. . . ."

Then oil cakes and castor seeds are mentioned, and the letter proceeds:—

"For all these articles we would prefer to deal with you as principal to principal on *c.i.f.* or *c.f.* basis, as the case may be, and you fix your own remunerations, each party paying their own cable and incidental expenses. Balance of account to be adjusted *pro* and *con* by 3 d/s draft, as we accept to do business with you, and to meet your wishes we cable you as per copy enclosed, and trust we shall soon hear from you with a view to business."

There appears to be a letter of the 5th September which has not been produced, and then the respondents wrote again on the 19th September, the material parts of this letter being as follows:—

"We were pleased to receive your yesterday's cable notifying that you had written us full particulars respecting the business proposed in our letter of the 5th instant.

"We now await same with interest, and trust it will not be long before some mutually satisfactory business result between us

* * * *

"*Conditions of sale*:—

For groundnuts in shell and groundnut kernels would be the usual Marseilles terms, which are doubtless familiar to you.

Other articles would usually be sold. . . .

"If desired, we will send you *pro forma* contracts.

"It is, of course, understood that, in the event of allowances for inferiority of quality, damages, late shipment or non-fulfilment of contract, same would be refunded by you on receipt of official award, should an amicable settlement be impossible. Kindly confirm. . . .

"Prices mentioned are net.

"*Consignments.*—We shall be interested to hear whether you can secure any parcels of Tanned Skins (Goat and Sheep) and Tanned Hides (Buffalo and Cow), Wool, Aloe Fibre, etc., etc., to send to our care for sale.

"The outlets are quite familiar to us. . . ."

Then comes a letter from the appellants to the respondents of the 10th October :—

"We thank you for your favour of the 18th ultimo, contents of which we have perused with interest."

"*Terms.*—Those enumerated appear to be in order."

Then terms as to castorseed are mentioned.

"*Prices.*—Your proposal that these should be *c.i.f.* or *c.* and *f.* nett is acceptable to us.

* * * *

"We would like to draw your attention to the fact that very often buyers will not bid full prices for cabling, they reserving a margin to protect themselves in the event of values weakening pending receipt of reply. We hope, therefore, that, should orders prove to be at impracticable prices, you will not ignore same, but respond, wherever possible, with best counter-offer.

"We would also ask you to support us with as many offers as possible. When you find it impossible to offer, we would advise quotations. These will enable us to keep buyers posted and help us to secure orders for cabling. . . ."

* * * *

There is also a letter from the appellants to the respondents of the 16th October containing the words—

"We of course agree that allowances, if any, imposed for inferiority of quality, damages, late shipment, or other causes, will be refunded by us on receipt of award, should an amicable settlement be impossible."

It is not necessary to mention any other documents at this stage.

Business began to be done, but it appears from a letter from the respondents of the 12th December that as a rule the prices asked were too high ; and when the documents in respect of another contract No. 424 came to the knowledge of the respondents, they discovered the reason why the prices had ruled so high, and in their letter of 12th December they expressed themselves as follows:—

Contract No. 424.—For the 200 groundnut kernels, *c.* and *f.* Marseilles, at 15, February/March shipment, we notice you provide 1 per cent. commission for us. We had been under the impression, until receipt of the Contract Note referred to above, that prices were net, as proposed in your letter of 18th September and confirmed in ours of 10th October last.

"We have doubtless lost a good deal of business, as the difference in your and our prices has, on several occasions, represented the 1 per cent. commission. In order to avoid any misunderstanding in future, we have asked you to reserve us 1 per cent. commission on all transactions, and no doubt our request will have your attention.

"Subject to your approval, we purpose the 1 per cent. commission on Contract No. 424 shall be divided between us, in view of the fact that we both had to cut our margin of profit in order to put the business through."

On the 12th December, the day that this letter was written, there is a telegram which is significant as to the general business relations of the parties ;—

"25 tons.
"Please offer.
"Groundnuts in shell, Marseilles.
"100 tons January/February.
"Read price midway.
"12/3¾d. c. and f.
"Groundnuts in shell, Marseilles.
"100 tons February/March.
"Read price midway.
"12/3¾d. c. and f.
"Groundnuts in shell, Marseilles.
"100 tons March/April.
"Read price midway.
"12/3¾d. c. and f.
"The whole order to be executed or not at all.
"Please look after our commission.
"1 per cent.
"In future."

During all this time, letters, owing to the War, were much delayed in transit. That of December 12th was answered on the 31st December 1913 :—

"*Contract No.* 424.—We note your remarks and are sorry to learn of the misunderstanding, which doubtless stood in the way of business. We note you are agreeable to forego half of the commission on the first transaction, *and* in futare it is agreed that all our offers will include a commission for your goodselves of 1 per cent."

Now, turning to the first letter, that of August 29th, 1913, it may be observed that *c. i. f.* sales are to be cases where the respondents had already found a purchaser, and consignment sales where they are to take their chance of finding one.

The paragraph beginning "We are agreeable" may be open to two constructions; but their Lordships are of opinion that it refers to *c.i.f.* transactions only and offers two alternatives in the case of *c.i.f.* transactions, *viz.*:—We will provide our own remuneration—which means we will buy from you and get what profit we can from our buyers; or, we will treat ourselves as agents and sell for you on a commission of 1½ per cent. It does not refer to consignment sales. The answer of the 18th September is to the effect that the appellants would prefer to deal as principal to principal, and let the respondents fix their own remuneration.

So far the documents, it is contended, appear to point to a relation of seller and buyer. But, notwithstanding, for some reason which is not explained, it is clear that the appellants were providing for a 1 per cent. commission, which would be an agency commission for the respondents, and that, when the discovery was made, the respondents accepted the arrangement, so that the appellants would naturally believe that the respondents were selling at the price quoted by the appellants, taking their 1 per cent. out of the purchase-money and remitting the rest.

Why the appellants had allowed them 1 per cent. only instead of 1½ per cent., and why the respondents were agreeable to accept this in future, is not explained. It may be that, as sales were hanging fire, the respondents were content with the smaller commission, just as they proposed to divide the 1 per cent. commission on contract No. 424.

As a result, however, in their Lordships' opinion, the documents antecedent to the particular contract in question support the general relation as being one of agency in the legal sense of the term and not one of sale and purchase.

It was suggested on behalf of the respondents that the 1 per cent. was to be considered as in the nature of a discount or special favour to the respondents as agents in the modern commercial sense only, leaving them still to make a profit as sellers. But, admitting that this would be a possible theory, their Lordships can find no trace of anything in the correspondence which would give it a foundation in fact.

Their Lordships now come to the consideration of the particular contract. The letter of the 14th October 1916, from the appellants gives the price as francs 59, and under the head of the terms "commission" the words "as arranged." The document of the 18th October 1916 called "contract (purchase) note" gives the price as francs 59, less 1 per cent. per 100 kilos. That 1 per cent. is unquestionably the respondents' commission. The printed word "buyer" in the appellants' letter of the 14th October 1916, is followed by a blank. It is common ground that the appellants did not at that time know to whom the respondents had sold, though, in fact, the respondents' contract with Sydney Harvey and Co. had been made on the 16th. These facts all point to "agency."

Counsel for the respondents drew their Lordships' attention to the contract for the sale of castor seeds, in which a similar form was filled up with the names of the respondents as buyers and a blank after the word commission; and he suggested that this was the real nature of the business, and that, if other contract notes had been printed in the record, they would be found to take the same shape; but if words mean anything, the distinction between the contract note in the case now under discussion and the castor seeds case and possibly others, shows that some business was done on one set of terms and other upon others. It is to be noticed that, in the castor seeds case, the price was not *c.i.f.*, but *f.o.b.*

In the correspondence in this case as it was up to the last moment the respondents spoke of themselves as agents. Even after the appellants had seen a copy of the award of the Tribunal of Commerce and noticed that Gravier had bought at an increased price, the respondents still wrote that they had acted as agents for the appellants. They did so as late as the 2nd December 1918, and it was not till the appellants on

the 7th December took the point that, as agents, the respondents were not entitled to make secret profits, that they set up the case that they had always dealt as principals and not agents.

Their Lordships agree with both the Courts below that the respondents were in the strict sense agents, and that, unless they can show that the appellants, with knowledge of what they had done, adopted and ratified it, they have no case.

The Appellate Court thought they had so ratified it. Their Lordships find this very difficult to understand. What motive could the appellants possibly have for adopting a contract which, at the time they are supposed to have so done, meant a certain loss.

First of all it is necessary to ascertain when the appellants got to know the facts. The Chief Justice relies on a letter of the respondents of the 22nd March 1917, which, it is said, if carefully looked into, would show that there was a chain of buyers and sellers, and that there were buyers in London who in their turn were sellers at Marseilles, from which the appellants should have learnt that they were not and could not be directly parties to the proceedings before the Tribunal of Commerce.

It may be that they should have understood this and should have remembered it when they wrote the later letters. But this knowledge would not inform them that the respondents had acted as principals and were making a profit. This information only came out bit by bit ; the sequence is as follows :—

On the 13th February, 1918, the respondents wrote to the appellants and sent them a copy of the award of the Tribunal of Commerce, which was dated the 22nd January. When this was received by the appellants does not precisely appear, but the first comment upon it is in a letter of the 16th April, in which they write as follows:—

"*SS. 'Seapool.'*

"We thank you for your remarks and for the copy of the arbitration award in this connection.

"On perusing the award, we are in the first place struck with the fact that we are no party to the proceedings, which are held in connection with Mr. Jules Gravier and Sydney Harvey and Co., who, we presume, were buyers from you of the 300 tons relating to our contract No 626. We may say that this is the first and only information we have received to he effect that the arbitration proceedings were not between Mr. Jules Gravier and your goodselves, for we were all along under the impression that Mr. Gravier had brought his claim against you ; in fact, it was with this idea that we addressed him with a request that matter be settled out of Court. As the parcel was sold by you to Messrs. Sydney Harvey and Co., and as they resold the lot at a profit of Frs. 2,, theirs is merely a contingent liability with which we have really no concern. . . .

"We therefore take it that, had the arbitration proceedings been held as between Mr. Gravier and ourselves or you as our agents, the arbitrators would have been in duty bound to give due consideration to the facts which precluded the shipment of the lot sold, and that under such circumstances we would have been fully exonerated from all blame and responsibility in the matter.

"We are, however, quite ready and willing to give Messrs. Sydeny Harvey and Co. every assistance we can to enable them to fight their case successfully, and with this end in view we beg to enclose certified documents connected with the case, as per details below, but, as we have already stated, Messrs. Sydney Harvey and Co.'s dispute with Mr. Jules Gravier is a contingent liability and we are no party to the same."

The respondents wrote back on the 29th May :—

"*SS. 'Seapool.'*

"We are much obliged for your favour of the 16th April and for the enclosures regarding the appeal on the above, which we have put forward to Messrs. Sydney Harvey and Co., asking them to post them down to the lawyer in Marseilles.

"Regarding what you write about the proceedings taken between Mr. Jules Gravier and Messrs. Sydeny Harvey and Co., we were under the impression that, right away at the commencement, we told you that we had sold to Mr. Gravier through our brokers, Messrs. Sydney Harvey and Co., and are sorry if we omitted this.

"In any case, the trouble would have reverted back to you through ourselves as your agents, because, had Mr. Gravier taken proceedings against Messrs. Sydney Harvey and Co., they in their turn would have claimed their loss back from you, and it is usual in

cases of this sort for there to be one case for the whole transaction.

"Regarding what you write about the profit of 2 francs, this is not a profit made by Messrs. Sydney Harvey and Co., who merely acted as brokers.

"We added the 2 francs to your figure in order to cover our expenses for Finance, Commission, etc., and to leave a small profit for ourselves as the 1 per cent. which you allow us we had to pay Messrs. Sydney Harvey and Co. as their brokerage.

"We hope that, with the documents in hand, the lawyer in Marseilles will be successful in the appeal, and we will advise you in due course of the result."

The critical letter in answer is that from the appellants of the 18th July:—

"*SS. 'Seapool'*

"We note carefully your remarks on the position. Regarding the difference Frs. 21, this had nothing to do with us, for we are dealing with you as agents, and we do not think it fair to ourselves that you yourselves should have appointed another medium to handle this business. However, we await results of the appeal, when we shall revert to this subject."

The Chief Justice thinks that this is a letter "urging" the respondents "to go on with the appeal" and accepting the position. Their Lordships do not find anything in it about urging an appeal. They consider that it is a reasonable letter, meaning this: "You have done something that you ought not to have done; it may be, however, that on this particular occasion it will do us no harm, for we trust that the French Court of Appeal will accept the defence of *force majeure*; so we will wait till that appeal is heard, and then we will take up the whole matter with you." This they subsequently did by desiring to know whether the respondents had not on other occasions taken a secret profit to which they were not entitled.

It is said that they urged an appeal. That was in their letter of the 31st May, written before disclosure, when they approved of the measures which, as they were informed, had been taken to institute an appeal. As the respondents kept writing to them that they were liable, what more natural than that the appellants should get every ground of defence against Gravier's claim put forward?

Coutts-Trotter, J., thinks that their letter of December 7th showed that they elected to abide by the contract; but their Lordships take an opposite view. The appellants were protesting against the decision of the French Court of Appeal, refusing to agree to the respondents' offer to accept a rather smaller sum in settlement, taking the point that the respondents must have mismanaged the case to bring about such a result, and further plainly saying that the respondents as their agents were not entitled to make secret profits; and there the matter ends.

Their Lordships can find nothing to lead them to suppose that the appellants did such an absurd and purposeless thing as to ratify this action of their agents, when they already knew of its disastrous results.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and the judgment of the Court of first instance be restored with costs here and below.

Z. K. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Sanderson, Lee and Co.*

Solicitors for the Respondent:—Messrs. *Donald, McMillan* and *Mott.*

RANGOON HIGH COURT.

SECOND CIVIL APPEALS NOS. 323 AND 324 OF 1923.

December 18, 1924.

Present:—Mr. Justice Maung Gyi.

ABDUL RAHIM—PLAINTIFF—APPELLANT

versus

MAHOMED CASSIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Construction of document of title—Question of law—Lower Burma Town and Village Lands Act (IV of 1898), s. 42, Rules framed under, rr. 4, 43, 44—Permit granted by village headman effect of, whether question of law.

The question of the legal effect of a deed which can be treated as a document of title or embodies a contract or is the foundation of the suit is a question of law and can be considered in second appeal.

The plaintiff's title was based on a permit granted to his predecessor-in-title by the village headman under r. 4 of the Rules framed under the Lower Burma Town and Village Lands Act:

Held, that the question of the legal effect of the permit was a question of law and could be gone into in second appeal.

Appeal against the judgment of the District Court, Pegu, in Civil Appeals Nos. 39 and 40 of 1923.

Mr. *Dadachanji*, for the Appellant.

Mr. *Halkar*, for the Respondents.

JUDGMENT.—These two Appeals Nos. 323 and 324 of 1923 have been heard together. They are second appeals with concurrent findings by the lower Courts. The plaintiff-appellant claims that the main portion of the land in dispute as well as the land measuring 3 feet by 79 feet running parallel with a line of Kokko trees forming site No. 1257 was bought by him from one Law Ke under a registered-deed of sale, Ex. D, dated 2nd May, 1921. The 1st respondent-defendant claims the land in dispute which is village land under two registered sale-deeds, Exs. 2 and 3, dated respectively the 16th May, 1922 and 20th August 1922. Exhibit 2 was executed by Ma Shin Khin and her brother, Maung Ba Kyaw, and Ex. 3 by Shwe Tha and his wife Ma Sa Tin, owners of site No. 1258. Shwe Tha states that 3 feet by 79 feet of the land in dispute forms part of his land which he sold to the 1st defendant-respondent under Ex. 3. Shin Khin and her brother Ba, Kyaw, state that the land conveyed under Ex. D, site No. 1257 was land inherited by them through their parents. Shwe Tha's land, site No. 1258, adjoins site No. 1,257. Plaintiff alleges that the boundary between the two sites is marked by a line of Kokko trees planted by Shwe Tha many years ago. Shwe Tha, however, states that the line of Kokko trees was 3 feet within his boundary. The facts of the case have been gone into in the judgments of the lower Courts. It must be noted that the two respondents became the wife of the 1st respondent a month after the execution of Ex. 2 and 3rd respondent is 1st respondent's brother-in-law. The plaintiff-appellant's story is that Law Ke, who executed the sale-deed said he was the sole owner of the suit land, as he had obtained the site from the headman of the village. Maung Kun (P. W. No. 8) under a permit, Ex. C. The whole question turns on what the legal effect of Ex. C is. Exhibit C is a permit in printed form duly filled up by the village headman, Maung Kun, under r. 4 of the Rules under the Lower Burma Town and Village Lands Act, 1898. The boundaries of the site are given and the permit is dated 30th March, 1914. That this permit was given in due form and under the rules required by the Act of 1898 was not challenged. It must be held, therefore, that the permit was given by the headman of the village after fulfilling the requirements under r. 43, *i. e.*, demarcation of the site and public notice of application. The lower Courts have held that Ex. C is valueless unless the book of counterfoils is produced in evidence. I do not see why Headman, Maung Kun, 8th prosecution witness gave evidence that he issued the permit, Ex. C. It was for the respondents to challenge this and to call upon him to produce the book of counterfoils. Rule 44 runs as under:—

"* * * * * the headman shall issue to the applicants a license in such form as may be prescribed under s. 42 of the Act * * * * *"

Both Advocates rely upon *Rajah Makund Deb* v. *Gopi Nath Sahu* (1) decided by a Bench of the Calcutta High Court. The learned Advocate for the respondents contends that a second appeal will not lie. It was held in that case that unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract, or is the foundation of the suit, a second appeal does not lie. I hold that the legal effect of the document, Ex. C, is a question of law. As to the strip of land on the north side measuring 3 feet by 79 feet which 1st respondent claims as his by right of purchase from 4th and 5th respondents, Maung Shwe Tha and Ma Saw Tin, Maung Ba Cho, the revenue surveyor (P. W. No. 2) who filed a revised map of the site and Maung Kun (P. W. No. 8), the headman who demarcated Law Ke's site, state that the Kokko trees planted by Shwe Tha formed the boundary line of his site, I hold that the respondents have encroached upon Law Ke's original site No. 1257 on the north side to the extent of 3 feet by 79 feet and that the land in dispute is the property of the appellant who derived it from Law Ke. Both appeals are allowed with costs throughout.

Appeals allowed.

Z. K.

(1) 25 Ind. Cas. 286; 21 C. L. J. 45.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT
No. 1279 OF 1921.
April 10, 1922.
Present:—Mr. Justice Fawcett.
THE INDIAN HOTELS COMPANY, LTD.,—PLAINTIFFS
versus
PHIROZ SORABJI, CONTRACTOR —DEFENDANT.

Bombay Rent (War Restrictions) Act (II of 1918), s. 2 (1) (b)—Transfer of Property Act (IV of 1882), s. 105—Easements Act (V of 1882), s. 52—Lease and license, distinction between—Right to use stalls and cubicles in mews on payment, nature of—"Premises," what are.

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license and not as a lease. [p. 317, col. 2.]

The ordinary case of a lease of immoveable property is one where a defined piece of land or a defined building or part of a building is transferred to the lessee, and there can be no valid lease of an area the position of which varies from time to time. [p. 318, col. 1.]

The Bombay Rent (War Restrictions) Act of 1918 is an encroachment upon the ordinary property owner's right to freedom of contract and must, therefore, be strictly construed. [p. 320, col. 1.]

The definition of "premises" in s. 2 (1) (*b*) of the Bombay Rent (War Restrictions) Act of 1918 excludes the case of a single cubicle reserved not for the occupation of a human being but for the occupation of a chattel, *e. g.*, a motor-car, at any rate, in the absence of some document or reliable oral evidence showing that the agreement between the parties was otherwise, and provided that the owner of the premises exercises a general right of control over the premises. [*ibid.*]

Plaintiffs were the owners of certain mews which provided stabling accommodation for horses in stalls and loose boxes and also accommodation for carriages which were kept on open spaces, no definite space being allotted to any particular carriage, the carriages being placed as they happened to come in on any particular day. In addition accommodation was provided for motor-cars in single cubicles and also in cubicles accommodating more cars than one and in open spaces. In the open spaces no particular space was allotted to any particular car, nor was any particular space reserved in the larger cubicles for particular cars. The key of the larger cubicles was kept by a supervisor employed by the plaintiffs and the keys of single cubicles were kept by the respective chauffeurs of the cars garaged in the cubicles. Defendant kept a horse in one of the stalls and a carriage on the open space provided for carriages in the building. He also kept three cars, one on the open space, the second in one of the bigger cubicles and the third in a single cubicle. He made certain payments in respect of the use of the stall, open spaces and cubicles. The plaintiffs exercised general control over the premises and carried out the necessary repairs, etc.:

Held, (1) that the right acquired by the defendant on payment to the use of the stall, open spaces and cubicles was in the nature of a license and did not create the relationship of landlord and tenant between the plaintiffs and the defendant; [p. 319, col. 1.]

(2) that the stall, open spaces and cubicles did not fall within the definition of "premises" contained in s. 2 (1), (*b*) of the Bombay Rent (War Restrictions) Act of 1918 and consequently the Act was not applicable to them. [p. 320, col. 1.]

Mr. *Campbell* (with him Mr. *Strangman*), for the Plaintiffs.

Mr. *Mulla*, for the Defendant.

JUDGMENT.—The plaintiffs, the Indian Hotels Co., Ltd., are the owners of the immoveable property known as the "Wellington Mews." This consists of a ground floor and one upper floor and is used as a mews and motor garage. The ground floor provides stabling accommodation for about one hundred and ninety horses in stalls and loose boxes shown in blue in the Plan. It also provides accommodation for about one hundred and fifty carriages, which are kept on open spaces shown in pink in the Plan.

The evidence of the plaintiffs' representative, Dr. Vakharia, which is not disputed, is that no definite space is allotted to any particular carriage, but that carriages are placed as they happen to come in, so that they are not invariably on the same spot but change their position from time to time.

Then, on the ground floor, there are nine single cubicles or lock up rooms, each of which is able to contain one motor-car. These are shown in green in the Plan. Each cubicle has a door with a lock, the key of which is supplied to the chauffeur of the car kept inside. The upper floor is entirely used for motor-cars. About eighty cars are accommodated on the open spaces, which are shown brown on the Plan; and the same rule applies to the position of cars on these open spaces as I have mentioned in the case of the carriages on the ground floor. Then there are seven cubicles shown in yellow in the Plan, each of which accommodates more than one car varying in number from four to ten cars. The key of each of these cubicles is kept by a supervisor employed by the plaintiffs; and here, again, no particular portion of the cubicle is allotted to a particular car, but the cars kept inside take up their position as they happen to come in. Then there are about forty single cubicles for cars, shown in green in the Plan. Each of these contains one car. The chauffeur has the key as in the case of single cubicles on the ground floor.

The defendant has, since February 1920, kept a horse in a stall on the ground floor and a carriage on the open space there. He has also three cars, one of which is kept on the open space on the upper floor, the second is kept in one of the bigger cubicles shown in yellow in the Plan, and the third car has been kept in the same single cubicle throughout.

The question between the parties is whether their relationship is that of landlord and tenant, or merely of licensor and licensee.

The defendant pleads that the former is the relationship; the plaintiffs say it is the latter.

From the correspondence, Ex. A to the plaint, it appears that in 1920 the Rent Controller in Bombay took action under the Bombay Rent (War Restrictions) Act (No. II of 1918) and fixed standard rents in respect of the accommodation provided by the Mews. The plaintiffs sent out a circular in October 1920 saying that they were advised that the action of the Controller was *ultra vires* and contrary to law. They, therefore, proposed to have his decision set aside by filing an action for the purpose. The present suit is a test case which raises this point.

The figures given in the plaint are not disputed. The plaintiffs claim to be entitled to charge the defendant for one horse and carriage Rs. 18 a month as against Rs. 14-5-0 fixed as standard rent; for one car in the open space Rs. 25 as against Rs. 16-8 0; and for each of the other two cars Rs 30 as against Rs. 22. The difference for the months of August 1920 to January 1921 amounts to the sum of Rs. 137-2-0 and the plaintiffs claim to recover this from the defendant, and also ask for declaratory and consequential reliefs.

The substantial facts alleged by the plaintiffs and deposed to by Dr. Vakharia are not disputed; but the contention raised by the defendant is that he is a tenant of the plaintiffs, and, that, therefore, the premises, in question are premises to which the Bombay Rent Act applies under the definition contained in s. 2, sub-s. (1), cl. (*b*), of that Act.

The issues raised are:—

(1). Whether the premises in suit are premises as defined by the Bombay Rent Act?

(2). Whether the relation between the plaintiffs and the defendant is that of licensor and licensee, as alleged by the plaintiffs, or that of landlord and tenant, as alleged by the defendant?

(3). Whether any actual space of the ground floor or upper floor of the premises was exclusively reserved for the defendant?

(4). Whether payments made by the defendant for the spaces actually occupied by him are "rent" within the meaning of the Bombay Rent Act?

(5). Whether the plaintiffs are entitled to claim from the defendant the sums of Rs. 18, Rs. 25 and Rs. 30 mentioned in the plaint?

The case really turns upon whether the agreement between the parties is one of lease or merely of license. This follows from the definition of "premises" in the Bombay Rent Act, to which I have already referred. That definition says that "premises" means any building or part of a building let separately for any purpose whatever including any land let therewith. And, therefore, to constitute such premises the part of the Wellington Mews, for which the defendant pays, must have been let to him.

Now, the ordinary distinction between a lease and a license is laid down as follows in Halsbury's Laws of England, Vol. XVIII, page 337, Art. 770:—

"It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not as a lease."

The test, therefore, is whether there is a right to exclusive possession. In India we must, of course, first refer to the statutory definitions of lease and license. That of lease is contained in s. 105 of the Transfer of Property Act, under which a lease of immoveable property is a transfer of a right to enjoy such property, etc. A license is defined in s. 52 of the Indian Easements Act, *viz.* "Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

Having regard to these definitions there is no substantial difference between the Indian and the English Law on the subject. The words "right to enjoy" in s. 105 of the Transfer of Property Act, when read with the rights of the lessee laid down in s. 108 of the same Act, clearly show that there should also be a right to exclusive possession to constitute a lease under the Transfer of Property Act. Therefore, I take it that the test of exclusive possession is the main one to be applied in deciding this case.

I first take up the case of the defendant's carriage and car which are kept not in the separate cubicle but on the open spaces I have mentioned. In regard to these, Mr. Wadia for the defendant contends that though the particular portion of space that is occupied by his client's car and carriage from time to time varies, yet he does have exclusive possession of some portion of this area, and the fact that that portion varies is immaterial. The ordinary case of a lease of immoveable property is, of course, one where a defined piece of land or a defined building, or part of a building, is transferred to the lessee; and having regard to the rights of a lessee, which are specified in s. 108 of the Transfer of Property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of immoveable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immoveable property" (as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and a carriage, within certain specified limits, although the place occupied by the chattels might vary from time to time. That would correspond to a lease of an incorporeal hereditament such as is referred to in Halsbury's Laws of England, Vol. XVIII, page 340, Art. 774. A careful conveyancer might, no doubt, draw out an agreement which would constitute such a lease, although the particular portion of space occupied varied in the same manner as it does in this case. Consequently I am not prepared to say that there cannot be a lease of that description, but at the same time it seems obvious that the burden of showing that there has been such a lease in a case of this kind lies upon the lessee, and ordinarily the law takes it that a case of that kind is not one of a demise, but that of license. I think there is clear authority for this afforded by the case of *London and North Western Railway Co.*, v. *Buckmaster* (1). That was a case of rating; but it is pertinent to the present point, because the question whether a person is to be rated or not in England raises the question of exclusive occupation in the same way that it arises in the distinction between a lease and a license. In that particular case the plaintiffs, the Railway Company, were rated in respect of certain lines of railway and certain stables. The facts as regards the lines of railway will be found at pages 72* and 73* of the report as follows, omitting immaterial matter:—

"The twelve lines of rails and sidings... were and are... used exclusively for the reception of trucks and the storage of coal, stone, etc., belonging, not to the plaintiffs, but to various coal-owners and merchants, and to a stone merchant. In these trucks are brought coals from collieries connected with the plaintiffs' system of railways...The space appropriated to one coal-owner, when not fully occupied by him, is appropriated by the servants of the plaintiffs to other coal-owners."

It is, therefore, a case somewhat similar to the present case, where no car-owner can say any definite space is allotted to him alone. The stables were also used by coal-owners under a certain agreement in writing. In the judgment of Blackburn J., he says (page 76)*:—

"The occupier of any property is the person who has the sole and exclusive possession of it, and he is the person who ought to be rated. Whenever the owner of property demises it to another giving him the exclusive possession and occupation, so as to make him tenant of it, it is the tenant who should be rated and not the landlord. In this case, however, I do not think what was done did amount to a demise of any portion of this property, but merely to a giving of a license to have the easement and use of it, analogous to the case of a lodger. The more important part of the case consists of the lines of rails and portions of property adjoining which

(1) (1875) 10 Q. B. 70 and 444; 44 L. J. M. C. 180; 33 L. T. 329; 24 W. R. 16.

*Pages of (1875) 10 Q. B.—[*Ed.*]

are part of the company's premises, and it appears that it has been the practice of the company to let them out to coal-owners and stone merchants to store their coals and their stone on particular spots there. It does not appear from the case that there is the slightest ground for saying that these spots are irrevocably appropriated to the particular persons; on the contrary, it appears when one spot is not occupied by a particular person, and his coals or goods are not there, that the company's servants move the boundaries and allow another to occupy the spot. Therefore there is no pretence for saying that there is any more than an easement, and on that part of the case the plaintiffs fail."

The word "easement" is, of course, here used not in its strict sense but in the sense of a license. There was an appeal from that decision, in which the two other Judges concurred; and this is reported in the same Volume at page 444.* This appeal was heard by a Bench of six Judges, who were equally divided in regard to the question of the stables, which I need not go into here, but who were unanimously of opinion, on hearing the appellants' Counsel only, that so far as related to the lines of railway, the plaintiffs were liable to be rated (page 445*). Therefore, the argument in Blackburn, J.'s judgment was unanimously approved.

Following that view, I hold that, so far as the open spaces are concerned, in the absence of any documentary or reliable evidence to the contrary, it must in the circumstances be taken that the defendant had a license simply to keep his carriage and car on such open spaces; and, therefore, the relationship is not one of landlord and tenant.

I may here refer to Mr. Wadia's contention that the nature of the case was such that exclusive possession could not be given. I do not think that is true. It would be possible for the plaintiffs, if they were so minded, to mark out by whitewash or otherwise, particular strips or spaces and to number them and definitely assign them to each particular car or carriage.

I next take the other extreme, *viz.*, the case of a car being kept in the same single cubicle, of which the chauffeur had the key. Here, at first sight it certainly does seem that there is clear ground for saying that the defendant has a right to exclusive possession. The giving of a key is generally the symbol of this. I was at first inclined to take that view, but further consideration has altered my opinion. There is this important point to be borne in mind that the mere fact that the defendant has had the exclusive use of this particular cubicle for two years and that it was the intention of the parties that no one else should use that cubicle so long as the defendant kept his car on the premises, is not in law sufficient to show that the agreement was a demise or a lease and not a license. As authority for this, I think perhaps the most relevant case is that of *Watkins* v. *Overseers of Milton Next Gravesend* (2). This is another rating case. The conservators of the Thames were owners of the soil and bed of the river, and of moorings fixed to the soil of the river. *W.* used the moorings to moor his hulk, as a floating coal depot, under a document in writing. It was held that the document was not a demise but only granted to *W.* a license to use the moorings, and that he was, therefore, not the occupier, and not liable to be rated. I need not go into the terms of the particular document in that case. What I wish to refer to is the portion of the judgment of Blackburn, J., at pages 356 and 357.* After giving his opinion that *prima facie* the agreement would not be a demise, but merely a license, he goes on as follows:—

"Against that contention it is said the appellant has the sole and exclusive possession of the moorings. It seems, during five years, the appellant has been the sole person who has used them, and I think if any rival hulk were moored there it would have been contrary to what the parties intended, but it does not from this follow that the appellant is liable to be rated as the sole occupier. There may be a grant of many easements which are conveyed solely to one person, and yet do not confer any occupation, such as a way leave to carry coals from a colliery to the seashore; an important right confined to that colliery alone; that does not make the person who has the sole use of a private way over the land rateable; or in the more familiar case of a lodger, who has the sole right to the use of certain rooms in a house, he is not made by that means rateable if the agreement is that the tenant

*Pages of (1875) 10. Q. B.—[*Ed.*]

(2) (1868) 3 Q. B. 350; 37 L. J. M. C. 73; 18 L. T. 601; 17 W. R. 1059.

*Pages of (1868) 3 Q. B.—[*Ed.*]

of the house shall retain the possession, as in the general case of a lodging he does, for the purpose of looking after the management of it; the lodger is merely the inmate."

And the case of the lodger there referred to is certainly a very striking one. The lodger has, we will say, a separate room to himself. He has the key of that room, and yet in the case where the lodging house keeper retains the general control of the house, he is not a tenant but is merely a licensee. And that particular aspect of the law is recognised also in the definition of 'premises" in the Bombay Rent Act. For it concludes by saying that the expression does not include a room in an hotel or boarding house. The law in regard to the case of a lodger is summarised in Halsbury's Laws of England, Vol. XVIII, page 339, Art 772:—

"A lodger who has no separate apartment, is only a licensee, and, even though he has a separate apartment, he has not in law an exclusive occupation, and is, therefore, in tbe position of a licensee, if the landlord retains the general control and dominion of the house, including the part occupied by the lodger." The Rent Act of 1918 is an encroachment upon the ordinary property—owner's right to freedom of contract, and, therefore, it is an enactment which must be strictly construed, I, therefore, think that if, as is plainly shown, the definition of "premises" excludes the cases of lodger, to which I have referred it must also be taken to exclude the analogous case of asingle cubicle reserved not for the occupation of a human being but for the occupation of a chattel, *viz.*, a motor-car, at any rate, in the absence of some document or reliable oral evidence, showing that the agreement between the parties was otherwise, and provided of course that the owner of the premises does exercise a general right of control such as I have referred to. In this particular case there is no document or other evidence, which would rebut the presumption that, I think, arises. And another thing that favours the plaintiffs' case is that it is not suggested that any body else but the plaintiff is liable to execute repairs of the premises. That is a circumstance, which is of some importance in a case of this kind, for, as was said by Blackburn, J., in the judgment that I last referred to, *prima facie* the person who repairs is the person in possession (see page 356)* So that where you get such a position, it favours the relationship of licensor and licensee, rather than that of landlord and tenant. Therefore, on the facts of this case, I think that the law favours the plaintiff's contention.

It is, no doubt, true that the form of the bill used by the plaintiffs, Ex. B, mentions the word 'rent' in regard to the charges for stalls for horses, carriages or motor-cars. But that is at most an admission which is not conclusive. It is, also, natural that the word 'rent' should be used under such circumstances, and there are many cases where the same expression has been used in the agreement between the parties and where, notwithstanding that, it has been held that the relationship between them under the document was merely that of licensor and licensee. Two such cases are: *Wilson* v. *Tavernor* (3) and *Taylor* v. *Coldwell* (4). Therefore, in my opinion, Ex. B does not affect the view I take.

Then, there are the two intermediate cases first of the defendant's horse, which is kept in a stall or loose box, and secondly, of the car, that is kept in one of the bigger cubicles. In the first of these cases, there is no basis for saying that there is exclusive possession from such symbols as a lock and key; and Dr. Vakharia deposes that, as a matter of fact, the defendant's horse was shifted from the stall it occupied to another. On the other hand, he admits that that is rarely done, and it is natural that that should be the case for the syce in charge of the horse would be likely to keep his things in the stall for grooming the horse, etc, and would, therefore, generally go to the same stall. In the second case, the key of the cubicle did not remain with the defendant's chauffeur but with the supervisor, and the spaces the car occupies vary. It is obvious that if the plaintiffs succeed as to the single cubicle, these two cases must fall with that. Therefore, I think that in all the cases that arise, the plaintiffs' contention is correct.

I may perhaps add that I certainly sympathise with the defendant, and should have been glad if I could have come to a contrary decision for I believe that there has been considerable profiteering with regard to motor garages in Bombay. But I have

(3) (1901) 1 Ch. 568; 70 L. J. Ch. 263; 84 L. T. 48.
(4) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 8 L. T. 356; 11 W. R. 726; 122 E. R. 309; 129 R. R. 573.

*(1868) 3 Q. B.—[*Ed.*].

come to the conclusion that the law is with the plaintiffs.

There must, therefore, be a decree for the plaintiffs in terms of prayers (*a*) and (*b*) of the plaint.

In regard to prayer (*c*). I am not disposed to declare that the plaintiffs were entitled to demand from the defendant "such consideration as they think fit per month in respect of the premises in the occupation of the defendant." That is, in my opinion, far too wide. But there will be a declaration that the plaintiffs are entitled to demand from the defendant at the monthly rates of Rs. 18, Rs. 25 and Rs. 30 mentioned in the plaint and to continue to demand such payments till such time as the license is legally revoked or surrendered, or other terms as agreed upon by the parties.

The defendant must also pay the plaintiffs the sum of Rs. 137-2-0 plus the difference between the rates actually paid and the rates I have referred to in prayer (*c*) from February 1, 1921, till March 31, 1922.

Interest on judgment at six per cent. per annum.

The plaintiffs do not pray for costs, so I pass no order as to costs.

Z. K. *Suit decreed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 683 OF 1920.

May 6, 1925.

Present:—Mr. Justice Broadway and Mr. Justice Fforde.

Nawab AHMAD YAR KHAN—DEFENDANT—APPELLANT

versus

S. K. BOSE—PLAINTIFF AND GODAR RAM—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 54—Attachment of immoveable property—Procedure—Land paying revenue to Government, what is—Notice not affixed in office of Collector, effect of.

When the law lays down a definite procedure for the doing of an act which is purely symbolical that procedure must be strictly followed and any omission therein must be regarded as material. [p. 322, col, 2.]

Khub Ram v. *Surat*, 39 Ind. Cas. 753; 20 P. R. 1917; 26 P. L. R. 1917, ; 22 P. W. R. 1917, followed.

Under r. 54 of O. XXI, of the C. P. C., it is necessary when immoveable property is attached that an order should be made prohibiting the judgment-debtor from transferring or charging the property in any way and other persons from taking any benefit from such transfer or charge. This order should be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and a copy of the order may be affixed on a conspicuous part of the property and then on a conspicuous part of the Court-house and also, where the property is land paying revenue to the Government, in the office of the Collector of the District in which the land is situate. Failure to comply with any of the provisions of the rule would render the attachment illegal and of no effect. [p. 322, col. 1.]

Where property sought to be attached in execution of a decree is a house standing on a site which is assessed to land revenue, the property is land paying revenue to the Government within the meaning of r. 54 of O. XXI of the C. P. C., and in such a case it is necessary to have the notice contemplated by the rule fixed in the office of the Collector of the District in which the property is situate. [p. 322, col. 2.]

Per *Fforde, J.*—The meaning of the word "land" unless otherwise controlled by the context includes everything which is above or beneath the surface. [*ibid.*]

In O. XXI, r. 54 of the C. P. C., the term "land" is not declared to be used in any special or restricted sense and accordingly it must be presumed that it bears its ordinary meaning. It, therefore, comprises not only the site on which a house stands but also the building which has been erected upon that site. [*ibid.*]

First appeal from a decree of the Senior Subordinate Judge, Montgomery, dated the 13th January 1920.

Mr. *Abdul Rashid* and Maulvi *Ghulam Mohi-ud-din*, for the Appellant.

Mr. *Shamair Chand*, Lala *Jagan Nath Agarwal*, Lalas *Hargopal* and *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.

Broadway, J.—Nawab Ahmad Yar Khan obtained a decree on the 22nd March 1911 against Godar Ram and Jagan Nath for a sum of Rs. 5,209-15-6. The suit had been instituted on the 30th January 1911 and on that date an application had been filed for the attachment before judgment, of certain immoveable property, situated in Pak Pattan. Attachment was ordered and was apparently carried out under the provisions of O. XXXVIII, r. 5. The decree-holder took no steps to execute his decree or to bring the property attached before judgment to sale, until 1915 when an effort was made to bring the property to sale. One Mr. S. K. Bose filed an objection to the sale claiming that the house sought to be sold was part of certain property which had been mortgaged to him for Rs. 10,000 by Godar Ram, the mortgage having been effected on the 2nd February 1915. Mr. Bose's objection having been overruled he instituted a suit asking for a declaration that the house in

question could only be sold subject to his morgtage charge thereon. The mortgage was effected, so far as the property in suit is concerned, both on the house and the site on which the house stood. It should also be mentioned that one Rai Bahadur Jaikishen Das had taken the same property on mortgage on the 4th April 1913 and that Mr. Bose had redeemed that mortgage. The plaintiff's suit having been decreed Nawab Ahmad Yar Khan has come up to this Court in appeal.

It is admitted that, if the attachment was a valid and subsisting one at the date of the mortgage in Mr. Bose's favour, Mr. Bose is out of Court, having regard to the provisions of s. 64 of the C. P. C. The question, therefore, for decision is whether there was a valid and subsisting attachment on the date of the mortgage. Various points have been urged but it is not necessary to discuss all of them inasmuch as the first question, namely, whether this property, which was attached, had been legally attached in accordance with the provisions of O. XXI, r. 54, practically concludes the matter. Under r. 54 it is necessary when immoveable property is attached that an order should be made prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge. This order should be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order should be affixed on a conspicuous part of the property and then on a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the District in which the land is situate. It is in evidence that the order required by this rule was passed, that it was promulgated, that a proclamation was made by beat of drum, and that a copy of the order was affixed on a conspicuous part of the Court-house at Multan. A copy of this order was not affixed in the office of the Collector of the District, *i. e.*, Montgomery.

It has been urged that, having regard to the provisions of ss. 4 and 141 of the Land Revenue Act it was necessary for the notice to be affixed in the Collector's office. On the other hand, for the appellant it has been urged that the property is not "land" within the meaning of the Land Revenue Act and, therefore, it was not necessary to have the notice put up in the Collector's office. Rule 54 is of general application and specifically states that where property is land paying revenue to the Government notice should be affixed in the Collector's office. It is also in evidence that in the presemt case the site on which the house stands is assessed to land revenue. Therefore, the property sought to be sold is clearly land paying revenue to the Government and, therefore, in my judgment, it was essential to have this notice affixed in the office of the Collector of Montgomery. The attachment, therefore, must be regarded as illegal and s. 64 of the C. P. C., does not affect the mortgage in Mr. Bose's favour.

As pointed out in *Khub Ram v. Surat* (1), when the law lays down a definite procedure for the doing of an act which is purely symbolical that procedure must be strictly followed and any omission therein must, therefore, be regarded as material. The omission to affix the notice in the Collector's office was, therefore, material, and I would dismiss this appeal with costs.

Fforde, J.—I agree. The short point for determination in this case is whether the immoveable property which has been alleged to have been attached comes within the expression "land paying revenue to Government." The meaning of the word "land" unless otherwise controlled by the context includes everything which is above or beneath the surface. Under O. XXI, r. 54 the term "land" is not declared to be used in any special or restricted sense and accordingly we must presume that it bears its ordinary meaning. Accordingly it comprises not only the site which has been mortgaged but the building which has been erected upon that site. It admittedly pays revenue to Government. Therefore, as the order of attachment has not been affixed in the office of the Collector of the District in which the land is situate, namely, in the office of the Collector at Montgomery, the provisions of O. XXI, r. 54, have not been strictly complied with and the attachment is accordingly invalid.

I agree that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 39 Ind. Cas. 753; 20 P. R 1917; 26 P. L. R. 1917; 22 P. W. R. 1917.

PATNA HIGH COURT.

CIVIL REVISION No. 264 OF 1924.

November 14, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

RADHAKISHUN CHAMARIA—PETITIONER

versus

ZALIM SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 4—Mortgage suit—Decree, form of—Interest pendente lite and future interest, direction to pay—Construction of judgment—Future interest, meaning of.

Under rr. 2 and 4 of O. XXXIV of the C. P. C., where in a suit for sale the plaintiff succeeds the Court must pass a decree either ordering an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs, if any, awarded to him upto the expiry of the days of grace, or must pass a decree declaring the amount so due and the decree must further direct that in default of payment within the period of grace the mortgaged property be sold and the proceeds, after defraying expenses of the sale, applied in payment of what is declared due to the plaintiff together with subsequent costs. Under these rules the Court has power to direct not only payment of the principal and interest on the mortgage upto the expiry of the days of grace but also payment of subsequent interest, that is to say, interest up to the date when the property is sold and the claim realized. [p. 325, cols. 1 & 2.]

In a mortgage suit the plaintiff is entitled to interest at the bond rate from the date of the suit till the date fixed for payment unless the Court for any special reason thinks fit to reduce the interest during this period. On default the decree-holder is entitled to the Court rate of interest from the date fixed for payment till the date of actual realization. [p. 326, col. 1.]

In a mortgage suit the plaintiff claimed that an account be prepared of the principal amount and interest due under the mortgage-bond and that a mortgage decree be passed for a certain sum besides costs and future interest till the day of realization at the rate of interest entered in the bond. The suit was decreed and the judgment concluded as follows:—"Hence it is ordered that the suit be decreed with costs. Defendants to pay up the decretal amount within six months. In default the mortgaged property will be sold subject to the encumbrance mentioned above. As the interest has swelled to an abnormal amount I do not allow future interest on the bond rate. Interest at 6 per cent. per annum from this date till the date of payment:

Held, (1) that the expression "future interest" in the judgment meant interest from the date of the decree and that the words "date of payment" meant the date of actual realization so that the effect of the judgment was that interest at the rate of 6 per cent. per annum had been awarded from the date of the decree till the date of actual realization; [p.326, cols. 1 & 2.]

(2) that an order for the payment of interest between the date of the suit and date of the decree was implied in the opening words of the concluding portion of the judgment which meant that the suit as laid in the plaint was decreed with costs subject to the reduction of the rate of interest as specified in the judgment. [p. 326, col. 2.]

Appeal against an order of the Subordinate Judge, Patna, dated the 2nd May 1924.

Messrs. *H. Imam, M. Prasad* and *D. C. Varma*, for the Petitioner.

Mr. *N. C. Sinha*, for the Opposite Party.

JUDGMENT.

Miller, C. J.—This is an application in revision asking to set aside an order of the Subordinate Judge of Patna, dated the 2nd May 1924. The petitioner is the decree-holder in a mortgage suit. The opposite party, Zalim Singh, is one of five defendants in the suit who represent the original mortgagor. They did not defend the suit and judgment was pronounced against them *ex parte*. There were two other defendants who were interested in part of the mortgaged property and who appeared and claimed certain priorities with respect to that property. Having failed in their defence as to one of the properties they appealed to the High Court where they were successful. The decree with regard to that portion of the property was accordingly modified but in other respects it was affirmed. The amount found due under the preliminary decree not having been paid within the period of grace allowed, the final decree was passed on 14th September 1921 and the mortgaged property was ordered to be sold. When the petitioner proceeded to obtain execution of his decree the opposite party applied to the Subordinate Judge for amendment of both the preliminary and final decrees partly on the ground of clerical or arithmetical mistakes in the decrees and partly on the ground that the decrees did not carry out the directions in the judgment. Three points were taken before the Subordinate Judge, (1) that owing to a miscalculation in the schedule to the plaint an excessive amount of interest had been claimed and that this mistake had been reproduced in the decree with the result that the total balance claimed as due for principal and interest at the date of the suit was more than the plaintiff was entitled to, (2) that interest *pendente lite* had been awarded by the decree whereas there was no order to that effect in the judgment, and (3) that interest at 6 per cent. upon the amount found due had been awarded by the decree from the expiry of the days of grace until realization whereas on the true construction of

the judgment no such interest had been allowed.

With regard to the first point it is admitted by Mr. Hasan Imam on behalf of the petitioner that an arithmetical mistake has crept into the preliminary decree but has pointed out that although in the item in question one year's interest has been calculated in excess of that due, in the next item one year's interest too little has been calculated and that there are other slight mistakes elsewhere. In these circumstances the parties have agreed that the decree shall be amended by making a proper calculation which has been done. In the result it is agreed that the balance due to the plaintiff for principal and interest at the date of the institution of the suit is Rs. 12,663-8-5 instead of Rs. 14,451 as stated in the plaint and in the decree. The costs will also be reduced proportionately.

With regard to the second and third points it becomes necessary to consider what directions were given in the judgment and whether the decrees as drawn up properly represent the effect of the judgment pronounced. First it is necessary to bear in mind that the plaintiff in his plaint claimed that an account be prepared of the principal amount and interest due under the mortgage bond and that a mortgage-decree be passed for Rs. 14,451, besides costs and future interest till the day of realization at the rate of interest entered in the bond. The material part of the judgment in which the plaintiff's suit was decreed is as follows:—

"Hence it is ordered that the suit be decreed with costs. There will be an *ex parte* decree against the absent defendants. Defendants to pay up the decretal amount within six months. In default the mortgaged property will be sold subject to the incumbrance mentioned above. As the interest has swelled to an abnormal amount I do not allow future interest at the bond rate. Interest at 6 per cent. per annum from this date till the date of payment." The preliminary decree as drawn up in pursuance of that judgment was, in so far as it is material, as follows:—

"It is ordered and decreed that the suit be decreed with costs and that *ex parte* decree be passed as against the absent defendants, that the absent defendants should pay the decretal amount within six months and that in case of non-payment the mortgaged properties entered in Sch. 2 be sold at auction and as the interest has accumulated to a very great amount so future interest has not been awarded at the rate entered in the bond. Future interest may be calculated from this day to the date of realization at the rate of 6 per cent. per annum, and as per bond Rs. 3,467 may be awarded to the plaintiff as *pendente lite* interest and that the sum of Rs. 1,247-2-6 be paid by the defendants to the plaintiff on account of the costs of this suit with interest thereon at the rate of 6 per cent. per annum from the date to the date of realization." The *pendente lite* interest mentioned in the decree is interest at the bond rate from the institution of the suit to the date of the decree. The final decree passed in September 1921, after reciting that the decretal amount has not been paid within the period of grace and ordering the mortgaged properties to be sold and the money brought into Court, further orders "that the plaintiff do get Rs. 19,165-2-6 payable under the said preliminary decree with Rs. 25-7-3 as costs in this case as detailed below and also interest upto the date of realization at the rate of 6 per cent. mentioned in the aforesaid decree and the costs including costs of this application be given to the plaintiff." It was contended that interest at the bond rate between the date of the institution of the suit and the date of the decree ought not to have been allowed in the decree as there was no specific direction in the judgment that any interest for that period should be awarded. It was further contended that although the judgment allowed interest at 6 per cent. per annum from the date thereof until the date of payment this must be taken to mean interest only upto the date ordered for payment, that is up to the expiry of days of grace, and that the preliminary decree and the final decree were both inaccurate in allowing interest at 6 per cent. from the date ordered for payment upto the date of actual realization. The learned Subordinate Judge considered that his predecessor by whom the judgment had been delivered had not allowed any interest *pendente lite* and that this ought not to have been awarded in the decree. He also considered that the learned Judge in using the words "date of payment" meant not date of realization but the date fixed for payment that is

when the days of grace expired, and ordered the decrees to be amended accordingly. He relied upon the case of *Tikait Krishna Prasad* v. *Surendra Mohan Kundu* (1), for the proposition "that such words as "date of payment" or "date of realization" used in a preliminary decree in a mortgage suit as the termination of the period for which interest is awarded must mean the date ordered for payment. The learned Judge does not appear, however, to have considered how this restricted meaning came to be applied to such expressions in a preliminary decree in a mortgage suit nor does he appear to have considered the effect of the provisions of O. XXXIV of the C. P. C., which superseded the provisions of ss. 86 to 90 of the Transfer of Property Act and which laid down rules to be followed by the Court in drawing up mortgage decrees. According to the law in force when these sections of the Transfer of Property Act were applicable it was provided with regard to mortgage suits that in a suit for sale if the plaintiff succeeds the Court shall pass a decree to the effect mentioned in the first and second paragraphs of s. 86 and also ordering that in default of the defendant paying as therein mentioned the mortgaged property or a sufficient part thereof should be sold and applied in payment of the amount found due. Now s. 86 shows the nature of the decree which the Court shall pass if the plaintiff succeeds and provides that such decree shall order that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit, if any, awarded to him on the day fixed for payment or declaring the amount so due at the date of such decree and nothing is said about any future interest after the period of grace has expired. The Court may have had discretion in awarding interest after the expiry of the days of grace but it is clear from the section that unless a special order was made to that effect in the judgment such interest could not be awarded by the decree. Order XXXIV of the C. P. C., rr. 2 and 4 show nature of the preliminary decree which must now be passed. Under those rules where in a suit for sale the plaintiff succeeds the Court shall pass a decree either ordering an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs, if any, awarded to him upto the expiry of the days of grace or must pass a decree declaring the amount so due and further the decree must direct that in default of payment within the period of grace the mortgaged property be sold and the proceeds after defraying expenses of the sale applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent costs. The reason why the Courts held under the old law that directions in the preliminary decree awarding interest upto the date of realization or the date of payment must be taken to mean upto the day fixed for payment was because the sections of the Transfer of Property Act directed that the decree should award interest only upto that date. Under the present law, however, O. XXXIV, rr. 2 and 4 provide that the decree shall direct not only payment of the principal and interest on the mortgage upto the expiry of the days of grace but also payment of subsequent interest, that is to say interest upto the date when the property is sold and the claim realized. In the present case the judgment ordered that the suit be decreed with costs and had it ended there that would, in my opinion, have been sufficient to enable a decree to be drawn up awarding the plaintiff the amount found due for principal and interest at the bond rate upto the expiry of the days of grace. With regard to future interest after that date the matter lies in the discretion of the Court although it is usual to allow interest until actual realization at 6 per cent. but in the absence of any express direction such interest would not be entered in the decree. In the present instance the learned Judge, exercising his discretion refused by his judgment to allow interest at the bond rate between the date of his decree and the expiry of the days of grace and ordered interest only at 6 per cent. per annum from the date of his decree till the date of payment. He was clearly entitled under the rules to order interest at 6 per cent. from the expiry of the days of grace until actual payment and in using the expression "day of payment" I have no doubt that he meant what he said and intended that interest should run at 6 per cent. until the date of actual payment and not merely, as would be presumed

(1) 58 Ind. Cas. 223; 5 P. L. J. 598; 2 P. L. T. 78.

under the old law, upto the day fixed for payment. With regard to the interest which has been referred to as interest *pendente lite* that is between the date of institution of the suit and the date of the decree, the plaintiff having succeeded in the the suit was entitled to interest at the bond rate and, in my opinion, the decree in such circumstances was properly drawn up allowing such interest even without any special order to that effect in the judgment. It may even be doubted whether under the rules as they now stand the learned Judge was entitled to reduce the rate of interest between the date of the decree and the expiry of the days of grace from the rate stipulated in the bond to six per cent. as he did, but as no question was raised about this on behalf of the plaintiff either by appeal or otherwise the matter is not one with which we are concerned. In my opinion except as to the first point which has now been agreed between the parties the learned Judge was wrong in amending the decree.

The question was raised whether we were entitled under our powers of rivision or otherwise to interfere with the order of the learned Subordinate Judge. The learned Judge in acting as he did purported to act under ss. 151 to 153 of the C. P. C. If he was entitled under those sections to set the matter wrong it seems to me that we are equally entitled under the same sections to set it right. The order of the learned Judge will be set aside and the decrees as originally drawn will be restored subject to the correction of the mistakes in calculation of the amount due at the date of the institution of the suit. The petitioner is entitled to his costs here and before the Subordinate Judge.

Mullick, J.—I agree. It is now settled that in a mortgage suit the plaintiff is entitled to interest at the bond rate from the date of the suit till the date fixed for payment unless the Court for any special reason thinks fit to reduce the interest during this period. It is also settled that on defualt the decree-holder is entitled to the Court rate of interest from the date fixed for payment till the date of actual realization. In the present case we are bound, if possible, to construe the judgment of the 20th April 1916 on the assumption that the Court intended to comply with the law, and, therefore, I think it would be right to hold that the expression "future interest" in the udgment mean interest from the date of the decree and that the words "date of payment" mean the date of actual realization.

With regard to interest between the date of the suit and the date of the judgment, it is true that there is no express order; but I think the order is implied in the opening words of the judgment which are "hence it is ordered that the suit be decreed with costs." This means that the suit as laid in the plaint is decreed with costs. If the judgment had ended there, the plaintiff would have been entitled to charge interest and compound interest till the date of actual realization; but the judgment proceeds to restrict the claim in regard to interest by the subsequent directions which have been noticed above. Whether the Court was right in reducing the interest from the date of the judgment till the date fixed for payment is a point which has not been argued before us. All that we are called upon to decide is whether the Court intended to give interest *pendente lite* at the bond rate, and I think the answer is in the affirmative. The final decree, therefore, allowing interest at the bond rate up to the date of the judgment and at 6 per cent. from the date of the judgment till the date fixed for payment is in full conformity with the judgment. Similarly with regard to interest at 6 per cent. from the date fixed for payment till the date of actual realization there is no variance between the judgment and the decree.

Z. K. *Petition allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 472 OF 1925.

June 11, 1925.

Present:—Mr. Justice Zafar Ali.

SHAH MUHAMMAD—DECREE-HOLDER—APPELLANT

versus

MUHAMMAD ROSHAN KHAN—JUDGMENT-DEBTOR—RESPONDENT.

Appeal—Execution of decree—Forum of appeal, determination of—Limitation Act (IX of 1908), s. 5—Appeal, delay in filing—Review, period spent in applying for, whether can be excluded—Extension of time.

The course of appeal in execution proceedings is determined by the value of the suit and not by the value of the subject-matter of any dispute that may

arise for settlement in the course of execution proceedings.

Sarat Chander Bose v. *Saraswati Debi*, 34 C. 216; 5 C. L. J. 380, *Umrao Bakhsh* v. *Nur Muhammad Khan*, 72 Ind. Cas. 732; (1923) A. I. R. (L.) 612; 89 P. W. R. 1923, relied on.

The time spent in prosecuting a well-founded application for review should be excluded in computing the period of limitation provided for an appeal against the order of which review was sought.

Brij Indar Singh v. *Kanshi Ram*, 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.), followed.

Second appeal from an order of the Senior Subordinate Judge, First Class, Ambala, dated the 2nd October 1924, reversing that of the Subordinate Judge, Third Class, Ambala, dated the 5th May 1924.

Mr. *Shamair Chand*, for the Appellant.

Chaudhri *Ghulam Muhammad*, for the Respondent.

JUDGMENT.—The two questions involved in this second appeal are: (1) whether the lower Appellate Court had jurisdiction to hear the appeal, and if not (2) whether the time spent in the prosecution of the application for review of judgment of that Court should be excluded in computing the period of limitation for preferring this second appeal to this Court?

The appeal to the lower Appellate Court was against an order made in the execution proceedings of a decree that had been passed in a Small Cause suit exceeding Rs. 500 in value, but the order related to a dispute with regard to a sum of Rs. 190 only. The person aggrieved by that order was one of the two judgment-debtors and he lodged the appeal in the Court of the Senior Subordinate Judge. The decree-holder objected as stated in the application subsequently filed for review of judgment that the appeal lay to the District Judge as the value of the suit exceeded Rs. 500. The Senior Subordinate Judge, however, heard and accepted the appeal and reversed the order of the Executing Court. The decree-holder then applied for review of judgment on the ground that the Senior Subordinate Judge had no jurisdiction. That officer dismissed this application holding that the appeal lay to him as the amount in dispute was Rs. 190 only though the value of the suit exceeded Rs. 500. This view of the Senior Subordinate Judge was erroneous because the course of appeal is determined by the value of the suit and not by the value of the subject-matter of a dispute that may arise for settlement in the course of the execution of the decree. One of the rulings that may be cited on this point is *Sarat Chander Bose* v. *Saraswati Debi* (1) which was followed in *Umrao Bakhsh* v. *Nur Muhammad Khan* (2). The application for review was, therefore, well-founded and the time spent in prosecuting the same should be excluded in computing the period of limitation as held by their Lordships of the Privy Council in *Brij Indar Singh* v. *Kanshi Ram* (3). I, therefore, find on both the questions in favour of the decree-holder-appellant and accepting his appeal set aside the order of the Senior Subordinate Judge and direct him to return the memorandum of appeal for presentation to the proper Court. The respondent will pay the decree-holder's costs in this Court as well as in the Court of the Senior Subordinate Judge.

Z. K. *Appeal accepted.*

(1) 34 C. 216; 5 C. L. J. 380.

(2) 72 Ind. Cas. 732; (1923) A. I. R. (L.) 612; 28 P. W. R. 1923.

(3) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 22, 1925.

Present:—Lord Sumner, Lord Blanesburgh Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

SURA LAKSHMIAH CHETTY AND OTHERS—APPELLANTS

versus

KOTHANDARAMA PILLAI—RESPONDENT.

Benami *transaction—Purchase by husband in name of wife—Presumption—Marriage settlement, oral, whether can be proved—Duty of Court.*

A purchase in India by a native of India of property in India in the name of his wife unexplained by other proof or admitted facts must be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. [p. 328, col. 2.]

It cannot be laid down as a proposition of law that an oral ante-nuptial agreement may not be proved in an Indian case, but it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreemant which

would in fact be a marriage settlement unless there was contemporaneous written evidence to corroborate the oral evidence. [p. 330, col. 2.]

Appeal from a judgment and decree of the Madras High Court, dated the 15th August 1922.

Messrs. *L. De Gruyther, K. C.*, and *E. Raikes*, for the Appellants.

Mr. *K. V. L. Narasimham*, for the Respondent.

JUDGMENT.

Sir John Edge.—This is an appeal from a decree, dated the 15th August, 1922, of the High Court of Madras, which reversed a decree, dated the 31st August, 1921, of the same Court made in its Ordinary Original Civil Jurisdiction, which had dismissed the suit.

The suit in which this appeal has arisen was brought in the High Court of Madras on the 19th November, 1918, by the plaintiff, a minor, by his next friend, against the Official Assignee of Madras and three money-lenders. One of the money-lenders died, and his legal representative was brought on the record as a defendant. The plaintiff is the respondent in this appeal.

The plaintiff is the son of V. S. Chockalingam Pillai, a Hindu of the Villala caste, by his wife, Lakshmi Ammal, who died before the suit was brought. The plaintiff is the sole heir of his late mother, and he claims the property to which the suit relates as her heir. On the 30th September 1918, the plaintiff's father, Chockalingam, was adjudged insolvent by the High Court of Madras under the Presidency Towns Insolvency Act III of 1909. The plaintiff claims in his suit, with other reliefs, a declaration that a piece of land with a dwelling-house and buildings thereon, being Nos. 4 and 5, Nainiappa Naick Street, are his exclusive property as the heir of his mother, and that his father, Chockalingam, had no beneficial or other interest in those properties, which could have vested in the Official Assignee or have been asigned by him in mortgage. Nos. 4 and 5, Nainiappa Naick Street will, in this judgment, be referred to as the property in question.

The land and buildings then thereon were purchased by Chockalingam on the 12th May, 1909, and by the sale-deed were conveyed by the vendors to Lakshmi, who had been married to Chockalingam some years previously. The question upon the answer to which this suit depends is whether Chockalingam had purchased that property in 1909 for his wife Lakshmi in performance of an antenuptial agreement alleged to have been made by him to settle a house upon her, or whether the purchase was made in her name as *benamidar* for Chockalingam. There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the Law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. See *Gopeckrist Gosain* v. *Gungapersaud Gosain* (1), *Moulvie Sayyud Uzhur Ali* v. *Bebee Ultaf Fatima* (2) and *Bilas Kunwar* v. *Desraj Ranjit Singh* (3). If the plaintiff failed to prove that antenuptial agreement and that it was in performance of it that the property in question was purchased by Chockalingam in Lakshmi's name, his suit fails.

Chockalingam has not been called by either side to give evidence in the suit, and his absence from the witness-box has not been satisfactorily explained.

The facts, so far as they can be ascertained by their Lordships from the record, are as follows:—Chockalingam and Vinayatheertha Pillai, who died in 1898 or in 1899, were trading as pea merchants in partnership at 6, Mint Street, in Madras. When that partnership commenced their Lordships do not know. It does not appear what the interest of the partners respectively was in the house, 6, Mint Street, or in the partnership. But 6, Mint Street was the property of the partnership. Vinayatheertha left surviving him two young children, a son Vadivelu, who was living when the witnesses were giving their evidence in the suit, and a daughter Lakshmi and his mother Kathayee, who gave evidence in this suit. After Vinayatheertha died his mother Kathayee carried on the family business in partnership with Chocka-

(1) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 19 E. R. 20.

(2) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538.

(3) 30 Ind. Cas 299; 42 I. A. 202; 19 C. W. N. 1207; 29 M. L. J 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. J. J. 991; 17 Bom. L R. 1006; 37 A. 557; 22 C. L. J. 516 (1915) M. W. N. 757 (P. C.).

lingam at 6, Mint Street, and Kathayee and the two young children of Vinayatheertha continued to live in that house together with Chockalingam. Chockalingam married Lakshmi, according to the plaint in or about 1907, or, according to the evidence of witnesses who were relations of Lakhshmi, in 1909. At the time of the marriage Chockalingam had two wives living, one of whom was living with him, and he also had a son living. According to the evidence of Kathayee and two relations of Lakshmi, if it may be credited, when Chockalingam asked for Lakshmi in marriage, Kathayee, acting on the advice of relations, said to him that she would give him Lakshmi in marriage if he would make a provision for her, but not otherwise, and asked him what provision he would make for Lakshmi, and he said that, it the Mint Street house were sold, another house might be purchased and be given to Lakshmi. Thereupon she, Kathayee, gave Lakshmi to Chockalingam in marriage. That was the antenuptial agreement which is alleged by the plaintiff to have been made. A Railway Company was negotiating for the purchase of the Mint Street house, and purchased it for the price of Rs. 10,315-8-0 from Chockalingam and Kathayee and paid the price to them. It is to be presumed that the money then paid by the Railway Company to Kathayee was, or part of it was, received by her for and on behalf of her grandson Vadivelu, who does not appear to have had any other person to look after his interests.

In 1904 Chockalingam had purchased, apparently with his own money, houses Nos. 12 and 13, Memorial Hall Street, in Madras, and he, in 1909, mortgaged those houses for Rs. 9,000, and their Lordships consider it probable that Chocklingam, on the 12th May, 1909, had other property apart from his interest in the pea dealing partnership and in the Mint Street house, and there is no reason shown why all the purchase-money of the property in question was not Chockalingam's own money. Certainly none of it is shown to have been Lakshmi's.

Mr. Justice Phillips, who tried the suit, did not believe the evidence that there had been an antenuptial agreement, and he found that the purchase of the property in question on the 12th May, 1909, in the name of Lakshmi was a *benami* transaction and that she was merely *benamidar* for her husband Chockalingam. Mr. Justice Phillips in his judgment made a statement with which their Lordships agree. He said :—

"We do not know what really happened to Vinayatheertha's property when he died or what share he had in the business or whether really he did leave any property which was undisposed of at the date of Lakshmi's marriage. There is no evidence about these facts on either side though the plaintiff's family ought to know all that can be known about this."

It will de remembered that Vinayatheertha had died in 1898 or in 1899, and the property in question was purchased in May, 1909. Mr. Justice Phillips rightly found as to the money which was invested in the purchase of the property in question that if the purchase-money did not belong to Chockalingam it did not belong to Lakshmi but belonged to her brother Vadivelu. Mr. Justice Phillips by his decree dismissed the suit From that decree the plaintiff appealed under the Letters Patent.

The appeal under the Letters Patent was heard by Sir W. S. Schwabe, C. J., and Mr. Justice Wallace. The Chief Justice stated in his judgment :—that "the question to be decided is whether a purchase of property by one Chockalinga, an insolvent, in the name of hi s wife, Lakshmi, was a settlement on her marriage or was a *benami* transaction, she being *benamidar* for him. The evidence called was all one way, namely, that the property was purchased out of funds belonging 6/11 (six-elevenths) to Chockalinga and 5/11 (five-elevenths) to Lakshmi's infant brother Vadivelu, as the heir to his father, formerly a partner of Chockalinga."

If there was such evidence as to the respective shares of Chockalingam and Vadivelu, the attention of their Lordships has not been drawn to it, and if there had been such evidence it would not show that Lakshmi had acquired a beneficial title to the property. Vadivelu was a minor on the 12th May, 1909, and could not make a present of his property to his sister, Lakshmi. Mr. Justice Wallace agreed with the judgment of the Chief Justice.

They accepted the evidence that the alleged antenuptial agreement had been made and gave the plaintiff the decree which he claimed. From their decree this appeal has been brought.

It would, no doubt, have been prudent on the part of Kathayee and Lakshmi's relations to have insisted before Lakhmi was given in marriage to Chockalingam, who was an old man with two wives and a son living, that he should agree to settle some property on her. It is obvious to their Lordships that Lakshmi had no property of her own. She was not the heir to any property and could have had no expectations of succeeding to any property. Possibly, Chockalingam may have been asked to promise to make a settlement on Lakshmi, but the question is: Did he agree to do so? It appears to their Lordships that most probably the story of this alleged agreement to make a settlement was first thought of after Chockalingam's insolvency in order to save for the plaintiff some part of the property of the insolvent. The property in question was purchased in May 1909, and Lakshmi lived until 1912 and if Chockalingam had agreed to settle the property in question there was plenty of time in which he could have executed a proper deed of settlement upon her.

In their Lordships' opinion it would be unwise to accept as proved such an oral agreement as is alleged on the part of the plaintiff except on the clearest and most satisfactory evidence of credible witnesses, and after giving the most careful consideration to the evidence in this suit their Lordships agree with Mr. Justice Phillips and find that Chockalingam did not agree to make any settlement upon Lakshmi and that she had no beneficial interest in the property in question and was a mere *benamidar* for Chockalingam.

If it were necessary in this case to ascertain by evidence whether her position was that of a beneficial owner of the property in question and not that of a mere *benamidar* for Chockalingam, the transaction which will now be referred to would be material evidence. See *Ram Narain* v. *Muhammad Hadi* (4) and the cases already cited. The property in question was purchased on the 12th May 1909. On the 25th July, 1909, Chockalingam and Lakshmi jointly gave what was apparently treated as an equitable mortgage to S. Krishnaswam Ayyangar of the property which had been purchased on the 12th May 1909, in her name, which they stated was "in our possession and enjoyment." On the 30th March, 1910, Chockalingam and Lakshmi jointly granted a lease of the property in question to Sirakalai Pillai. On the 4th December, 1912, Lakshmi died. On the 18th March, 1914, Chockalingam on his representation that he "is in possession of and is entitled to" the property in question obtained in the Registration Department the Collector's certificate. On the 21st February, 1918, Chockalingam mortgaged the property in question to C. Vythialingam Pillai and in the deed of mortgage it was stated that he had purchased the property in question out of his own self-acquired earnings and was absolutely entitled to it. As to these transactions by Chockalingam after the 12th May, 1909, it is only fair to the plaintiff to bear in mind that his mother was, until she died, under the influence of her husband Chockalingam, and seems to have had no independent advice, and that the plaintiff was a minor of tender years without anyone, except his great grandmother, an aged woman, to protect the interest, if any, which he may have had. But those transactions show how Chockalingam dealt with the property in question.

Their Lordships do not decide that an antenuptial agreement may not be orally proved in an Indian case, but they consider that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an antenuptial agreement, which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence. In this case there was no such evidence.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs and the decree appealed against should be set aside with costs and the decree of Mr. Justice Phillips be restored.

Z. K *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Josselyn* and *Elwes.*

Solicitor for the Respondent:—Mr. *H. S. L. Polak.*

(4) 26 I. A. 38; 26 C. 227; 3 C. W. N. 113; 7 Sar. P. C. J. 425; 13 Ind. Dec. (N. S.) 794 (P. C.).

RANGOON HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 122 OF 1924

December 22, 1924.

Present :—Mr. Justice Carr and Mr. Justice Maung Gyi.

BOWDENS LTD.—APPELLANTS

versus

THE BRITISH PLUMBING AND SANITARY ENGINEERING CO., LTD — RESPONDENTS.

Companies Act (VII of 1913), s. 162—Private Company having two Directors—Winding up—One Director representing creditor company—Debtor company, whether can be represented by other Director—Appeal filed by other Director, whether competent.

A private Company consisted of two share-holders who were also the Directors of the Company. One of the Directors was the governing Director of another Company which was the creditor of the former Company and which filed a petition for the winding up of the former Company. The other Director of the Company filed an appeal against that order:

***Held*, (1) that the Company could be represented only by its Directors and that there being only two of them and one of them being the governing Director of the petitioning Company was incompetent to represent the debtor Company which was consequently to be represented by the other Director alone; [p. 332, col. 1.]**

(2) that it was, therefore, competent to the other Director to file an appeal against the order for winding up. [*ibid.*]

Miscellaneous appeal from an order of the Original Side of the High Court, in C. M. No. 114 of 1924.

Mr. *Keith*, for the Respondent.

ORDER.

Maung Gyi, J.—The question at present is whether on the pleadings an appeal lies. In other words, can Miss. Bowden appeal as Bowdens Limited ? In answering this question, we are confined solely to the evidence on the record. Bowdens Limited is a private Limited Company, now in liquidation, with a paid-up capital of Rs. 38,000, and consisting of two share-holders, *viz.*, Mr. G. S. Clark and Miss. Bowden and two Directors who are the same two share-holders. Miss. Bowden contributed Rs. 8,000 and Mr. Clark the balance. From the time of its coming into actual existence Bowdens Limited have not complied with the requirements of the Indian Companies Act. No share certificates have been allotted: no share register kept : no statutory meetings held : no balance sheet struck: in fact, the business was carried on as if it were that of a private partnership. Miss. Bowden was not only a Director but was the Manager of the Company which carried on a business in millinery and ladies' and children's outfits and garments. Mr. Clark, the other Director, financed the Company and kept the Company's books. Mr. Clark states that one meeting was held on the 10th April, 1924, and Miss. Bowden contends that that meeting was null and void as it was not convened according to law, or to the provisions of the Articles of Association of the Company. It is not necessary to decide this at present. The undisputed facts are :—(*i*) that the Memorandum of Association was signed only by Mr. G. S. Clark and Miss. Bowden ; (*ii*) that they are the two Directors who hold office until they resign or are removed by the Company in general meeting. Neither Director has resigned nor been removed by the Company in general meeting ; (*iii*) that no general meeting has ever been held ; (*iv*) that the meeting of the 10th April, 1924 was only a meeting of Directors under Art. 92 of the Articles of Association and not a general meeting ; (*v*) that there is no resolution in writing signed by all the Directors of any kind as required under Art. 96; (*vi*) that the Company owes money either to Mr. G. S. Clark or to the British Plumbing and Sanitary Engineering Company, Limited, of which Mr. Clark is the governing Director ; (*vii*) that there are contracts between the Company and either Mr. Clark or the British Plumbing and Sanitary Engineering Company, Limited ; (*viii*) that Mr. Clark is interested either personally or as governing Director of the British Plumbing and Sanitary Engineering Company, Limited, in the aforesaid contracts ; and (*ix*) that under Art. 85 of the Articles of Association he cannot vote. This is equivalent to s. 91-B of the Indian Companies Act which has been repealed so far as regards private Companies by Act XLII of 1920. But as its terms are included in the Articles drawn up in 1922, it is binding on the Company. On the 15th May, 1924, the British Plumbing and Sanitary Engineering Company, Limited, filed a petition on the Original Side of this Court under s. 162 (5) and (6) of the Indian Companies Act of 1913 for the winding up of Bowdens, Limited. A liquidator was appointed by the Court, and on the 4th August, 1924, order was passed for the winding up of the Company. Miss. Bowden, as Bowdens, Limited, appeals on the Appellate Side from that

order in Civil Miscellaneous No. 114 of 1924. Mr. Keith for the respondents contends that an appeal does not lie as Miss. Bowden is not the Company, that she is merely a share-holder and that she appeared as a share-holder on the Original Side. He further contends that he alone represents the Company, that he has been retained by Messrs. Clark and Saigol who own thirty thousand out of the thirty-eight thousand shares. There is no proof before us that Lieutenant Colonel Saigol owns any of the shares in the Company and his claim need not be considered now. Mr. Clark must be considered as holding thirty thousand shares, and, therefore, has a controlling majority. But as no general meeting or ordinary meeting of the Company has been held, the question of the preponderance of shares does not arise. The only meeting that was ever held was one of the Directors, and as Mr. Clark was not entitled to vote under the Articles of Association on questions where he as a Director had an interest, I hold that Miss. Bowden should be regarded as representing the Company. It would be inequitable to do otherwise. Had the respondents been independent petitioning creditors, this question may have been decided otherwise. Under Art. 99, sub-s. 8 and 18, the Directors have power to bring and defend actions and two make the Directors. As one Director here has no right to vote, the only other Director who can appear for the Company is Miss. Bowden. I hold that the appeal lies.

Carr, J.—I agree with my learned brother that Miss. Bowden is entitled to represent Bowdens Limited in this appeal. The Company can be represented only by its Directors. There are only two of these. One of them, Mr. Clark, is a governing Director of the petitioning creditor Company and represents it in these proceedings. Clearly, therefore, he is disqualified from representing also the respondent debtor Company. Miss. Bowden is thus the only Director who can act for Bowdens Limited, and I hold that she can so act alone. It is contended that in the Court below she appeared only for herself and not for the Company. The facts here are not quite clear but I think that this point is unimportant. If Miss. Bowden did not represent the Company in the lower Court it was not represented at all and the proceedings against it were *ex parte*. But that does not debar the Company now from appeal.

Z. K. *Order accordingly.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 82 OF 1924.

April 16, 1925.

Present :—Justice Sir B. K. Mullick, KT., Mr. Justice Ross and Mr. Justice Kulwant Sahay.

MOHIT NARAIN JHA—JUDGMENT-DEBTOR—APPELLANT

versus

THAKAN JHA AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11, O. XXI, r. 66—Execution of decree—Sale proclamation—Order settling particulars—Appeal, whether lies—*Res judicata—*Construction of document—Mortgage—Agreement by lessee of mortgaged property to give up possession in case property was purchased by mortgagee, effect of.*

In cases where the principle of *res judicata* is applicable it is the final order which operates as a bar, and not the reasons given for the final order. [p. 335, col. 1.]

An order of an Execution Court determining any of the particulars to be stated in the sale proclamation under O. XXI, r. 66 of the C. P. C. is not a final order and the parties are at liberty to re-open the question in a subsequent proceeding. Such an order does not operate as *res judicata* in a subsequent proceeding. [p. 334, col. 2.]

An order refusing to notify a lease in a sale proclamation is an order under O. XXI, r. 66, of the C. P. C., and is not appealable. [p. 335, col. 1.]

Certain properties comprised in a mortgage-deed were held in lease by the appellant for a term of years which gave him the option of renewal for another term of years. The lessee executed an agreement in favour of the mortgagee by which he agreed to waive his right of renewal and to relinquish possession of the property which the mortgagee might himself purchase either by private sale or at a sale in execution for payment of the mortgage-debt. The mortgagee instituted a suit to enforce the mortgage and the appellant was made a party to that suit and obtained a decree which directed that the appellant would be bound to give up possession of the property leased to him if the mortgagee himself purchased any of the properties comprised in the mortgage:

Held, (1) that the agreement executed by the appellant had the effect of enlarging the security and must be taken to have been for the benefit of the mortgagee and his heirs and representatives and was not merely a personal agreement to enure for the benefit of the mortgagee himself only; [p. 335, col. 2.]

(2) that the effect of the agreement was that if the mortgagee purchased the property the lessee would give up possession but that if an outsider or a third person purchased, then the lessee would not give up

possession; what was contemplated was the case of the mortgagee becoming the auction-purchaser in contradistinction to a third person purchasing the property. [p. 335, col. 2; p. 336, col. 1.]

(3) that consequently the covenant contained in the agreement was for the benefit of the decree-holder, whoever he might be, at the time of the execution of the decree, and not merely for the benefit of the mortgagee personally. [p. 336, col. 1.]

Appeal from an order of the Subordinate Judge, Darbhanga, dated the 5th April, 1924.

Messrs. *K. P. Jayaswal* and *L. K. Jha*, for the Appellant.

Messrs. *Murari Prasad* and *Anirudhji Barman*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by one of the judgment-debtors, Mohitnarain Jha, against an order of the Subordinate Judge of Darbhanga, dated the 5th of April 1924, rejecting his application of objection to the execution proceeding. The decree under execution was passed on the basis of a mortgage-bond executed by one Shibnath Jha on the 27th of September 1916 in favour of *Musammat* Debdhira Dai mortgaging certain properties. Three of those properties were held in lease by the present appellant under a *thica patta* dated the 7th January 1915 executed by Shibnath Jha for a term of seven years from 1322 to 1328 *F. S.* The *patta* provided that, after the expriy of the lease in 1328, the lessee was to continue in possession for another term of seven years from 1329 to 1335 on the same *jama* and conditions as the original lease; and that the lessor was to execute a fresh *patta* for the subsequent period. It appears that the mortgagee Debdhira Dai objected to advance the loan and to take the mortgage unless the lessee agreed to give up possession of the leasehold properties after 1328, in case she had to purchase any of those properties either by a private conveyance or in execution of a mortgage-decree for the satisfaction of the mortgage-debt. The lessor induced the lessee to agree to this term and accordingly on the same day on which the mortgage was executed, namely, the 27th September 1916, the lessee executed an *ekrarnama* in favour of the mortgagee *Musammat* Debdhira Dai by which he agreed to waive his *thica* right and to relinquish possession of the property which the mortgagee might purchase either by private sale or at a sale in execution for payment of the mortgage-debt. The mortgagee instituted a suit to enforce the mortgage and, in this suit, the lessee, who is the present appellant, was made a party and was the defendant No. 8.

One of the issues raised in the mortgage suit was issue No. 2 which ran thus; "is the *ekrarnama* dated the 27th of September 1916 binding on defendant No. 8 and has plaintiff any cause of action against him? The learned Subordinate Judge held that according to the terms of the *ekrarnama* of 1916, the defendant No. 8's lease would be subject to the plaintiff's mortgage if the dues of the plaintiff be not paid by the executant till 1328. He further held that the defendant was bound to give up possession of the property if the plaintiff purchased any of the mortgaged properties, and the usual mortgage-decree was made in which it was directed that the defendant No. 8 would be bound to give up possession after 1328 if the plaintiff herself purchased any of the properties. Debdhira Dai executed this decree in Execution Case No. 166 of 1922. An application was filed by the present appellant praying that a note be made in the sale proclamation that the mortgaged property shall be sold subject to his lease, and that after the decree-holder purchased the properties, the applicant shall give up possession thereof after 1328.

The learned Subordinate Judge refused this application by his order dated the 26th of August 1922. The reason given for refusing this application was that the lease had expired in 1328 and that, therefore, the lessee had no right to continue in possession, the application for making the note in the sale proclamation having been filed in the year 1329, that is after the expiry of the lease. This execution case was, however, ultimately dismissed.

The original decree-holder thereafter assigned her decree to the present respondent, Thakan Jha. The present execution which is Execution Case No. 283 of 1923 has been taken out by the assignee and the appellant filed an objection to the execution in which he objected to competence of the assignee to take out execution on the ground that he was merely a *farzidar* for Kamlnath Jha, judgment-debtor. He also prayed that in case the assignee was held entitled t proceed with the execution, a note might be made in the sale proclamation that the properties advertised for sale shall be sold subject to his prior lease which extends up to 1335. The learned

Subordinate Judge has rejected the objection of the appellant on finding that the assignee was not the *farzidar* for Kamlnath Jha and that the application for making a note in the sale proclamation was barred by *res judicata* on account of the previous order of the Subordinate Judge in the execution case of Debdhira Dai, dated the 26th of August 1922 mentioned above. He has further held that on a true interpretation of the *ekrarnama* in favour of the original decree-holder the assignee was entitled to take the benefit thereof, and that the agreement contained in the *ekrarnama* was not a personal agreement with Debdhira Dai as was contended by appellant. Against this order the appellant has come up on appeal to this Court.

The first point taken by the learned Counsel for the appellant is that the assignee was a *farzidar* for Kamlnath Jha, one of the judgment-debtors and, therefore, he was not entitled to execute the decree. The learned Subordinate Judge has discussed the evidence and has come to the conclusion that it has not been satisfactorily established that the assignee was *farzidar* for Kamlnath Jha. On a consideration of the evidence which has been placed before us, I am of opinion that the learned Subordinate Judge was right in his conclusion on this point.

The learned Counsel has referred to the evidence on behalf of the assignee and has argued that this evidence is not sufficient to show that he was a real purchaser, but it was for the appellant to prove conclusively that the assignee was a *furzidar* for the judgment-bebtor. The evidence on his behalf is not at all satisfactory to prove the *farzi* character of the assignment and this ground of the appellant must fail.

The second ground taken by the learned Counsel for the appellant is that the Subordinate Judge was wrong in holding that the present application, in so far as it asked a note to be made in the sale proclamation about the properties being subject to the appellant's lease, was barred by *res judicata*. This contention appears to be sound. The application made by the present appellant in the previous execution case was that his lease might be notified in the sale proclamation. Now this was an application in connection with the drawing up of the sale proclamation as provided by O. XXI, r. 66 of the C. P. C. The Court executing the decree is required to state certain particulars in the sale proclamation and in order to state those particulars it is sometimes necessary that the Court should hold a summary enquiry. The sale proclamation has to be drawn up under O. XXI, r. 66 of the Code after notice to the decree-holder and the judgment-debtor and both parties are entitled to apply to the Court asking it to state such particular in the sale proclamation as they think proper. When there is a difference between the decree-holder and the judgment-debtor as regards any of the particulars to be stated in the sale proclamation, the Court has to make a summary enquiry and pass orders after such enquiry. One of the particulars to be stated in the sale proclamation is as regards the encumbrance to which the property sought to be sold is liable. Another particular to be stated therein, as provided by clause (*e*), sub-r. (2) r. 66, is everything which the Court considers, material for a purchaser to know in order to judge of the nature and value of the property. Under this head the matter, which is usually enquired into by the Court, is as regards the valuation of the property and evidence is generally given under cl. (4) of the rule in order to enable the Court to state those particulars. It has been held that the order of the Court determining any of the particulars to be stated in the sale proclamation under O. XXI, r. 66 is not a final order and the parties are at liberty to re-open the same question in a subsequent proceeding such as proceedings relating to setting aside the sale under O. XXI, r. 90 of the C. C. P. The order of the Court in previous execution case of the original decree-holder dated the 26th of August, 1922, was, therefore, not a final order but an interlocutory order after a summary; enquiry and it cannot be held that such an order would operate as *res judicata* in a subsequent proceeding. Moreover the objection taken on the previous occasion was that the lease has expired in 1328 *F. S.* and was not subsistent at the time the previous execution was taken out. The objection in the present case is that the present decree-holder, who is the assignee of the decree-holder, is not entitled to the benefit of the *ekrarnama* which was a personal agreement with the original mortgagee decree-holder. No doubt there was a summary decision in the previous execution case that the lease had expired in 1328, but that was only a reason

given for disallowing the prayer of the judgment-debtor to notify the lease in the sale proclamation. It is the final order which operates as a bar in cases where the principle of *res judicata* is applicable. The reasons given for the final order cannot operate as a bar. In a subsequent proceeding between the heirs of the original lessor and the lessee it has been determined by this Court that the lease did not expire in 1328, but would expire in 1335. No doubt the present decree-holder or his predecessor was not a party to the proceeding in which that decision was come to; but I am of opinion that it is still open to the lessee, the present appellant, to raise that question in the presence of the present decree-holder. I am, therefore, of opinion that the learned Subordinate Judge was wrong in holding that the present application of the appellant was barred by *res judicata*.

It has, however, been contended by the learned Vakil for the respondent that if the order in the previous execution case be held merely to be an order under O. XXI, r. 66 of the Code and not an order under s. 47, then the present order under appeal, so far as it disallows the appellant's prayer to notify the lease in the sale proclamation, is also an order under O. XXI, r. 66 of the Code and is, therefore, not appealable. This objection of the respondent appears to be sound. The order of the learned Subordinate Judge, in so far as it refuses to notify the lease in the sale proclamation, is really an order under O. XXI, r. 66 and is, therefore, not appealable; and the present appeal, in so far as this part of the order is concerned, is incompetent.

The question, however, as regards the interpretation of the *ekrarnama* was raised in the Court below and decided by it, it has also been raised before us and has been fully argued on both sides. I think it, therefore, desirable to express my opinion as regards the interpretation thereof. It has been contended on behalf of the appellant that the agreement contained in the *ekrarnama* was an agreement entered into with the mortgagee *Musammat* Debdhira Dai personally, and her heirs or representatives are not entitled to take the benefit thereof. Reference is made to the terms of the *ekrarnama* and to the absence of any expression showing that it was the intention of the parties that their heirs or representatives of the original mortgagee could enforce the terms of the *ekrarnama*. I have read the *ekrarnama* carefully and I have considered the circumstances under which it was executed; and I am of opinion that the intention of the parties was that not only the mortgagee *Musammat* Debdhira Dai personally was to take advantage of the terms thereof, but that her heirs and assignees and legal representatives were also entitled to the benefit thereof. It is to be noted that the terms of this *ekrarnama* were settled before the mortgage was executed although the actual execution of the *ekrarnama* took place after the execution of the mortgage-bond. There is a recital in the *ekrarnama* that the lessor Babu Shibnath Jha was in need of money but the money-lender raised the objection that in the event of non-payment of the debt up till 1328 if she (the *mahajan*) be under the necessity of getting a *kobala* executed in respect of the mortgaged property or purchasing at an auction-sale any of the *mouzas* held in lease by the lessee, she would be put to loss if the lessee continued to hold possession after 1328. The *ekrarnama* was, therefore, executed at the request of Babu Shibnath Jha for the satisfaction of the *mahajan*, the money-lender. It was a part of the terms of the mortgage and to my mind it seems clear that the mortgage was executed with the stipulation that in case the mortgagee purchased the property the lessee would give up possession after 1328. I see no reason to hold that this was a personal agreement to enure for the benefit of *Musammat* Debdhira Dai personally and not of her heirs and representatives. It had the effect of enlarging the security and must be taken to be for the benefit of the mortgagee and her heirs and representatives.

Stress is laid by the learned Counsel for the appellant to the expression contained in the *ekrarnama* to the effect that if the said *mahajan* herself purchased any of the leasehold properties then the lessee would give up possession after 1328; and it is contended that the expression "herself shows that it was intended that *Musammat* Debdhira Dai alone could take advantage of this *ekrarnama*. In my opinion this contention is not sound. What was intended to be expressed was that if the mortgagee purchased then the lessee would give up possession; if an outsider or a

third person purchased, then the lessee would not give up possession. What was contemplated was the case of the mortgagee becoming the auction-purchaser in contradistinction to a third person purchasing the property.

It is next argued that there was no intention that this covenant should run with the land; and it is pointed out that it was stipulated in the *ekrarnama* that if the mortgagee purchased one, two or all the three *mouzas* and obtained delivery of possession thereof, the condition as regards relinquishment by the lessee shall hold good in respect of the one, two or three *mouzas* which the mortgagee might purchase and not of the other *mouza* or *mouzas* which she might not purchase. I am unable to see any force in this contention. This term in the *ekrarnama* is in no way in conflict with the previous terms thereof and does not show that the covenant was not to run with the land. It only emphasises the fact that no one except the mortgagee was to get the benefit of the agreement; and that if the mortgagee purchased only one or two out of the three leasehold properties, then she would be entitled to take possession of only that one or those two properties. Reference has been made by the learned Counsel for the appellant to s. 6, cl. (*d*) of the Transfer of Property Act which provides that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him; and it is argued that the assignment, in so far as the terms of the *ekrarnama* are concerned, is bad in law. This would be so only if it be held that the covenant in the *ekrarnama* was a personal agreement with *Musammat* Debdhira Dai. Once it is found that it was not a personal covenant, s. 6, cl. (*d*) of the Transfer of Property Act can have no application to the present case.

I am, therefore, of opinion that the learned Subordinate Judge was right in holding that the covenant in the *ekrarnama* was for the benefit of the decree-holder, whoever he might be, at the time of the execution of the decree. I would, however, dismiss this appeal, in so far as the question of the *farzi* character of the assignment is concerned against the appellant on the merits, and in so far as the appellant's application to notify the lease in the sale proclamation is concerned, on the ground that no appeal lies against this portion of the order. The appellant ought to pay the costs of this appeal.

Mullick, J.—I agree.

Ross, J.—I agree that the appeal so far as it questions the right of the respondent to execute the decree on the ground that he is a *farzidar* of one of the judgment-debtors should be dismissed; and I also agree that no appeal lies against the decision of the Subordinate Judge refusing to notify the appellant's lease in the sale proclamation. The appeal should, therefore, be dismissed with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

SPECIAL CIVIL APPEAL No. 48 OF 1924.

January 16, 1925.

Present:—Mr. Justice Heald and Mr. Justice Chari.

L. B. LALHIA AND ANOTHER—APPELLANTS

versus

B. M. BHARADWAJA—RESPONDENT.

Promissory note, suit on—Oral agreement that amount shall not be payable till certain accounts have been gone into—Evidence, whether admissible—Evidence Act (I of 1872), s. 92.

Plaintiff sued defendants on a promissory-note. Defendants admitted execution of the note but pleaded that under an oral agreement which was subsequently embodied in a written instrument, the amount of the pro-note was not payable until the accounts of a certain partnership, for the business of which plaintiff had provided the money, had been settled. The Trial Court held that the written instrument which was signed some days after the promissory-note had been executed, could not have retrospective effect and that defendants could not be allowed to prove that the amount was given for a partnership account as laid down in the written instrument:

Held, that the finding was not sufficient to exclude evidence to prove the oral agreement alleged by the defendants which had been entered into prior to the written instrument, subject, however, to the admissibility of such evidence having regard to the provisions of s. 92 of the Evidence Act. [p. 337, col. 1.]

Appeal against an order of the Small Cause Court, Rangoon.

Mr. *Bose*, for the Appellants.

Mr. *N. C. Sen*, for the Respondent.

JUDGMENT.—Respondent sued appellants on a promissory-note. Appellants admitted execution of the note but pleaded, *inter alia*, that under an oral agreement which was subsequently embodied in a written instrument, the amount was not payable until the accounts of a certain

partnership, for the business of which respondent provided the money had been settled. The learned Judge in the lower Court found that the written instrument, which was signed some days after the promissory-note had been executed, could not have retrospective effect, and that appellants could not be allowed to prove that the amount was given for a partnership account as laid down in that agreement. That finding did not, in our opinion, warrant the exclusion of evidence in the oral agreement which was alleged to have been made some time before the written instrument came into existence and should have been in similar terms, and, therefore, we set aside the learned Judge's order, which amounted to a refusal to allow appellants to offer evidence of the oral agreement which they alleged, and the decree which was finally passed as a result of that order, and we remand the case for disposal in the light of this order. We express no opinion on the question whether or not the oral agreement, which appellants wish to offer, excluded on other grounds, *e. g.*, on the ground that is inadmissible under s. 92 of the Evidence Act, since that question does not arise in this appeal. The costs in this appeal will be costs in the suit.

Z. K. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 27, 1925.

Present:—Lord Shaw, Lord Carson Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

PROBHUDAS—APPELLANT

versus

GANIDADA—RESPONDENT.

Tariff Act (VIII of 1894), s. 10—Tariff (Amendment) Act (IV of 1916), s. 3 (2)—"Duty" and "Tariff value," distinction between—Change in tariff value, whether entitles buyer to claim deduction.

Tariff value and its taxation is totally different from duties and their levying. The former is a matter of intelligent anticipation based upon such knowledge of price variations as is available. When the tariff value has been anticipated contracts are made; and when the duty is not changed these contracts take stock of the position with complete accuracy and there is no occasion in reason for any subsequent re-adjustment as between buyer and seller. But duties are in a different position. Their rate remains the subject of Government and administrative action. The parties who make forward contracts are not apprised of such changes, but have to wait for budget announcements. It is in this latter case that s. 10 of the Tariff Act comes in to declare that a change in the duty by decrease, the duty having been imposed between the making of the contract and the delivery of the goods, may be the ground of a claim by the buyer. [p. 339, col. 1.]

A change of duty amounts to a change in the rate of duty and not a change in the total amount of the duty brought about by a change in tariff values. Where there is no change in the rate of duty, the contention that a change in tariff values is constructively a change in the duty is without justification, and does not entitle a buyer to claim a deduction under s. 10 of the Tariff Act. [*ibid.*]

Mr. *W. Wallach*, for the Appellant.

Sir *G. Lowndes*, *K. C.*, and Mr. *E. B. Raikes*, for the Respondent.

JUDGMENT.

Lord Shaw.—The Courts below agreed. The question which arises has reference to the taxation upon sugar and the point involved is represented to be of very great general importance to all mercantile communities in India which deal with that article.

Their Lordships are satisfied that both the Courts below have come to a just conclusion.

From the documents produced with the stated case it is clear that the subject of sugar taxation, and particularly the methods of its imposition, have been for some time a matter of concern to the dealers in the article and of communication with the Government of India.

It is to be noted that in 1911 a letter was addressed by the Under Secretary to the Indian Government Department of Commerce and Industry to the Secretary of the Bengal Chamber of Commerce at Calcutta. The letter noted previous correspondence and in particular that it had been represented by the Karachi Chamber of Commerce supported by the Bengal and Bombay Chambers of Commerce that reconsideration should be given to the then existing system. "It was represented" says Mr. Irwin's letter, "that, in the opinion of the Bengal Chamber of Commerce, the present system of fixing the tariff valuation of sugar, under which merchants have to make forward contracts in ignorance of the tariff value, was unsatisfactory, and that there was a strong and unanimous feeling amongst importers that the present system should be changed."

This request was acceded to. It was intimated that the Government of India had decided to fix the tariff valuation of sugar on the average price of one year from 1st October to 30th September. It was added that the necessary instructions would be issued to the Director-General of Commercial Intelligence to publish as early as possible a statement giving the information already available for the current year. In result, accordingly, monthly statements of average value per maund were issued and published in the Gazette and the definite Government value of sugar struck on the average prices calculated on the monthly returns as there described was to be fixed and officially intimated.

On the 21st October, 1922, the supplement to the *Gazette of India* contained the notification, the effect of which is in question in this case. It notified that "returns have been received from October, 1921, and the average value of Java 23 Dutch Standard and above for the 12 months October, 1921, to September, 1922, is notified below." The average nett value per cwt. is stated as Rs. 16 annas 4. There is then added the following:—

"The tariff valuation of sugar for each calendar year is fixed on the average nett market price ruling during the previous 12 months ending September. The above statistics are published in order to enable merchants to determine the probable tariff valuation of the next calendar year."

From that date forward accordingly merchants were notified of the probable tariff valuation, and the object aimed at by the Chamber of Commerce in providing the convenience to merchants in making forward contracts was thus secured. There had been great variations of prices and the intimated tariff valuation of Rs. 16 annas 4 was a reduction by Rs. 10 from its former figure of Rs. 26 annas 4. By a notification dated 23rd December, 1922, issued by the Government of India the reduction—which had thus been in October anticipated as probable—took place; the tariff valuation of imported sugar was reduced as stated with effect from the 1st January, 1923. It was admitted in the High Court by Counsel for the appellant that the appellant must have had information of the notification of the previous October, and it seems out of the question to suggest that the contracts for sugar made in the succeeding December were not made by both well-known merchants in view of that published fact.

These contracts were made on the 15th and 18th December, 1922, the former for 237½ tons of white Java sugar and the latter for 225 tons of the same article, the goods to be delivered ex-godown *SS Calcutta*. The goods arrived in January under the first contract, and in January, February and March under the second, and they were settled and paid for between the parties. A question possible in the case was as to whether the transactions were not thereby definitely closed; but the point has not been raised in view of the importance of the other matter now to be alluded to.

The buyer claims, in this litigation, a right to deduct, as against the seller, from the prices paid by him, the equivalent of a decrease of duty. The Government duty as such has not been decreased but the buyer claims that it has constructively been decreased because, as the duty was fixed upon the basis of a tariff valuation and that tariff valuation has been reduced, therefore—such is the argument—he must take the same duty applied to a smaller tariff valuation, and so constructively reckon that there is a decreased duty upon the goods sold.

Their Lordships agree with the Courts below in holding that there is no justification for such an operation.

The contention depends upon the provisions of s. 10 of the Indian Tariff Act VIII of 1894. The material part thereof, as amended by subsequent Acts, is as follows:—

"In the event of any duty of customs . . . . on any article being . . . decreased. . . after the making of any contract for the sale of such article...duty paid where duty was chargeable at that time—

* * * * *

(*b*) if such decrease...so takes effect that the decreased duty only...is paid the purchaser may deduct so much from the contract price as will be equivalent to the decrease of duty...and he shall not be liable to pay or be sued, for, or in respect, of such deduction."

So far in regard to "duty."

With regard to the other topic as to tariff valuation, that is dealt with by the Indian Tariff Amendment Act IV of 1916, in the following terms:—

"3. (2) The Governor-General in Council

may, by notification in the *Gazette of India*, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings in the said schedules as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force."

These citations are made in order to show that the tariff values and their taxation are, of course, totally different from the duties and their levying. The former is matter of intelligent anticipation, based upon such knowledge of price variations as was available, and the desire for this knowledge was acquiesced in by the Government of India for the convenience of merchants. Their Lordships do not doubt that that convenience occurred in the present instance. The tariff value basis being thus anticipated, contracts are made; and, when the duty is not changed, these contracts take stock of the position with complete accuracy and there is no occasion in reason for any subsequent re-adjustment as between buyer and seller. But "duties" are in a different position. Their rate remains the subject of Government and administrative action. The parties who make forward contracts are not apprised of such changes, but have to wait for budget announcements. It is in this latter case that the Indian Act comes in to declare (to keep the case in hand) that a change in the duty by decrease, the duty having been imposed between the making of the contract and the delivery of the goods, may be the ground of a claim by the buyer.

A change of duty means a change in the rate of duty. Their Lordships are of opinion that, there having been no change whatsoever in the rate of duty in the present case, the contention that a change of tariff values of sugar is constructively a change in the sugar duty is without justification. The rate of duty was not reduced But suppose—to test the matter—suppose that the rate of duty had been reduced, and that the tariff values h d also been reduced, the buyer would, then, be claiming two different reductions, one in respect of actual duty and a second in respect of a constructively reckoned duty. The Act could not mean that. To bring in tariff values into the question of increase or reduction of sugar duties, is to introduce an improper and confusing element into the construction of the taxing Act.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Rankin, Ford & Chester.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

RANGOON HIGH COURT.

CIVIL REVISION NOS. 153 AND 154 OF 1924.

January 27, 1925.

Present:—Mr. Justice Carr and Mr. Justice Brown.

E. E. DAWOODJI AND SON—DEFENDANTS—PETITIONERS

versus

H. C. SHERMAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 15, 16—Arbitration in pending suit—Award—Objections—Opportunity to produce evidence, failure to give, effect of—Decree passed on award, validity of—Appeal, whether lies.

Where during the pendency of a suit the matter in dispute is referred to arbitration and an award is made and objections are filed to the award, the Court must give an opportunity to the objector to produce evidence in support of his objections. Where a decree is passed upon the award without giving such opportunity to the objector the decree is liable to be set aside on appeal. [p. 340, col. 1.]

Revision against a decree of the Small Cause Court, Rangoon, in C. R. Nos. 1346 of 1923, 1337 of 1923, 736 of 1924 and 1465 of 1923.

Mr. *Ormiston* (with him Mr. *Halkar*), for the Appellants.

Mr. *N. N. Sen* (with him Mr. *Moore*), for the Respondent.

JUDGMENT.—These four cases arise out of four suits of a similar nature in the Rangoon Small Cause Court. During the pendency of the suits the questions at issue in all of them were by consent of parties referred to an arbitrator. When the arbitrator filed his award the defendants, present applicants, and Pleaders, filed objections to the award, and prayed that it should be set aside. Some of the objections referred to the merits of the award and with those I do not at present propose to deal. Others of the objections were direct charges of mih conduct on the part of the arbitrator, susc-

as, if established, would clearly entitle the defendants to have the award set aside under cl. 15 (1) of the Second Schedule to the C. P. C. No reply to these allegations was filed either by the plaintiff or by the arbitrator. The learned Judge merely fixed the case "for hearing." On the date fixed Counsel were heard and the judgment was reserved, no date being fixed. The judgment was delivered seven days later when the learned Judge disallowed the objections and gave decrees in accordance with the award. In his judgment he said : " At the close of the Trial the Court pointed out to the Pleaders that they had neither produced evidence nor filed an affidavit to support the objections and that they could use their discretion in the matter as the judgment had been reserved. Yet they have not taken any steps up to date. As already said, it is for the objectors to prove their case first." The last proposition is unimpeachable. As for the rest of this quotation I would say that it does not show that the matter was disposed of in a satisfactory manner. If the learned Judge thought that the objectors should have an opportunity of producing evidence in support of their objections he should have definitely given such an opportunity. Indeed in the first instance the proper course would have been to frame issues on the allegations of misconduct and to fix a date for the trial of such issue. And it would have been much more satisfactory had the Judge recorded what he told the Pleaders on the date of hearing in the diary for that date instead of having it unrecorded until he wrote his judgment. At the same time it must be said that it was very clearly the duty of the objector to substantiate the allegations of misconduct and that he and his Pleader should have known that this could only be done by producing evidence of the facts alleged. In spite of this, however, I think that the fault was mainly with the Court and that the parties did not have such an opportunity of being heard as to the validity of the award as they should have had. The question whether an appeal lies in this case was not raised by the respondent but we have heard parties on it. Mr. Ormiston for the appellants contends that the appeal lies under s. 24 of the Rangoon Small Cause Courts Act, whether an appeal would lie under the C. P. C. or not. I do not think it necessary to come to a decision on this contention since I have satisfied myself from authorities that in the circumstances in this case an appeal will lie under the Code. In *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (1) the Privy Council held that the High Court had properly set aside the decree on the award which had been passed before the expiry of the time allowed for an application to set aside the award. In *Ibrahim Ali* v. *Mohsin Ali* (2) a Full Bench of the Allahabad High Court held that an appeal would similarly lie where the Court had passed a decree without considering such an application. I think that this is a reasonable view and that in the present case the Court did not properly consider the objection. I would, therefore, allow all these appeals and applications and remand all four suits to the lower Court for decision after due hearing of the application to set aside the award. I would direct that the costs of each appeal (other than the Court-fees paid on the appeals and applications) be costs in the suit following the result. The appellant will be granted the refund under s. 13, Court Fees Act, of the Court-fees paid on two appeals.

Z. K. *Appeals allowed.*

(1) 23 W. R. 429; 3 Sar. P. C. J. 493 (P. C.) appeal from 15 W. R. 37.

(2) 18 A. 422; A. W. N. (1896) 137; 8 Ind. Dec. (N. S.) 987 (F. B.).

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 44 OF 1922.

April 21, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

GAURI SHANKAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgagees—Decree obtained by subsequent mortgagee subject to prior mortgage—Subsequent decree obtained by prior mortgagee—Auction-purchasers—Priority—Prior mortgage paid off by subsequent mortgagee, effect of—Intention of parties.

The question whether a mortgage which has been paid off is to be considered as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention; but every one is presumed to intend that which is manifestly for his benefit. [p. 342, col. 2.]

Certain property was mortgaged to *H* and the same property along with some other property was subsequently mortgaged to *P*. Later on the property comprised in the second mortgage-deed was mortgaged to *N* along with some other property and a portion of the consideration was left with *N* to enable him to pay off *H*. *H* was not paid by *N* and consequently instituted a suit to enforce his security against the mortgagors. In this suit *P* was also impleaded as a defendant. In the meantime *P* had also instituted a suit to enforce his mortgage and obtained a decree subject to the prior mortgage of *H*. In execution of this decree the property was sold and purchased by the plaintiffs. In the suit instituted by *H*, the heirs of *H* after his death assigned the security in favour of the defendant for valuable consideration. Defendant obtained a preliminary decree which gave *P* the right to redeem his mortgage. *P* did not choose to exercise his right of redemption and a final decree was passed in favour of the defendant who brought the property to sale and purchased it himself. Thereupon the plaintiffs brought a suit for a declaration that they were entitled to priority over the defendant:

Held, that the plaintiffs having purchased the property with complete notice of the prior mortgage in favour of *H*, they could not claim priority over the defendant who was the representative of *H*. [p. 342, col. 1.]

Appeal against a decision of the Subordinate Judge, First Court, Patna, dated the 28th November 1921.

Messrs. *N. C. Sinha*, *N. C. Ghosh*, *G. P. Das* and Miss. *S. B. Hazra*, for the Appellants.

Messrs. *Sultan Ahmad*, *Kailaspati*, *S. Dayal* and *Sarjoo Prasad*, for the Respondents.

JUDGMENT.

Das, J.—It is somewhat difficult to understand the nature of the suit which has given rise to this appeal; but the object seems to be to obtain a declaration that the second mortgagee or the person who now represents the interest of the second mortgagee is entitled to priority over the first mortgagee.

In order to understand the point which has been argued before us by the plaintiffs, who are the appellants in this Court, it is necessary to remember the following transactions.

On the 9th June, 1902, defendants Nos. 11—16, who will henceforth be referred to, as the mortgagors, mortgaged an 8-annas share of a certain *mokarrari* proper to Harbans Narain Singh represented in this action by defendants Nos. 7—10. On the 29th September, 1902, the mortgagors mortgaged 16-annas of the same property to Rai Bahadur Harihar Prasad Singh cited as defendant No. 5 in this action.

On the 23rd December, 1907, the mortgagors borrowed Rs. 71,000 from Ram Narain Singh, represented in this action by defendants Nos. 2—4 and gave a usufructuary mortgage of the entire 16-annas of the *mokarrari* property as well as other property to him. This usufructuary mortgage was executed in order to enable the mortgagee to pay off, amongst others, Harbans Narain Singh. A large portion of the consideration money was left with Ram Narain Singh to enable him to pay off Harbans Narain. It appears that Harbans Narain was not paid by Ram Narain and on the 11th June, 1909 Harbans Narain instituted a suit, being Suit No. 27 of 1909, against the mortgagors, to enforce the security of the 9th June, 1902 as against them. He took the precaution of joining Rai Bahadur Harihar Prasad Singh as a party defendant in his action. This suit, as I have said, was instituted on the 11th June, 1909; but it appears that Rai Bahadur Harihar Prasad Singh himself instituted a suit to enforce his security of the 29th September, 1902 sometime in 1904 and on the 4th February, 1905 he obtained the usual mortgage-decree subject to the prior mortgage of Harbans Narain Singh. He took out execution proceedings and in due course the property was put up for sale and on the 17th September, 1917, the plaintiffs purchased the property at that sale. Meanwhile, as I have said, Harbans Narain instituted his suit to enforce the security of the 9th June, 1902, and, as I have said, he cited Rai Bahadur Harihar Prasad Singh as a party defendant in his suit. On the 2nd July, 1912, the heirs of Harbans Narain Singh, cited as defendants Nos. 7-10 in this action, assigned the security of the 9th June, 1902 to Bahadur Singh for valuable consideration. Bahadur Singh is the first defendant in this action and is contesting the claim of the plaintiffs. Bahadur Singh applied for substitution and in due course was substituted in the record of Suit No. 27 of 1909 as plaintiff in the place of Harbans Narain Singh. On the 7th June, 1919, Bahadur Singh obtained a preliminary decree which gave Rai Bahadur Harihar Prasad Singh the right to redeem his mortgage. It will be remembered that, although the Rai Bahadur had obtained his decree on the 4th February, 1905, the property had not passed to the plaintiffs until the 17th September, 1917. The Rai Bahadur's decree was subject to the prior security created in favour of Harbans Narain Singh, and it might be pointed out that he did not choose to exercise his right

of redemption in Suit No. 27 of 1909. The final decree in Suit No. 27 of 1909 was passed on the 8th November, 1918. Execution proceedings followed, and in due course the mortgaged properties were put up for sale and were purchased by Bahadur Singh on the 21st August, 1920.

The case of the plaintiffs is that Bahadur Singh is the *benamidar* of Ram Narain Singh and that the deed of assignment was a fraud upon Rai Bahadur Harihar Prasad Singh and that it operated as an extinguishment of the prior mortgage of the 9th June, 1902. The learned Subordinate Judge has come to the conclusion that Bahadur Singh is the *benamidar* of Ram Narain Singh. I will assume, though I do not decide, that the finding of the learned Subordinate Judge on this point is right; but even then, I do not see how it is possible for the plaintiffs to succeed in the action. The decree of Rai Bahadur Harihar Prasad Singh expressly provided that the sale to be held in his suit should be subject to the mortgage lien of defendants Nos. 6—14, the prior mortgagees. The plaintiffs purchased the mortgaged property at the sale held in execution of the decree obtained by the Rai Bahadur and the sale proclamation itself recited Harbans Narain Singh's mortgage, and it stated that, having regard to the prior incumbrances, the decree-holder fixed Re. 1 to be the value of the property. There is no doubt whatever that the plaintiffs purchased the property with complete notice of the prior mortgage in favour of Harbans Narain Singh and it is difficult to understand on what principle they should claim to have priority over the principal defendant.

Mr. Naresh Chandra Sinha contends that the effect of Ram Narain Singh taking an assignment of the mortgage on the 2nd July, 1912 was that an additional burden was placed on him. His first contention is that, had Ram Narain Singh carried out his bargain with the mortgagors and discharged the mortgage of the 9th June, 1902, Rai Bahadur Harihar Prasad would naturally have stepped into the position of the first mortgagee. With this contention I am unable to agree. Ram Narain Singh would undoubtedly have been entitled to be subrogated to the securities held by Harbans Narain Singh had he paid off Harbans Narain Singh out of the money advanced by him on the 23rd December 1907 to the mortgagors. It is quite true that the question whether the mortgage which is paid off is to be considered as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention; but, as has been pointed out, every one is presumed to intend that which is manifestly for his benefit. Now, what are the surrounding circumstances? On the 23rd December 1907, when Ram Narain Singh took a mortgage of the property, there were two outstanding mortgages, one of the 9th June 1902, the other of the 29th September 1902. It cannot for a moment be contended that Ram Narain Singh was not aware of the mortgage of the 29th September, 1902, for his mortgage bond gave him an opportunity to pay off Rai Bahadur Harihar Prasad Singh for his own protection. Now, if that be so, clearly it was to his manifest advantage to keep on foot the security of the 9th June 1902 and not to extinguish it. I quite agree that, if it could be shown that Ram Narain Singh was not aware of any other mortgage except that of the 9th June 1902, it could be argued with some show of reasoning that there would be no object in Ram Narain keeping alive the security of the 9th June 1902, since there was no other intermediate security to imperil his security; but obviously that is not the position in this case. It was for him to discharge the mortgage bond of the 9th June 1902. Having discharged that mortgage bond, clearly he would have been entitled to keep alive the security of the 9th June, 1902 for his own benefit.

And a perusal of the mortgage bond executed by the mortgagors in favour of Ram Narain Singh supports this conclusion. That mortgage bond provides that Ram Narain Singh should discharge the security of the 9th June 1902 and "on taking back the bonds they should keep them with themselves and should make them over to us along with this deed."

"Now, there was no object in preserving the mortgage bond of the 9th June 1902 if the intention was to extinguish the security of that date. Clearly the intention of the parties was that on discharging the mortgage bond of Harbans Narain and others, Ram Narain Singh should step into the shoes of Harbans Narain and hold the mortgage of the 9th June 1902 as a shield against the mortgage bonds that might have been executed by the mortgagors subsequent to the 9th June 1902. In my opinion

there is no doubt whatever that, had Ram Narain Singh carried out his undertaking, the plaintiffs would have been in no better position than that which they occupy to-day.

It is next contended that Ram Narain Singh should have paid off Harbans Narain Singh on or about the 23rd of December 1907 and that the effect of not paying off Harbans Narain Singh has been to throw an additional burden upon the plaintiffs. I do not see how this question arises. The argument is founded upon the fact that on the 23rd December 1907 Harbans Narain was entitled to receive Rs. 16,064-15-6 from the mortgagors and that the amount swelled to a very large sum of money when Bahadur Singh ultimately obtained his final decree as against the mortgagors. The question that arises from the failure of Ram Narain Singh to pay off the mortgage on or about the 23rd December, 1907, is a question between Ram Narain Singh and the mortgagors. It may be that Harihar Prasad, if he had claimed the right to redeem, might have asked the Court to open the accounts as between the mortgagors and Harbans Narain Singh in order to enable the Court to determine the terms upon which he should be allowed to redeem the mortgage. The question is put in this form by Mr. Naresh Chandra Sinha, had Ram Narain Singh paid off Harbans Narain Singh, the burden upon Harihar Prasad Singh would not have exceeded the sum of Rs. 16,064-15-6. Ram Narain Singh did not pay off Harbans Narain Singh, but, in fraud both of the mortgagors and of Harihar Prasad Singh, took an assignment of the security from the heirs of Harbans on the 2nd July 1912. No doubt the usufructuary mortgage bond of the 23rd December 1907 provided that Harbans Narain Singh should be paid off at once. As I have said, the delay in paying off Harbans Narain Singh is a question as between Ram Narain Singh and the mortgagors; but I am quite willing to concede that had Rai Bahadur Harihar Prasad Singh claimed the right to redeem the property he might have asked the Court to place him in the position which he would have occupied had Ram Narain Singh carried out his bargain; but Rai Bahadur Harihar Prasad Singh never claimed the right to redeem the mortgage. In my opinion the question does not fall to be considered since Harihar Prasad Singh never claimed the right to redeem and since his right to redeem is, by virtue of the decree in suit No. 27 of 1909, gone for ever.

The position is a very simple one and may be re-stated. The plaintiffs cannot claim to be in a better position than that which they would have occupied had Ram Narain Singh carried out his bargain. If Ram Narain Singh had carried out his bargain he would have been entitled to enforce the security of the 9th June, 1902. It makes no difference to the plaintiffs whether that security is enforced by Harbans Narain Singh or by Ram Narain Singh. Harihar Prasad Singh had an opportunity to redeem the prior mortgage at any time he chose and it can make no difference either to him or to the plaintiffs who have purchased the property at the execution sale held pursuant to the decree obtained by Harihar Prasad Narain Singh whether the security of the 9th June 1902, is enforced by Harbans Narain Singh or by Ram Narain Singh. In my opinion the question whether Bahadur Singh is the *benamidar* of Ram Narain Singh has nothing whatever to do with the question.

In the next place, it seems to me that the assignment taken by Ram Narain Singh in the name of Bahadur Singh on the 2nd June 1912 was a mode of performing his obligation under the mortgage bond of the 23rd December 1907. There is of course the question of delay in performing his obligation. As I have said that question could have been raised either by the mortgagors or by Harihar Prasad Singh had he claimed the right to redeem; but the question no longer arises. In my opinion the decree passed by the learned Subordinate Judge is right and must be affirmed. I would dismiss this appeal with costs payable to the respondents Nos. 1 to 4.

Adami, J.—I agree.

Appeal dismissed.

Z. K.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

April 28, 1925.

Present:—Lord Phillimore, Lord Carson, Lord Blanesburgh, Sir John Edge, and Mr. Ameer Ali.

HARIGIR KISANGIR GOSAVI AND ANOTHER—APPELLANTS

versus

ANAND BHARTHI VISHNU BHARTHI GOSAVI—RESPONDENT.

Hindu Law—Bombay School—Berar, law applicable

in—Gharbari Gosavis, *law applicable to*—*Adoption, proof of*—*Suit to recover possession after death of widow*—*Limitation, commencement of*—*Limitation Act (IX of 1908), Sch. I, Art. 141.*

Gharbari Gosavis are a fraternity within the *Sudra* caste. They are married ascetics having certain of the customs and practices of ascetics necessarily modified by the fact of marriage and its consequences. Except so far as their particular customs apply they are governed by the usual law as to Hindus which in the Province of Berar is the same as the Hindu Law in the Presidency of Bombay. [p. 344, col. 1.]

Plaintiff claimed to succeed to one *J* as his adopted son on the allegation that he had been adopted by *J's* widow after *J's* death under an authority from *J*. *J* belonged to a family of *Gharbari Gosavis* and it was found that the plaintiff had been shaved as a preliminary ceremony for being appointed the disciple of *J*, that after the date of the ceremony he lived in the family of *J* and bore a name showing that he belonged to it and had nothing to do with his natural family and also that on several occasions he had been described as the son of *J* by *J's* brother and after his death by the latter's widow :

Held, that under the circumstances plaintiff must be deemed to have been validly adopted by *J's* widow as a son to *J*. [p. 346, col. 1.]

Z had two sons *J* and *R*. *J* died during the lifetime of his father and subsequently *R* separated from the father. Plaintiff was adopted by the widow of *J* under an authority from *J*. After *R's* death his widow obtained possession of *R's* property and continued to be in possession of it for over 20 years. She made various alienations and after her death plaintiff brought a suit to recover *R's* estate as his nearest male heir from the alienees of *R's* widow :

Held, (1) that if *R* and the plaintiff had been joint in estate the plaintiff ought to have succeeded to the property as surviving co-parcener and that in that case *R's* widow ought not to have taken possession of the property and having taken possession of it she would have acquired for herself and for her alienees a title by adverse possession ; [p. 346, col. 2.]

(2) that as *R*. was not joint in estate with the plaintiff, *R's* widow took possession of his property for a widow's interest and it was not till her death that the plaintiff's title accrued and that, therefore, limitation began to run from the date of death of *R's* widow. [*ibid.*]

Messrs. *A. M. Dunne* and *S. Hyam*, for the Appellant.

Messrs. *G. R. Lowndes* and *E. B. Raikes*, for the Respondent.

JUDGMENT.

Lord Phillimore.—The plaintiff-respondent in the present appeal sued the present appellants and other parties to recover various properties of which the only one now in dispute is included in the Izara of Naigaon. He claimed title as the reversioner to the estate of one Ram Krishna and alleged that these properties had been disposed of to the appellants by Sita, the widow of Ram Krishna, without legal necessity.

In the course of proceedings it was established that there was no legal necessity for the dispositions, but the plaintiff failed in the opinion of the Second District Judge before whom the case came on remand, to prove his title to inherit and his suit was, therefore, dismissed.

On appeal to the Court of the Judicial Commissioner of the Central Provinces, this decision was reversed, and the decree was given in favour of the plaintiff.

This decision is now questioned by the present appeal, and it is also contended that the plaintiff's suit was barred by limitation.

The plaintiff deduced title as follows :—One Zingar Bharti had two sons, Ram Krishna and Jairam and Jairam died in the life-time of Zingar Bharti, leaving no son. It was asserted by plaintiff that after Jairam's death his widow—with the concurrence of Zingar Bharti—adopted Vishnu who was the plaintiff's father, as a son to Jairam. This adoption was disputed by the appellants and upon its existence and validity or otherwise, the case mainly turns. All the parties are *Gharbari Gosavis*, a fraternity within the *Sudra* caste. *Gharbari* means house-holder and the literal translation of the two words is "house-holder ascetics"—that is, they are married ascetics having certain of the customs and practices of ascetics necessarily modified by the fact of marriage and its consequences. Except so far as their particular customs apply they are governed by the usual law as to Hindus, which in this Province, Berar, is the same as the Hindu Law in the Presidency of Bombay. See *Balwant Rao* v. *Baji Rao* (1).

It would appear that in this sect there may be direct inheritance, by the disciple (*chela*) to his preceptor (*guru*). If this took place without adoption it may be that it would confer upon the disciple no right of inheritance to the collaterals of his *guru*. This is a point, however, which it will not be necessary for their Lordships to decide, because it seems clear that this peculiar form of inheritance does not preclude the ordinary Hindu partice of adoption with its usual consequences. Adoption in the usual sense, however, may as some witnesses suggest be of recent introduction as a practice in this sect.

In the course of the case there has been a good deal of confusion of the two differ-

(1) 57 Ind. Cas. 545; 47 I. A. 213; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 3 N. L. J. 251; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 16 N. L. R. 187; 25 C. W. N. 243; 48 C. 30 (P. C.).

ent matters—the initiation of a *chela* and the adoption of a son; but for the purposes of the present decision their Lordships assume that the plaintiff will only succeed if he proves that his father was adopted.

This suit was begun on the 3rd August, 1910, and, as it will speedily appear the adoption if it ever took place was a long time previous. Vishnu was about 22 years old in 1882 and is said to have been three or four years old when he was adopted. This would put the adoption about 1864. Zingar died in 1869 or 1870. Ram Krishna died in 1885. Sita, his widow survived him for 20 years, dying in 1904 The result is that, though oral evidence was given at the trial it was given by persons of advanced age, whose memory as regards old matters which did not much concern them, is not altogether to be relied upon.

In 1877 Ram Krishna, as *patel* of a village, executed a power-of-attorney or *parwana* appointing Vishnu his deputy and describing him as son of Jairam. In 1882 some questions were raised as to the position of Vishnu in the family, and Ram Krishna claimed to cancel the power-of-attorney. On that occasion Ram Krishna said that Jairam had got Vishnu shaved as his *chela* or, as he states it in another document Vishnu had been shaved in his brother's name. He proceeds, however, to say that the further ceremony of *bija hom* had not taken place that adoption as such does not take place in his sect and that Vishnu had not been adopted. On the other hand in a genealogical tree which he filed, he placed Vishnu in the position which would be occupied by the son of Jairam, qualifying him, however as a *chela*.

Vishnu gave evidence in support of his claim and called witnesses. He also made the point that Ram Krishna had gone out of the family having been himself given in adoption to his uncle Mana which Ram Krishna denied.

In the end, the Deputy Commissioner said that, as Ram Krishna was the real son of Zingar, the *patelki* should be recorded in Ram Krishna's name, and that, if Vishnu was the proper heir he should get his rights established in the Civil Court. This he failed to do. Ram Krishna appears to have remained in undisturbed possession, and was succeeded by his widow, Sita. In 1886 the plaintiff claimed the *patelki* of a village against Sita, but failed. On that occasion Sita said that she did not know whether he had been adopted or not. Sita in 1891 when she wished to discharge her attorney Govinda Bharti and to appoint Vishnu in his place described Vishnu as having been adopted by her husband's brother Jairam.

In 1898 Vishnu brought a suit against her and some alienees from her, She then gave evidence and explained her previous statements saying that she had not said that he was the adopted son, but that he was a *chela*; that she did not know the ceremony of adoption but shaving the head was not part of the ceremony. The suit which Vishnu brought against Sita and her alienees was dismissed because in it he claimed as the adopted son of a member of an undivided family, in which case he should as surviving co-parcener, have succeeded on the death of Ram Krishna, and yet he treated Sita as lawfully in possession and only claimed as reversioner. Further, if the family was undivided, Sita by that date had been so long in adverse possession that the suit was time barred.

The ceremonies for the creation of a full disciple are, apparently, two, the initial shaving and the subsequent ceremony performed after the lapse of a period of years, of *bija hom*. The ordinary ceremony of adoption is the giving and taking, and in the case where the adoptive father is dead this is evidence by placing the child on the lap of the widow. This ceremony could not be performed after the death of the widow and the adoptive grandfather Zingar—though he might concur with the widow—could not of himself make an adoption to his son.

The plaintiff's case was that the full ceremonies for making his father a disciple and the proper ceremony for adoption while the widow was alive, had taken place. The defendants admitted that the ceremony of shaving had taken place, but denied that the further ceremony of *bija hom* had ever occurred, denied that there had been any adoption and said that the widow was already dead. All these points were in controversy in the present case.

There was a further controversy as to the facts, which in the end was not determined. Both parties appear to have thought that there could be no adoption in a family where there were males, unless indeed with the consent of them all. On this supposition the plaintiff endeavoured to make out that Ram Krishna had been adopted into

the family of his uncle Mana and no longer remained in the original family. But Ram Krishna had insisted that he had not been adopted by his uncle, though he had received benefits from him and as a kind of grateful recognition signed himself with the name of his uncle's family. As however, this Board in the case of *Yadao* v. *Namdeo* (2) has decided that the consent of the other males is not necessary, for this part of the case the question of the possible adoption of Ram Krishna need not be considered.

The oral evidence given on the several previous occasions and upon the hearing of the present suit was conflicting. The plaintiff's witnesses deposed to the fact that Vishnu was shaved that he was adopted by being placed in the lap of the widow of Jairam and that the ceremony of *bija hom* was afterwards performed. Witness for the defendants, while admitting the ceremony of shaving, denied that there had been the further ceremony of *bija hom* and said that the widow of Jairam was not living and could not, therefore, have taken part in the ceremony of adoption. It was, however, agreed that from the date of the ceremony of shaving Vishnu lived in his new family and bore a name showing that he belonged to it and had nothing to do with his former family, which, indeed, came from a different sub-division of the sect of *Gharbari Gosavis*. It was also proved that before the date of Vishnu's initiation. Ram Krishna had separated in estate from his father Zingar.

In these circumstances, their Lordships agree with the decision of the Judicial Commissioner and that of the First District Judge who tried the case before remand, that the proper presumption is that Vishnu who had been styled on occasions both by Ram Krishna and by Sita as the son of Jairam, and who had lived as if he were such a son all his life, must be deemed to have been validly adopted.

For this purpose it is not necessary for their Lordships to determine whether initiation means adoption or whether in this sect the ceremony of initiation is a necessary factor in an adoption. These questions of custom which are questions of fact need not be concluded by the present decision, which is simply that upon the evidence in the present case it ought to be presumed that whatever was necessary was done.

Now, with regard to the point taken that the plaintiff's suit was barred by limitation it is contended that Ram Krishna had usurped upon Vishnu and had acquired a title by adverse possession against him. But the plaintiff deduces title from Ram Krishna himself on the ground that he as the adopted son of the brother is the latter's nearest male heir. If Ram Krishna and Vishnu had been joint in estate Vishnu ought to have succeeded to the property now in dispute as surviving co parcener, and in that case Sita, the widow, ought not to have taken possession and having taken possession she would have acquired for herself and for the present appellants as her alienees a title by adverse possession. But it has already been stated that Ram Krishna was not joint in estate with Vishnu and, therefore, Sita as his widow rightly took possession of Ram Krishna's property for her widow's interest and it was not till her death that the plaintiff's title accrued and thus the suit was brought within time.

There is one remaining point to be noted. If Ram Krishna had been adopted into the family of Mana and thereby removed out of his own family Vishnu would not be his nephew, and the plaintiff, when he sought to prove this adoption, was to some extent injuring his own cause by making his relationship more remote. But there is no finding upon this point and none seems to have been asked for and as Mana was brother to Zingar it may well be that even if Ram Krishna is to be considered Mana's son nevertheless the plaintiff would be the nearest heir. In these circumstances their Lordships think that the judgment of the Assistant Judicial Commissioner was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondent:—Messrs. *T. L. Wilson & Co.*

(2) 64 Ind. Cas. 536; 48 I. A. 513; 17 N. L. R. 145; 30 M. L T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 15 L. W. 565; 20 A. L. J. 481; 24 Bom. L. R. 609; 49 C. 1; (1922) A. I. R. (P. C.) 216 (P. C.).

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

May 25, 1925.

Present:—Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

Mir SUBHAN ALI—APPELLANT

versus

IMAMI BEGUM AND OTHERS—RESPONDENTS.

Inam—*Berar Inam Rules, applicability of—Construction of grant—Grant to certain person and his male descendants, extent of—Female descendants, whether entitled to share—Suit to recover share of income and for declaration of title—Subsequent suit for partition*—Res judicata—*Civil Procedure Code (Act V of 1908), s. 11.*

The Berar Inam Rules lay down the conditions which are usually to accompany an *Inam* grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant. Where the right of inheritance is by the *Inam* certificate confined to a particular class of descendants, which in its exclusion of another class of descendants from enjoyment is in terms unambiguous, there is no reason why the grant in these terms should not have effect. [p. 349, col. 2.]

Where an *Inam* is granted to a person and his male descendants, the grant cannot be construed as meaning that it shall be continued to the male and female descendants of that person so long as there is no failure of male descendants. The only grant in such a case is to the male descendants themselves and the word "to" can have no other than its ordinary meaning attributed to it. It cannot be treated as meaning "during the existence of" or "pending the failure," and even if the word were capable of being so extended a general grant could not in such a case be evolved from the words of the grant in terms sufficiently wide to include female descendants within its scope. [p. 349, cols. 1 & 2.]

An *Inam* was granted to a certain person and his male descendants. After the death of one of the holders of the *Inam* who died leaving only female issue, the *Inam* was entered in the name of another male descendant of the original grantee. The daughters of the last holder of the *Inam* thereupon brought a suit against the present holder for a declaration that as the heirs of the last holder, they had got a certain share in the grant and that they were entitled to a certain share of the profits thereof. They were given a decree for the share of the profits claimed and a declaration was made in their favour that they were the owners of a certain share of the *Inam* villages in dispute. After the death of the judgment-debtor the *Inam* was entered in the name of his son. The plaintiffs then brought a suit for partition and separate possession of their share in the *Inam* estate:

Held, (1) that so far as the plaintiffs' claim to partition was concerned the matter was not *res judicata* between the parties inasmuch as the previous suit related only to a claim for profits and a declaration and a claim for partition if made in the previous suit might have been negatived even on the interpretation of the grant which was adopted in that suit; [p. 350, col. 2.]

(2) that the succession of the defendant to the *Inam* on the death of his father did not involve a re-grant of the *Inam* to him by the Government, it being merely a continuance of the grant to him in accordance with its original declared terms and that he held the estate burdened with the obligation of recognizing the rights of the plaintiffs to the share of income declared by the decree in the previous suit. [p. 350, cols. 1& 2.]

Consolidated appeals from an order of the Court of the Nagpur Judicial Commissioner's Court.

Messrs. *L. De Gruyther, K. C.*, and *J. M. Parikh*, for the Appellant.

Sir *G. R. Lowndes, K. C.*, and Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—The suit out of which these appeals arise was brought by the plaintiffs for partition and separate possession of their shares in an *Inam* estate or *jagir* in Berar, and for payment of their due proportions of the income for the three years immediately preceding the institution of the suit in February 1916. The estate now comprises the whole of the two villages of Barmi and Dhotra, and three fields in the village of Ganuhpur in the Murtizapur *taluq* of the Akola District. The original appellant, Mir Subhan Ali, the present certificate-holder and in sole possession of the *Inam*, was the principal defendant.

The trial took place before the Additional District Judge at Akola. He, by his decree, dated the 2nd April 1918, allowed the plaintiffs' claims in full. On appeal, the Court of the Judicial Commissioner, Central Provinces, Berar Jurisdiction, by a decree of the 5th April 1921, dismissed the suit so far as it was one for partition and separate possession of the *Inam*, but approved the judgment of the Court below in respect of the plaintiffs' claim to income. With the decree of the Judicial Commissioners both parties are dissatisfied, and in the present appeal and cross-appeal now consolidated, the plaintiffs, who were cross-appellants, ask that the decree of the Additional District Judge should be restored, while the defendant, Mir Subhan Ali, the original appellant, asks that the plaintiffs entire claim should be rejected and their suit dismissed.

The fundamental question at issue is one of construction, namely, whether the beneficial interest in the *Inam* granted to a common ancestor of the parties and continued by the British Government in 1866 passes

under the terms of the grant then made to all the heirs of the grantees according to Shia Muhammadan Law or whether that interest devolves upon male descendants only. There is, however, a further question, namely, how far the rights of the parties, whatever otherwise on construction they might have been held to be, are now regulated by a decree said to be binding upon the defendant, Mir Subhan Ali, and made by the Judicial Commissioners in a suit brought by the plaintiffs against, *inter alia*, the father and predecessor-in-estate of that defendant.

The facts of the case are not free from complexity, but they have been set forth at length and with perfect accuracy in the judgment of the Additional Judicial Commissioners. Their Lordships accordingly will re-state them only so far as is necessary to explain the conclusions at which, on the whole matter, they have themselves arrived.

Lands now represented by the estate in question had, from the end of the eighteenth century, been held under *sunnuds* from the Government of H. H. the Nizam by a succession of holders in direct male descent in a Shia Muhammadan family to which all the parties to these proceedings belong. The Extra-Assistant Commissioner who, in 1864, inquired into the origin of the grant and the claims of the then holders reported that the grant was valid and that its enjoyment had been long and uninterrupted.

"It is not hereditary according to the terms of the *sunnuds*, but practically the grant has been enjoyed by four successive incumbents during the space of more than 70 years and has assumed that right in a liberal point of view. I think the grant should be confirmed and continued to the present claimant and his descendants male."

These proposals of the Extra-Assistant Commissioner were supported both by the Deputy Commissioner and by the Commissioner, and to give effect to them the Resident recommended that the estate should "be continued to the present holder and his male descendants in perpetuity."

On the 3rd December 1866, this recommendation of the Resident was sanctioned by the Government of India, and an *Inam* certificate was issued, stating that the grant—one for personal maintenance—was "to be continued rent free in perpetuity to present holder and his male descendants."

The "claimant" and "present holder" so referred to was one Munawar Ali, the father of the plaintiffs. To him the *Inam* certificate was issued, and the fundamental question between the parties already referred to depends upon the true construction of these words in it.

And yet not quite so. For if, as has apparently been assumed in the copious stream of litigation which the grant has originated, an agnatic line of male descent is for one purpose or another thereby prescribed, then on a strict interpretation the grant has long since determined, inasmuch as Munawar Ali died in July 1896 leaving three daughters only—the plaintiffs and another—and no son.

But, as might well be supposed, none of the parties contend for this result. Nor has it, in fact, eventuated. It had been brought to the notice of the Extra-Assistant Commissioner in the course of his inquiry that Amjad Ali, the second son of the previous holder, Muzhar Ali, and a half-brother of Munawar Ali, was in receipt of half the income of the estate by a title which Munawar Ali, the "claimant" or "holder" made no effort to displace. In the original cerificate his position was ignored, possibly by inadvertence. In 1871, however, the omission was recognised and recertified and in that year Amjad Ali's name, was by Government, entered in the certificate as sharer in the estate with Munawar Ali. The effect, it has been assumed, is that the grant must be construed as if made to Munawar Ali and Amjad Ali and their male descendants in perpetuity, or, as a more compendious statement leading in the state of this family to the same result, as if made at an earlier date to Muzhar Ali and *his* male descendants in perpetuity. The true meaning of these words or their equivalent, therefore, is the fundamental question in the suit.

Amjad Ali died in 1880, and his son, Khairat Ali, was without objection, shown in his place on the certificate as a sharer along with Munawar Ali. The latter, as has already been said, died in 1896, in the lifetime of Khairat Ali. Of the three daughters whom he left, two are the present plaintiffs. The third, Aziz Begam married Khairat Ali as his second wife. As Munawar Ali left no son, Khairat Ali was entered

as the sole certificate holder in respect of the whole estate. This was objected to by the present plaintiffs and by their mother, Moghli Begam, Munawar Ali's widow, who survived him. They appealed to the Commissioner against the order that Khairat Ali was to be sole certificate-holder. Their claim was, that while the grant according to its terms was only to endure so long as the grantee's male line survived, the estate during the subsistence of the grant was to be enjoyed beneficially by all the heirs of the grantee, including females, according to Shia Muhammadan Law. The Commissioner refused to take this view of the grant, and he dismissed the ladies' appeal on the ground that women could not succeed to the *Inam*, which was to be continued to male descendants only. Khairat Ali died in 1914, and his eldest son by his first wife, Subhan Ali the present defendant, was in due course, entered in the register as certificate-holder. His appointment as such was once more opposed, as Khairat's had been, by Imami Begum, one of the present plaintiffs. Her opposition was again overruled. The *Inam* was to be continued to male descendants only.

The construction placed by the Revenue Courts upon the grant has, therefore, been uniform. But the plaintiffs in the present suit contend that it is erroneous, and they rely both as a *res judicata* and on their merits upon decisions of the Civil Courts in which their own view of the grant has been accepted. Their Lordships may here so far anticipate as to announce that the plea of *res judicata* will not avail the plaintiffs to the full extent of their claims in these proceedings. This fundamental question of construction must, therefore, be decided. It is convenient to proceed at once to its consideration.

Upon it their Lordships feel no doubt that the meaning attributed to the words in question by the Revenue Courts and by the learned Additional Judicial Commissioners in the present suit is correct. As it seemed to the Judicial Commissioners, so it seems to them, impossible to hold that an order that an estate shall "be continued to the male decendants" of a certain person means that it shall be continued to the male and female descendants of that person so long as there is no failure of male descendants. It was sought in argument before the Board to treat the estate conferred as being analogous to a base fee in English Law. Such analogies are rarely helpful and very frequently they are misleading. But here the suggested analogy is non-existent. A base fee is a grant in terms general, its limitation in point of duration being due only to the fact that the grantor was possessed of no estate enabling him to extend the grant, however, general its terms, for any period subsequent to the extinction of his own issue. But here there is no grant at all in general terms. The only grant is to the male descendants themselves—a very limited expression—and the word "to" can have no other than its ordinary meaning attributed to it. It cannot be treated as meaning "during the existence of" or "pending the failure of," and even if the word were capable of being so extended, their Lordships would still have difficulty in seeing how, from the words, a general grant could anywhere be evolved in terms sufficiently wide to include female descendants within its scope.

The learned Trial Judge found such a grant by holding that the certificate here was governed by what are known as the Berar Inam Rules, and particularly by No. V, of these rules, and that the grant must within that rule be treated as having been made in favour of "direct lineal heirs and undivided brothers"—an expression which would include females. Their Lordships agree with the Additional Judicial Commissioners in thinking that the learned Additional District Judge erred in attributing to these rules an operation universal and unqualified. The rules, it is true, lay down the conditions which are usually to accompany an *Inam* grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant. And where, as in the present case, the right of inheritance is by the certificate confined to a particular class of descendants which in its exclusion of all females from enjoyment is in terms unambiguous, there is no reason known to their Lordships why the grant in these terms should not have effect. As regards decisions upon the meaning of other grants cited in argument, their Lordships need only say that no authority was brought to their notice which leads them to qualify the effect which they attribute to the words of grant in the present case.

So far, therefore, the claim of the plaintiffs, whether for partition or for a share of

the profits of the estate, is not established. But the bearing and effect upon these claims of decrees in previous suits brought by the plaintiffs in the Civil Court remains to be considered. These are four in number. It will, however, suffice to deal in any detail with one of them only—namely, the Civil Suit No. 137 of 1904, filed in the Court of the Civil Judge of Amraoti by the present plaintiffs against Khairat Ali, and his three children by Aziz Begam. The claim there made was for a share of profits of the estate for 1903-4 and for "a declaration that as heirs of Munawar and his widow, Moghli Bogam, they got a half share in the *jagir*, and that they are entitled to the use of fruit and fodder from the villages."

The judgment awarded the plaintiffs a decree for the share of the profits claimed and declared that "the plaintiffs have 109-144 of half-share of the *jagir* villages in dispute." This decree was affirmed in appeal and second appeal.

"The entry," says the Additional Judicial Commissioner in his judgment on the second appeal, "regulates the duration of the grant but not the enjoyment of it as between the heirs of the grantee, and the inheritance devolves under the ordinary law in force in the family. No authorities to the contrary have been cited."

In the later suits this view was also taken. In the second and third the plaintiff's share of profits for the years 1904-5 to 1909-10 were claimed and awarded against Khairat Ali: in the fourth and last suit, brought against all the children and widow of Khairat Ali after his death in 1914, the claim was for a share of the income of 1911-12, and a decree for such share was made against the defendants to the extent of the assets of Khairat Ali in their hands.

Now it was not disputed by the defendant before the Board that the decision in Civil Suit No. 137 of 1904 was binding as between the parties to it and their representatives in interest to the extent that the plaintiffs are entitled during life to the there defined share of annual income, but it was contended that the defendant, Subhan Ali, does not claim through Khairat Ali, so that the decree is not binding upon him. Their Lordships concur with the learned Additional Judicial Commissioners in rejecting this contention. The succession of the defendant to the *inam* did not involve a re-grant by Government. It was merely a continuance of the grant to him in accordance with its originally declared terms. He holds the estate burdened with the obligation of recognising the rights of the plaintiffs to the share of income declared by the decree in the suit of 1904.

But no further. In that suit partition was not asked for, and their Lordships prefer in these appeals to deal with the question of partition as one which was not there decided because it was not raised. There are grounds on which a decree of partition might have been refused to the plaintiffs even by a Court which interpreted the grant as did the Additional Judicial Commissioners in that suit. In their judgment accordingly there can be no question of *res judicata* in the plaintiffs' favour so far as their claim to partition is concerned, and on the view which their Lordships take of the grant that claim cannot, as has already been stated, be maintained.

Their Lordships in the circumstances can feel no surprise that Khairat Ali resisted all claims of the plaintiffs to a share of the income of the estate and was unwilling to accept for subsequent years the principle of the decree in the suit of 1904. But it is right that that position should now, without further question, be accepted, and that the plaintiffs should not have imposed upon them the burden of instituting successive suits to establish a claim which, as between the parties, is no longer open to discussion.

Their Lordships accordingly think that there should be added to the decree appealed from a declaration that by virtue of the decree in the Civil Suit No. 137 of 1904, each of the plaintiffs is during her life and as against the defendant and his successors-in-interest in the property in dispute entitled to 109-288 of half-share of the income thereof, and liberty should be reserved after each year to apply to have the amount of such income determined by further proceedings in the suit and declared in a further decree.

With that addition to the decree, inserted to spare the parties unnecessary expense, their Lordships are of opinion that the decree appealed from should be affirmed and both appeals dismissed.

Their Lordshipe will humbly advise His Majesty accordingly.

There will be no order as to the costs of these appeals except that in accordance with

the order in Council of the 30th May 1924, granting to the plaintiffs special leave to cross-appeal, the costs of the defendant of that application must be paid by those cross-appellants.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Mr. *E. Dalgado.*

Solicitors for the Respondents: -Messrs. *T. L. Wilson & Co.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 3, 1925.

Present:—Lord Wrenbury, Lord Phillimore and Lord Carson.

N. S. P. K. L. PALANIAPPA CHETTIAR, SINCE DECEASED (NOW REPRESENTED BY N. S. P. K. L. KOLANDAIVELU CHETTIAR)—DEFENDANT—APPELLANT

versus

K. V. KATHIRESAN CHETTIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings and proof—Suit to recover damages for breach of contract—Agent, authority of, denial of—Burden of proof—Appeal—Question of fact—Trial Court, conclusions of, value of.

Plaintiff brought a suit to recover a certain sum by way of damages resulting from the re-sale of certain goods alleged to have been sold by the plaintiff to the defendant through a certain broker, delivery of which had been improperly refused by the defendant. Defendant denied that the broker had any authority from him to enter into the contract. The only evidence produced by the plaintiff in respect of his case was his own allegation that the broker had entered into the contract on behalf of the defendant, and had signed his Broker's Book on behalf of the defendant and that the transaction had been entered in the day book and Ledger of the plaintiff to the defendant's debit. The broker was examined as a defence witness and stated that he had no authority from the defendant to enter into the contract and that the defendant did not ratify the purchase of the goods. The defendant in his evidence also denied that he had ever given authority to the broker for entering into the contract. The suit was dismissed by the Trial Court but was decreed on appeal. On appeal to His Majesty in Council:

Held, that it was the duty of the plaintiff to prove the contract on the basis of which he sought to recover damages and that the proof of the contract necessitated proof of authority given to the broker, and that even if the evidence upon this point of the defendant and the broker were eliminated, there was still an utter absence of evidence of any authority on the part of the broker to enter into the contract on behalf of the defendant and that consequently plaintiff's suit was liable to be dismissed. [p. 352, col. 2.]

Where the question involved is one of fact the conclusion arrived at by the Trial Judge who has had the advantage of seeing the witnesses examined and cross-examined, should not be interfered with by the Appellate Court. [*ibid.*]

Mr. *K. Brown*, for the Appellant.

Mr. *Narasimham*, for the Respondents.

JUDGMENT.

Lord Carson.—The plaintiff (respondent) was a merchant in Madras, who in 1918 was carrying on business in piecegoods. He brought the present suit against the defendant, since deceased, and now represented by the appellant, to recover Rs. 13,384 damages resulting from the re-sale of goods alleged to have been sold by him to the defendant, and the delivery of which had been, as was alleged, improperly refused by the defendant.

The plaintiff's case was that, on the 27th August 1918, the defendant, through a broker named Ramakrishna, agreed to purchase from him 20 cases of *saries* for Rs. 29,910, and subsequently refused to accept delivery of, or pay for, such goods and entirely repudiated the alleged contract. There is no dispute that, on the date in question, the said broker did purport to purchase these goods from the plaintiff on behalf of the defendant and with his authority. The contract was signed by the said broker as being on behalf of the defendant in the plaintiff's contract book. The defendant, however, denied that the broker had any authority from him to enter into such a contract, and the question to be determined is purely one of fact, *viz.*, "had he or had he not such authority?"

The case was tried before Mr. Justice Phillips in the High Court of Judicature at Madras (Original Side), and he came to the conclusion, on the evidence in the case, that the defendant had not entered into the contract and had not authorised the broker to enter into such contract on his behalf. The only evidence produced by the plaintiff was his own allegation that the broker had entered into such contract on behalf of the defendant and signed his broker's book on behalf of the defendant, and he proved that the transaction had been entered in the day book and ledger to the defendant's debit. The broker was not called as witness on behalf of the plaintiff, although a *subpœna* had been taken out for his examination, but he was subsequently examined as a witness for the defence. He stated that he had no authority

from the defendant and that the defendant did not ratify the purchase afterwards.

The defendant, in his evidence, also denied that he had ever given authority for entering into the contract, and the learned Trial Judge, while raising some criticism upon a portion of his evidence, says that, on the whole, he impressed him favourably when in the box, and that he was inclined to attach a certain amount of weight to his oral denial of the contract. He also stated that, whilst he was not prepared to accept the broker's (Ramakrishna's) evidence *in toto*, he was prepared to accept it in so far he says that he had not the defendant's authority to purchase, and he, therefore, held that the plaintiff had failed to prove his case.

The plaintiff appealed to the High Court of Judicature at Madras (Appellate Side). That Court reversed the decision of Mr. Justice Phillips, and hence the present appeal. The Appellate Court refused to give any credence to the evidence of the broker saying that his evidence showed that he was a person of no character at all, and that not the slightest realiance could be placed upon his evidence. They made no reference to the denials of the defendant. It had been, however, alleged by the plaintiff that immediately after the signing of the book by the broker he had sent an invoice or *patti* to the defendant, and both Courts appear to have decided that the defendant had refused to accept such *patti*. There was a subsequent meeting to discuss the situation that had arisen by reason of the defendant's refusal to accept the goods, at which the plaintiff, the defendant, the broker, one Veerapa Chettiar and one Visvanatha Aiyar were proved to have been present, and it is not disputed that the *patti* was produced upon that occasion and comment was made as to the fact of its having had no date, and it was alleged that, after this meeting, the *patti* remained in the possession of the defendant. Upon these facts the Court of Appeal decided that "the only conclusion which we can draw from the evidence is that, as a result of this interview, the defendant retained the *patti*, and we would go further and say that the proper inference is that he accepted the *patti*." It would appear as if the Appellate Court were of opinion that the fact of the *patti* remaining in the possession of the defendant proved, in some way or other, the existence of the contract, which had always been hitherto repudiated. Assuming that the defendant did on the occasion mentioned retain the *patti*, their Lordships can find no evidence to support the decision that such retention was either an admission of the contract or the creation of a new contract so as to justify the inference drawn by the Appellate Court, and they are unable to concur in the reasoning or the decision come to by the Court of Appeal. It appears to their Lordships that the Court of Appeal has not sufficiently considered—that it was the duty of the plaintiff to prove the contract, which in the present case necessitated proof of authority given to the broker, and that, even if the evidence upon this point of the defendant and the broker were eliminated, there would be still an utter absence of evidence of any authority on the part of the broker to enter into the contract.

Their Lordships are also of opinion that the Court of Appeal, in disregarding the evidence of the defendant and the broker on the question of authority, did not sufficiently bear in mind the fact that the learned Trial Judge, who believed both the said witnesses, had the advantage of seeing them examined and cross-examined. In the circumstances, therefore, their Lordships are of opinion that this appeal should be allowed with costs and that the judgment of Mr. Justice Phillips of the 26th day of March 1920 should be restored, and they will humbly advise His Majesty accordingly.

Z. K.

Appeal allowed.

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondents:—Mr. *H. Polak.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 6 OF 1925.
February 24, 1925.
Present:—Justice Sir Henry Scott-Smith, KT.

KEHR SINGH—ACCUSED—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 215—Receiving gratification to help owner to recover stolen property—Gratification received by thief himself—Offence.

Section 215 of the Penal Code is not intended to apply to the actual thief but to a person who takes gratification on account of helping the owner to recover stolen property without at the same time using all the means in his favour to cause the offender to be apprehended and convicted of the offence.

Petition, under s. 439, Cr. P. C., for revision of an order of the Sessions Judge, Amritsar, dated the 31st December 1924, affirming that of the Magistrate, First Class, Amritsar, dated the 15th September 1924.

Lala *Rama Nand*, for the Petitioner.

Kanwar *Dalip Singh*, Government Advocate, for the Respondent.

JUDGMENT.—This is an application for revision of the order of the Sessions Judge of Amritsar who dismissed the appeal of Kehr Singh, who was convicted by a Magistrate of the First Class, under s. 215 of the Indian Penal Code.

The evidence for the prosecution is to the effect that the she-buffalo of Kala Singh was stolen while grazing outside the village by Kehr Singh petitioner who, on the following day, took Rs. 100 as *bhunga* and promised to return the stolen animal after eight days. As he failed to do this a report was made to the Police more than two months afterwards and he was eventually challenged and convicted under s. 215 as aforesaid.

The evidence as to the actual theft is that of a little boy Charagh. This evidence was believed by the learned Magistrate but, in spite of this no charge was framed against the petitioner under s. 379, Indian Penal Code. The learned Sessions Judge also says in his judgment that there is clear evidence that the buffalo was actually stolen. This shows that he also believed the evidence of the boy Charagh. *Queen-Empress* v. *Muhammad Ali* (1) is cited as an authority for the proposition that s. 215 is not intended to apply to the actual thief but to some one who takes any gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the offender to be apprehended and convicted of the offence. This decision was followed in *In re Nalli Veerathevan* (2) and I entirely agree with it. It is obvious from section itself that the person who takes a gratification is other than the actual offender with regard to whom he should use all means in his power to get him apprehended and convicted.

It is clear from the judgment of the Magistrate that he believed Kehr Singh to be the thief. If this was so he should have charged him with theft and not with an offence under section 215, Indian Penal Code.

I, therefore, am of opinion that the conviction under s. 215 cannot stand. Kehr Singh should have been charged with the actual theft if there was sufficient evidence to make out a *prima facie* case against him. If not, he should have been discharged. I allow the revision, set aside the conviction and sentence, acquit Kehr Singh and order that he be forthwith set at liberty.

Revision allowed.

Z. K.

(1) 23 A. 81.

(2) 24 Ind. Cas. 351; 15 Cr. L. J. 471; 26 M. L. J. 598.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 75 OF 1924.
June 18, 1924.
Present:—Mr. Baker, J. C., and Mr. Kotwal, A. J. C.

CHUNILAL—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Evidence Act (I of 1872), s. 32 (1)—Murder—Youth of accused—Sentence—Report made by deceased to Police concerning incident showing motive for attack, admissibility of.

The deceased was in charge of certain property on behalf of his employer. A party of men employed by a rival claimant of the property demanded the keys of the property from the deceased and on the latter's refusal to deliver up the keys he was assaulted by the accused. The deceased made a report of the incident to the Police. The following morning the deceased was stabbed with a knife and died as the result of the wound:

Held, that the report made by the deceased to the Police of the assault upon him by the accused on the previous day in connection with the dispute relating to possession was admissible in evidence under s. 32 cl. (1) of the Evidence Act. [p. 355, col. 2.]

Accused who was a raw youth of 17 or 18 years of age with no experience of the world stabbed the deceased with a knife under unknown circumstances and caused his death:

Held, that the accused was guilty of murder but that under the circumstances the sentence of transportation for life would meet the ends of justice and that it was not necessary to pass the sentence of death upon him. [p. 356, col. 1.]

Criminal appeal against an order of the Sessions Judge, Nagpur, dated the 15th April 1924.

Mr. *V. N. Herlekar*, for the Appellant.

Mr. *P. Lobo*, for the Crown.

JUDGMENT.—In this case the accused Chunilal Halwai has been convicted by the Sessions Judge, Nagpur, under s. 302, Indian Penal Code, of the murder of one Bapu Awari by stabbing him in the stomach with a knife and has been sentenced to death.

Many of the facts in this case are admitted. A large portion of the judgment of the learned Sessions Judge is taken up with the history of the disputes between two widows out of which the present case arose. It is not necessary to go into all these details. Admittedly one Sheoram Patil, who owned 16-annas share in *Mouza* Pardi and 4-annas share in *Mouza* Bhagi Mahari Tahsil Ramtek, died without issue, leaving two widows, Saraswati and Bhagirathi. There were disputes between the widows as to the possession of the property and Saraswati attempted to take possession of the property at Bhagi Mahari by force. For that purpose she engaged the assistance of some *badmashes* from Nagpur, and the present accused, who is a lad of about 17 or 18 accompanied her party to Bhagi Mahari. He himself says he went in the capacity of a cook. Bhagirathi's *mukhtear*, Mahadeo, lives at Pardi, and the house of Sheoram Patil at Bhagi Mahari was in charge of Bapu Awari on behalf of Bhagirathi. On Saraswati and her party demanding the keys Bapu refused to give them up, and it appears that he was struck by the accused. Ultimately he gave up the keys. The following morning an altercation is alleged to have taken place between Bapu and the accused, in the course of which the accused stabbed Bapu in the stomach with a knife, causing his death.

There is no evidence as to the actual circumstances of the murder, but it is not disputed that there was an attempt by Saraswati and her party to take possession by force of the property at Bhagi Mahari and that Bapu who was in the service of Bhagirathi was stabbed. It seems probable that he was stabbed by some member of Saraswati's party. Before dealing with the evidence it may be observed that the present accused was not only a stranger in the village but also the youngest and most insignificant member of the party of Saraswati, and, therefore, it seems unlikely that Bhagirathi's party would accuse him falsely of the murder if it were really committed by some other more influential man. It might, of course, be argued that the accused is being sacrificed in order to save somebody of greater influence, but this would not be supported by Bhagirathi's party.

The only witnesses who give direct evidence against the accused are P. W. No. 1, Mahadeo *mukhtear* of Bhagirathi, P. W. No. 4, Laxman also in the service of Bhagirathi, and P. W. No. 6, Bajirao Bhat. Certain witnesses from the village were also called, but they do not altogether support the prosecution, probably from fear of the accused's party.

There has been a good deal of argument on the subject of Vithal Prasad, P. W. No. 10 with the object of showing that he had gone to the village on behalf of Bhagirathi. The learned Sessions Judge has discussed this question at very great length. Vithal Prasad had very shortly before this occurrence been Saraswati's manager. He appears to be a man of dangerous character. It is sought on behalf of the defence to show that he was in the service of Bhagirathi at the time of this occurrence because he directly contradicts the evidence of the prosecution witnesses as regards the accused and tells much the same story as Kisan Mhali, P. W. No. 12, who admittedly is one of the party of Saraswati. We do not think it is necessary to add much to what the learned Sessions Judge has said on the subject. In the first place it is extremely improbable that Mahadeo, the *mukhtear* of Bhagirathi, would apply for assistance against Saraswati to a person who, on his own admission, has been in charge of Saraswati's interests up to a few days before these occurrences. It has also been pointed out by the learned Sessions Judge, that it was only on the morning on 31st October 1923 that possession was taken by force of the property at Bhagi Mahari by Saraswati's party, and there was not time

for Mahadeo to communicate with his Pleader Mr. Deshpande at Nagpur in order to engage the services of Vithal Prasad. Vithal Prasad says that Mr. Deshpande came to him in the morning of 31st October 1923, whereas Mr. Deshpande and Mahadeo altogether denying having engaged Vithal Prasad. The news of the forcible possession could not have reached Nagpur by that morning. We cannot rely on the word of Vithal Prasad against that of Mr. Deshpande and Mahadeo. The principal fact on which the defence relies is the withdrawal of two prosecution cases by Mahadeo against Vithal Prasad. There were two cases pending, one under s. 352 and the other under s. 195 of the Cr. P. C. against Vithal Prasad. The case under s. 352 was dismissed for non-appearance of Mahadeo, the reason being that the hearing of the case coincided with these events at Bhagi Mahari, and Mahadeo was consequently unable to leave the village. The explanation for the withdrawal of the other case is that a compromise was effected with Vithal Prasad. The explanation is not altogether a satifactory, but there is no reason to suppose that the finding of the Sessions Judge that Vithal Prasad came to the village on behalf of Saraswati is wrong. He himself has admitted that he slept and took his food, with Nane Tembhekar, a leading member of Saraswati's party. It has been suggested that the leaders of these two opposite factions simply made a show of opposition in order to earn their fees, but as Saraswati herself and Mahadeo, the *mukhtear* of Bhagirathi were both in the village their respective parties would hardly have fraternised under their very eyes. We have no doubt that the view of the learned Sessions Judge, is correct and that Vithal Prasad, who in the *Mushafari* book is described as "manager" had come there on behalf of his former employer Saraswati. Even, however, if his view is wrong and Vithal Prasad has been engaged specially by Bhagirathi, he is not a person on whose word reliance could be placed, so that his statement should be preferred to those of the other witnesses, and as the learned Judge, has pointed out he is contradicted by the *panchnama* which he himself wrote and which gives the name of the accused as the person who stabbed Bapu.

The story of the witnesses, P. Ws. Nos. 1, 4 and 6, is that on the morning of the 1st November last while the respective parties were endeavouring to settle the matter in the Bada of Sheoram Patil, the accused went out with a *lota* in his hand and after sometime returned running with a blood-stained knife in his hand, saying that he had stabbed Bapu, and he was shortly afterwards followed by Bapu who had a punctured wound in his side and stated that he had been stabbed by the accused. The accused then ran to the Bada of Anand Rao, who is a relative of Saraswati. Bapu's wound was bandaged but he died. Immediately after this occurrence a report was made to the Police Station at Parseoni, and it is to be observed that the name of the accused occurs in this report as the person who stabbed Bapu. This report was written by Rajaram, P. W. No. 3, and was taken by Amrita Kotwar, P. W. No. 2, to the Police Station. The accused's name was thus known from the very first as having stabbed Bapu, and Rajaram says that he got the name from the Kotwar, though the latter denies this and says that he did not know the name but only knew that Bapu had been stabbed by a Pahelwan from Nagpur.

None of the prosecution witnesses professes to have been an eye-witness. We do not know the circumstances under which the accused stabbed Bapu, but the presumption is that they are connected with the dispute about possession of the Bada in the course of which the accused had struck Bapu the day before. We agree with the Sessions Judge in holding that the report made by Bapu regarding the taking of possession to the Police is admissible under s. 32, cl. (1) of the Evidence Act, and although he did not mention the name of the assailant, which he did not know he pointed out the accused as having struck him to Mahadeo *mukhtear* on his arrival.

The story told by Vithal Prasad and Kisan Mhali, P. W. No. 12, who is one of Saraswati's party, that the accused came running and said he had been assaulted by a certain person does not appear to be true. Although the witnesses from the village do not support the evidence of P. Ws. Nos. 1, 4 and 6 in all respects, probably from fear of the accused's party, Barkoo, P. W. No. 8, says that he saw the accused running from the direction of the Akhar to Sheoram's *bada* with a *lota* in his left hand and a knife in his right hand, and Bapu came shortly afterwards with a wound in his ribs. He also admits in cross-examination that the knife was blood-stained.

Kisan Dhimar, P. W. No. 9, saw the boy running from the direction of Akhar towards Sheoram's *bada* with a knife in his hand and states that he was shortly afterwards followed by Bapu who was crying that he was dying. Both these witnesses have resiled from their statements before the Committing Magistrate. The knife was recovered from the bath room in Anandrao's house by the Sub-Inspector on the information given by the Kisan Mhali (P. W. No. 12), although Kisan now attempts to deny this.

The whole of the evidence has been exhaustively discussed by the learned Sessions Judge. The knife has been identified by a number of witnesses as the one which the accused was carrying and it has been found by the Imperial Serologist to be stained with human blood. In these circumstances we have no reason for disagreeing with the view taken by the learned Sessions Judge who has discussed the whole of the evidence in detail. The accused himself has admitted that when Bapu came to the *bada* of Sheoram after he had been stabbed, accused ran to Anandrao's house.

The suggestion that Bapu was killed by one of his own party because he had given up the keys disposed of by the fact that Bapu made a complaint to the Police that he had been compelled to hand over the keys. If the party of Bhagirathi, that is to say Mahadeo *mukhtear*, wanted to get up a false case, he would have selected some more important person and not this boy as the assailant of Bapu and would have deposed or got men to depose that the incident occurred in their presence, whereas no witnesses were called to say that they actually saw Bapu being stabbed and we are entirely in the dark as to how the incident occurred. In all probability, the learned Judge thinks it was connected with the assault on Bapu by the accused on the previous day.

In these circumstances there are no grounds for differing from the view of the learned Sessions Judge that the offence of murder is proved against the accused, but in view of the fact that his age is given as 17 or 18, that we do not know the circumstances which led him to stab Bapu and that the Sessions Judge himself finds the accused to be a raw youth with no experience of the world, we are of opinion that the sentence of death passed upon him should be reduced to one of transportation for life and we reduce it accordingly.

Z. K. *Sentence altered.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 957 OF 1924.

December 13, 1924.

Present:—Mr. Justice Zafar Ali.

RANJIT SINGH TAJWAR—ACCUSED APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 124-A—Evidence Act (I of 1872), s. 114, Illus. (f)—Exciting disaffection towards Government—Publication of pamphlet—Authorship, proof of—Name appearing on title page, whether sufficient.

In the absence of any other evidence the mere fact that the title page of a pamphlet bears a certain name does not justify the conclusion that a person bearing that name, and nobody else, could be the author and publisher of the pamphlet. The prosecution must prove by evidence that the accused is the author or publisher of the pamphlet. [p. 357, col. 1.]

Criminal appeal from an order of the Magistrate, First Class, Amritsar, dated the 12th September 1924.

Mr. *G. S. Salariya*, for the Appellant.

Mr. *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This is an appeal from a conviction and sentence under s. 124-A of the Indian Penal Code. The charge against the appellant is that he is the author and publisher of a poem in *gurmukhi* styled "Kale te Gore de sawal jowab" which brings into hatred or contempt or excites disaffection towards the Government established by law in British India. Being a non-co operator he did not defend himself and did not state whether he was the author or publisher of the book or not. The question whether he was, was disposed of by the Magistrate thus :—

"The name of the author Bhai Ranjit Singh Tajwar accused is printed on the title page of the booklet and it is clear proof of the fact that he alone is the author and publisher of the said pamphlet. There is no rebuttal on this point and I decide the question against the accused."

It is contended in this Court that the appellant was not the author and publisher of the pamphlet and that there is no evi-

dence on the record to show that he was. Mr. Noad, who appears for the Crown, admits, that there is no evidence on this point but refers to illustration (*f*) to s. 114 of the Evidence Act according to which the Court may presume that the common course of business has been followed in particular cases, and he urges that it should be presumed in the present case that the appellant was the author and publisher of the poem. This presumption could be made if there were anything to show that the accused had no namesake or that his name could not have been adopted by any other person. In the absence of all evidence, the mere fact that the title page of pamphlet bears his name does not justify the conclusion that he and nobody else could be the author and publisher thereof. This being so there is no evidence on the record to attribute the authorship of the book to him.

I, therefore, accept the appeal, set aside the conviction and sentence and order that the appellant be released from Jail forthwith.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 643 OF 1924.

December 17, 1924.

Present:—Mr. Justice Ryves.

KEWAL—ACCUSED—APPLICANT

versus

TUFAIL AHMAD—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 448—Criminal trespass—Formal possession delivered in execution of decree—Actual possession remaining with accused—Offence.

Where formal possession of a house is delivered to a decree-holder under a *dakhalnama*, the judgment-debtor remaining in actual physical possession of the house, the latter cannot be said to be guilty of an offence under s. 448 of the Penal Code.

In the matter of the petition of Gobind Prasad, 2 A. 465; 1 Ind. Dec. (N. S.) 866, followed.

Criminal revision against an order of the Sessions Judge, Meerut.

Mr. *Hamid Hasan*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—On the facts as they appear in the judgment of the learned Judge it seems to me that, having regard to the decision of this Court *In the matter of the petition of Gobind Prasad* (1), the offence of criminal trespass has not been made out.

It has been argued that, as a matter of fact, the decision arrived at by the Magistrate on the evidence of the case was to the effect that the applicant had been turned out of the house and that the possession of it had been made over to the complainant who had, afterwards, been forcibly ousted by the applicant. If those were the real facts then obviously the conviction would be right, but I do not think that the First Court really meant that, what it said was that "the *dakhalnama* is a decisive proof that the complainant was put in possession of the house and that the accused, Kewal, was ousted by an order of the Court." The *dakhalnama* apparently only gave formal possession of the house and actual physical possession was not given, as would appear from the findings of the learned Sessions Judge. On those findings, having regard to the ruling of this Court, which is binding on me, I must hold that the offence is not proved.

I accordingly allow the application and acquit the applicant of the offence charged and direct that the fine, if paid, be refunded.

Z. K. *Application allowed.*

(1) 2 A. 465; 1 Ind. Dec. (N. S.) 866.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 116 OF 1924.

November 6, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

L. PATTABI CHETTY—PLAINTIFF—APPELLANT

versus

GOPALA CHETTY AND OTHERS—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 195, 476, 476-A—Sanction to prosecute granted before amendment of Code—Lapsing of sanction—Procedure—Superior Court, power of, to make complaint.

Section 476A of the Cr. P. C. does not empower a superior Court to do what a subordinate Court had no power to do.

Where before the amendment of the Cr. P. C. a subordinate Court granted sanction for the prosecution of a person in respect of an offence mentioned in s. 195 of the Code, but the sanction lapsed owing to the subsequent amendment of the Code:

Held, that the remedy of the complainant was to move the subordinate Court to make a complaint under the amended s. 476 of the Code and not to move a superior Court under s. 476-A of the Code to make a complaint.

Appeal against an order of the District Court, Coimbatore, in O. P. No. 96 of 1923, dated the 7th February 1924, (O. P. No. 2 of 1923 on the file of the Court of the District Munsif, Gobichettipalayam).

Mr. *K. Narasimha Iyer*, for the Appellant.

Messrs. *Krishna Arya* and *Veeraraghavalu*, for the Respondents.

JUDGMENT.—We think that the District Judge's order is without jurisdiction. He had jurisdiction to interfere under s. 476-A of the Cr. P. C., and file a complaint only in two contingencies (*a*) that the District Munsif had not made a complaint under s. 476; (*b*) that he had rejected an application to make a complaint. Contingency (*b*) does not apply obviously. As to contingency (*a*) the District Munsif had, no doubt, not made a complaint under s. 476. But when he passed his sanction order, he had no power or jurisdiction to make such a complaint which must be a complaint under the amended s. 476, since that section was not then in force. We cannot hold that s. 476-A was ever intended to apply to a case of a Court not invoking a power which it had never power to invoke.

The lower Court's order is, therefore, without jurisdiction and is, therefore, set aside. It is open to respondents to proceed, as they should have done, when the sanction order lapsed by the passing of the amended Cr. P. C., by moving the District Munsif's Court to make a complaint.

V. N V. *Order set aside.*

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 250 OF 1925.

May 4, 1925.

Present:—Mr. Justice Banerji.

RAM CHARAN DAS—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 476, 476B—"Offence which appears to have been committed," meaning of—Order directing complaint to be made—Appeal—Appellate Court, power of.

The intention of the Legislature is that in cases of appeals under s. 476-B of the Cr. P. C. the Appellate Court should re-consider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below should nevertheless re-consider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the Appellate Court is not satisfied that a *prima facie* case has been made out the order appealed against must be set aside. [p. 358, col. 2.]

The words "offence which appears to have been committed" in s. 476 of the Cr. P. C. mean that the facts before the Court unless rebutted show that an offence has been committed. [p. 358, col. 2; p. 359, col. 1.]

Criminal appeal from an order of the Sessions Judge, Mainpuri, dated the 27th of February 1925.

Mr. *Hazari Lal Kapoor*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an appeal under s. 476-B of the Cr. P. C. against an order of the District Judge of Mainpuri directing the appellant to be prosecuted under s. 193 of the Indian Penal Code in respect of certain false statements. The first point to consider in this case is what are the duties of an Appellate Court in cases in which an order is made by the lower Court directing the prosecution of any one. Section 476-B has been enacted by Act XVIII of 1923, and the same Act has omitted original sub-s. 6 of s. 195, which gave the Appellate Court power of reviewing an order granting sanction or an order by a Court instituting a complaint. Chapter XXXI of the Cr. P. C. lays down the ordinary procedure and powers relating to appeals against convictions or acquittals. Section 476 B empowers the Appellate Court in appeal to direct the withdrawal of the complaint, or in cases where the First Court has refused to complain may itself make a complaint. I am of opinion that the Legislature intended that the Appellate Court in cases of appeals under s. 476-B of the Cr. P. C. should re-consider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below, should nevertheless re-consider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the Appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside. The words "offence which appears to have been committed" seem to me to have been used by the Legislature to mean that the facts before the Court un-

less rebutted show that an offence has been committed.

Now coming to the facts of the case, on the 18th of October 1924, one Shiam Lal brought a suit for recovery of Rs. 134 on a bond dated the 18th of April 1920 in the Court of the Munsif of Shikohabad. The *munsarim* of the Munsif's Court in the ordinary course of business reported that the bond on which the suit was based had the words "*chhah mah*" after the words "*ek sal*" and that the former words appeared to be written in a different ink. He further reported if one year was the stipulated period, the suit was not within time. On the office report being brought to the notice of the learned Pleader for the plaintiff, he made a statement which appears to me not to contest the *munsarim's* report. The Munsif directed the plaintiff to appear before him personally on the 25th of October. On the 24th of October a compromise was filed in Court in which it was stated that the defendant had paid the entire money sued upon, and the plaintiff admitted having received the money from the defendant, and the plaintiff did not claim his costs. On the 25th of October this application was verified by both parties. It appears that the Munsif was very surprised that the defendant, who had contradicted the original loan on the 18th of April 1920 should have at once satisfied the plaintiff's claim after the plaint had been filed.

The Munsif held an enquiry into the question of whether the bond in suit was for one year, or whether the words "*chhah mah*" had been interpolated. After taking down the statement of the present appellant Raran Chan Das on the 31st of October 1924, he recorded the statements of Shiam Lal, Kharagjit, marginal witness, and the defendant Randhira Chamar, and passed an order under s. 476 of the Cr. P. C., and made a complaint against Shiam Lal to the District Magistrate of Mainpuri. An appeal was filed by Shiam Lal before the District Judge under s. 476-B of the Cr. P. C. The learned Judge allowed the appeal of Shiam Lal and directed notice to issue to the petitioner Ram Charan Das to show cause why he should not be prosecuted under s. 193 of the Indian Penal Code for having falsely stated on the 31st of October 1924 that the words "*chhah mah*" were not written by him, and that the time for re-payment in the bond was only one year and not one year six months. On the 27th of February 1925 the learned Judge passed an order in the following terms:—"In pursuance of the notice issued by the Court against Ram Charan Das he put in appearance through a Counsel. I have heared the learned Advocate for Ram Charan Das but I see no good grounds why the prosecution of Ram Charan Das under s. 193 of the Indian Penal Code should not be ordered There is a strong *prima facie* case to prove that he made the following false statement before the Munsif of Shikohabad on 31st of October 1924 knowing that the statement made by him was false and not true." He then set out the false averments and directed that the appellant be prosecuted under s. 193 of the Indian Penal Code, and he further directed that the case be sent to the District Magistrate of Mainpuri for trial. It is against this order that an appeal has been filed. As no reasons are given to enable me on appeal to decide whether a *prima facie* case has been made out, I have examined the record of the case against Shiam Lal.

The learned Judge in his order of the 3rd of February 1925 in the appeal of Shiam Lal said:—"I think the view taken by the *munsarim* of the Munsif's Court and the learned Munsif himself is erroneous. I see absolutely no difference in the ink of the words "*ek sal*" and the words "*chhah mah*", and I wonder how it was that the *munsarim* came to report that the words "*chhah mah*" were in different ink. I have examined the document in question and I am unable to agree with the view taken by the learned Judge. The words "*chhah mah*" are not only written in different ink but the angle at which the lines forming the words '*chhah mah*" are written is different from that of the whole of the rest of the document. The learned Assistant Government Advocate who also examined the document was unable to say that the ink with which the words "*chhah mah*" was written was the same as the rest of the document. An examination of the document was made with the help of a powerful magnifying glass. I am of opinion that the view taken by the learned Munsif about the document was correct. I have also examined the other evidence in the case, and I cannot understand how Kharagjit, an illiterate person, could have identified the bond, and could have re-

membered the exact period for which the loan was given. I am not impressed by the evidence of Randhira Chamar as it seems to me surprising that he waited for such a length of time to re-pay the bond, and a few days after the suit was instituted, he satisfied it out of Court.

The result is that no case has been made out for the prosecution of Ram Charan Das the appellant. I allow his appeal and set aside the order of the District Judge dated the 27th of February 1925 directing the prosecution of the appellant under s. 193 of the Indian Penal Code and direct him to withdraw the complaint.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

December 8, 1924.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, Mr. Justice Beasley and Mr. Justice Srinivasa Iyengar.

In the matter of G. NARASIMHACHARIAR, B. A., B. L., HIGH COURT VAKIL, KUMBAKONAM.

Legal Practitioners Act (XVIII of 1879), s. 13—Professional misconduct—Misappropriation of client's money—Punishment.

A Vakil was retained by two persons one of whom was a *gosha* lady and the other an old man. They were the plaintiffs in a suit in which there stood a certain sum to their credit in Court. The Vakil drew the money out of Court, but failed to pay the amount to the clients on the ostensible ground that he could not interview the lady and that the old man could not give a valid discharge. The same Vakil was handed a certain sum of money by another client, a defendant, with instructions to admit the plaintiff's claim to that extent and to deposit the amount in Court. The Vakil misappropriated the amount and without the client's knowledge obtained adjournment after adjournment of the case and ultimately confessed judgment for the whole amount of the plaintiff's claim:

Held, (1) that a man guilty of two such grossly dishonest and improper actions could not safely be allowed to be entrusted with the interests and monies of future clients; [p. 361, cols. 2.]

(2) that the cases were of such gravity that in justice to the public and the profession, the High Court could do no less than order that the Vakil be struck off the rolls. [*ibid.*]

Case referred for the orders of the High Court by the District Judge, West Tanjore, in his letter, dated the 18th September 1924, in the matter of a High Court Vakil, practising at Kumbakonam.

Mr. *K. S. Krishnansami Iyengar*, for the Vakil.

The Advocate-General, for the Reference.

JUDGMENT.—In this case a High Court Vakil practising at Kumbakonam has had three charges made against him in relation to his professional conduct which have been sent up to this Court by the District Judge, West Tanjore.

We think that the third charge, which admittedly has not been perfectly investigated, is one in which it would not be possible to say with certainty that a case of professional misconduct has been proved.

There remain two other charges the facts of which have been fully investigated and reported upon by the learned District Judge and, as his findings of fact are not controverted, I will shortly summarise what they are. In the first case the Vakil was retained by two persons one of whom was a *gosha* lady and the other was an old man.

They were the plaintiffs in a suit in which there stood to their credit in Court a sum of Rs. 1,218, and it is not disputed that the Vakil drew that money out of Court. It was, of course, his duty to pay it over to his clients, and the only answer he has is that he could not interview the *gosha* lady and that he did not know that the other litigant could give him a valid discharge. It is a poor excuse, because there can be no doubt that the man in the case could have got the *gosha* lady, who was not *gosha* to him, to execute a proper discharge. But a yet easier course was open to the Vakil; if he was in that position, he could have paid back that money, which he had taken out, into Court and stated his reasons for doing so; and, indeed, so long ago as the 29th of August the District Munsif reported to the District Judge that he had in fact directed the Vakil, if he was *bona fide* embarrassed about getting a proper discharge, to put the money back into Court where it would be received. That is the first charge. It involved the loss to the clients of a substantial sum of money.

The next charge relates to a much graver matter. In that case the Vakil appeared on behalf of the defendant in a mortgage suit. The defendant's attitude was that, although something was due, it was a great deal less than what was claimed in the suit. It is unnecessary to go into the details of that defence but it broadly came to this, that, owing to the refusal

of the plaintiffs to take his money at a time when he was willing to pay it, they had inflated the claim by claiming interest throughout a long period when they could have had the money but would not take it. In these circumstances, the client's instructions to the Vakil were to admit that Rs. 760 odd was due, and he handed that sum to him with instructions to deposit it in Court. The Vakil did not deposit it in Court, nor did he disclaim liability formally for the balance of the plaintiff's claim. He tried to get adjournment after adjournment, doubtless without informing his client of it; and finally on the day of hearing, when he could obtain no further adjournments and no longer put off the evil day, he confessed judgment for the whole amount due. The client instructed somebody else who, on the whole matter being gone into, persuaded the learned Judge that the client had been deceived, and the learned Judge very properly on review restored the case to the list for trial on the merits. But the Vakil into whose conduct we are examining did not refund the money and the best he could do was to pass to the defendant a promissory-note for the money with interest as from the date when it was deposited with him. His defence to that charge was that he was given the money on condition that it should only be paid over to anybody if he could effect a final settlement with the other side for a sum not exceeding the funds in his hands. It seems quite clear from the record and from the subsequent attitude of the Vakil that he made no serious attempt whatever to effect a settlement with the other side. They had a Vakil in charge of their case whom he does not pretend, in the evidence that he gave, that he approached in any way. But he throws out vague suggestions that he made some proposals to settle with the other side directly with the clients. It hardly conforms to the best standard of professional conduct that he should try to go behind the back of the professional man on the other side with whom he ought to have dealt. However, let that pass. He now practically admits that he misappropriated the money but pleads that he got into very serious financial trouble owing to expenses of a marriage in his family and owing to his having made himself surety for a friend who failed to discharge the principal liability and involved him in a debt of some Rs. 20,000. So he says. That he was embarrassed there can be no doubt, because the learned Judge has forwarded with the papers, and quite properly forwarded, for our consideration a large number of judgments and execution proceedings taken against this Vakil.

In these circumstances, what is to be done? He has had the wisdom to abandon the untrue statements of self-justification which he put forward before the District Judge. If the question was merely one of the amount of punishment to be meted out to him were he standing in a criminal dock, that attitude would undoubtedly commend itself to the Court. But we have not only to consider the interests of the Vakil even should we believe that his repentance is sincere and that his present intention is that he will give no cause for further complaint about his conduct, but we have to consider the public in a matter of this kind and we have also to consider the legal profession generally. How can we say that a man, who has been guilty of two such grossly dishonest and improper actions as these, can safely be entrusted with the interests and monies of future clients. We cannot. Were we to suspend him, we should mark our sense of disapproval of such conduct by a suspension so long that it would be practically equivalent to debarring him from ever efficiently practising again and also we should prevent him from doing what we hope he will endeavour to do, namely ,to put his affairs in order and earn his livelihood in some other walk of life. These cases are of such gravity that we feel that, in justice to the public and the profession, we can do no less in this case than order that the Vakil be struck off the rolls. The sentence of the Court will be that G. Narasimhachari, High Court Vakil, be struck off the rolls of this Court.

V. N. V.
Z. K.

Vakil struck off the rolls.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 77 OF 1924.
November 10, 1924.
Present:—Mr. Kotwal, J. C.
NATHUSING—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 352—Police Officer, whether can be excluded from Court-room—Duty of Court—Special treatment accorded to Police Officer, effect of.

Section 352 of the Cr. P. C. gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exception in the case of a Police Officer. When an accused person objects to the presence of a Police Officer or other person the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs and not merely whether his presence is convenient or helpful to the Court or the prosecution. In the case of a person interested in the prosecution, such as a Police Officer, other than the Prosecuting Officer, even where the Court itself does not see sufficient reason to order that he shall not remain in the Court-room, it may put it to that or to the Prosecuting Officer whether in view of the accused's objection he will withdraw or be advised to withdraw from the Court-room.

It is not advisable that a Police Officer interested in a case proceeding before a Magistrate should receive exceptional treatment as a seat on the *dais*, as such treatment is calculated to breed suspicion in the mind of the accused as to the independence of the Magistrate.

Application for revision of an order of the First Class Magistrate, Hoshangabad.

Mr. *J. Sen*, for the Petitioner.

ORDER.—I do not think that any cogent ground for transferring the case at this stage has been made out. At the same time it may be pointed out to the Magistrate, with reference to his remark in his explanation to the District Magistrate that there is no law or ruling under which the Police Officers whose presence was objected to could be excluded from the Court, that s. 352, Cr. P. C., gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exceptions in the case of a Police Officer. The Magistrate has not merely to think of the help any Police Officer may be able to give him or the prosecution; but has also to consider ths susceptibilities of the accused and the effect which the presence of the Police Officer is likely to produce in the minds of the accused and witnesses. When an accused person objects to the presence of a Police Officer or other person the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs and not merely whether the presence is convenient or helpful to the Court or the prosecution. In the case of a person interested in the prosecution such as a Police Officer other than the Prosecuting Officer even where the Court itself does not see sufficient reason to order that he shall not remain in the Court-room, it may put it to that or the Prosecting Officer whether in view of the accused's objection he will withdraw or be advised to withdraw from the Court-room. In any case it is not advisable that a Police Officer interested in the case proceeding before the Magistrate should receive exceptional treatment as a seat on the *dais*, as it is calculated to breed suspicion in the minds of the accused as to the independence of the Magistrate. The application is dismissed.

Z. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 141 OF 1925.
April 14, 1925.
Present:—Mr. Justice Boys and Mr. Justice Banerji.
BUDHAN—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 112—Security proceedings—Preliminary order, form of—Being member of gang of dacoits, whether ground for proceeding—Evidence of substantive offence, whether admissible—Acquittal on previous charge—Evidence relating to previous charge, whether can be taken into consideration.

A Magistrate who issues an order under s. 112 of the Cr. P. C. must be careful to see that the order that he is issuing is in the terms of the section which he proposes to apply. [p. 363, col. 2.]

Being a member of a common gang of dacoits is not a ground for proceeding against a person under s. 110 of the Cr. P. C. [*ibid.*]

Where proceedings are taken against a person under s. 110 of the Cr. P. C. on the ground of his being a habitual robber, evidence that bad characters assemble at his house is entirely irrelevent unless it is evidence showing that the bad characters were robbers or that the assembly was for the purpose of robbery and not, for instance, merely for the purpose of gambling. [*ibid.*]

There is no warrant for the proposition that evidence which might possibly form the basis of a charge of a substantive offence is necessarily to be excluded

in proceedings under s. 110 and cannot form the basis of an order under s. 112 and a finding under s. 118 of the Cr. P. C. [p. 354, col. 2.]

The fact that a person against whom proceedings are being taken under s. 110 of the Cr. P. C. was acquitted of a charge brought against him of a substantive offence does not entitle him to have all evidence excluded of the incident which formed the subject of the previous trial. It is entirely a question of the value to be attached to the acquittal. If he was acquitted on the ground that the case was totally false against him no Magistrate or Judge would think of taking the case into consideration against him. On the other hand if he was only given the benefit of the doubt there is no reason why the incident should not be put in evidence and given whatever value it might be worth. The fact of acquittal may diminish and even destroy wholly the value of the evidence, but does not render it inadmissible. [p. 365, col. 1.]

Criminal revision from an order of the Sessions Judge, Bulandshahr, dated the 31st January 1925.

Dr. *M. L. Agarwala*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a case in which security has been taken from three persons under s. 110 of the Cr. P. C. One of them Budhan has applied to this Court in revision. He together with the others received a copy of an order under s. 112 of which the following are the material terms: "are members of a common gang of dacoits, and that you are dacoits and house breakers and thieves by habit and you jointly commit offences". The Magistrate found in the following terms at the end of his judgment:—"I, therefore, confirm the notice given to the accused and order them each to execute a bond, etc., etc.". As he took security for three years the case went up to the Sessions Judge who confirmed his order. The application for revision made by Budhan in this Court came before Mr. Justice Stuart. In the first of the grounds reliance was placed upon a ruling of this Court in the case of *Ram Prasad* v. *Emperor* (1). Mr. Justice Stuart referred the case to a Bench because he did not agree with the proposition laid down in that case. The argument before us has been directed to two points: (1) that in view of the ruling to which we have just referred the order of the Magistrate could not be sustained, and (2) that eliminating the evidence of association as a member of a gang of dacoits, there was no sufficient evidence remaining to support the order of the Magistrate. Much of public time and money would be saved in these cases if the Magistrate who issues an order under s. 112 were to be careful to see first that the order that he is issuing is in the terms of the section which he proposes to apply. We have quoted above the order under s. 112 which the Magistrate issued. He there gives the accused notice that they are charged with being members of a common gang of dacoits. A reference to s. 110 of the Code will show that no such phrase occurs in it from beginning to end. He goes on to say "and that you are dacoits." The word "dacoit" similarly does not occur anywhere in the section. The second error is, however, of less importance than the first, but it would have been desirable to avoid both. Finally we note that the Sessions Judge in his order of the 31st of January 1925 says: "Apart from this positive evidence there is general evidence of his (Budhan's) being a habitual robber and that bad characters assemble at his house." Section 110 does of course make mention of a habitual robber, but there is no such charge permitted by s. 110 as that based on having bad characters assemble at your house, and evidence, whether there be much or little, to that effect is absolutely irrelevant unless it is evidence, and is found to be evidence, showing that the bad characters were robbers, or that the assembly was for the purpose of robbery, and not *e. g.*, merely for the purpose of gambling. We find, therefore, that we must eliminate entirely from the notice to the accused, and from the findings of the Magistrate and the judge against him, the irrelevant matter to which we have referred. Before leaving this question we may refer to the judgment of Mr. Justice Mukerji in the case of *Ram Prasad* v. *Emperor* (1) to which reference has already been made. That case is entirely distingishable from the present. In that case the notice to the accused was, as it is set forth on page 18* of the judgment, "to show cause why they should not be bound over on the ground that they were habitual dacoits and belonged to the dangerous gang of Dhani and Ram Kishen, dacoits". The charge of being habitual dacoits was clearly part and parcel of the charge that they belonged to the dangerous gang of Dhani and Ram Kishen, dacoits. We have already adverted to the fact that no such

(1) 86 Ind. Cas. 282; 23 A. L. J. 18; L. R. 6 A. 45 Cr.; (1925) A. I. R. (A.) 250; 26 Cr. L. J. 746.

*Page of 23 A. L. J. - [*Ed.*]

charge comes within the terms of s. 110, and we should, therefore, have been entirely in agreement with the learned Judge in setting aside the order for security in that case. That case has, however, been pressed upon us, and we have little doubt that it was so pressed upon Mr. Justice Stuart who referred this case to a Bench as authority for a much wider proposition, namely, that evidence indicating the commission of a substantive offence punishable under the Indian Penal Code or other Act dealing with substantive offences is inadmissible in proceedings under s. 110. We do not think that such a proposition can possibly be supported. The case which we have just mentioned does not even purport to go so far. It dealt with a state of facts which did not come within s. 110 of the Cr. P. C. and did fall within s. 400 of the Indian Penal Code. It is ture that Mr. Justice Mukerji used the words "being a member of a gang of dacoits is a definite offence defined and punishable under the Indian Penal Code and it was for that reason that under the preventive sections action could not be taken for having committed a specific offence"; but it is clear from his preceding remarks that he was only suggesting an explanation, a suggestion with which we agree, of why the Legislature had thought it unnecessary to insert in s. 110 any provision relating to association with a gang of dacoits and was very far from holding that the fact that evidence points to the commission of a substantive offence punishable as such renders it inadmissible in a case under s. 110 of the Cr. P. C. The latter proposition is on a wholly different footing from that which Mr. Justice Mukerji was approving. It is quite impossible to hold, and there is no justification in the terms of s. 110 for holding, that because there is some evidence that a substantive offence has been committed, that evidence cannot form part of the evidence upon which an order under ss. 110 and 118 can be based. We need only take a particular case. If a witness comes into Court and says that the general repute of *A* is that he is an habitual thief that evidence is clearly admissible. Is the evidence of the witness to be ruled out because in cross-examination he says: "my reason for saying this, amongst other things, is that I am certain that he is the man I saw stealing my property, and I have heard from many persons that he is believed to be the man who stole the property of *B*, *C*, *D* and *E* on various dates". His evidence is clearly directed to a specific substantive offence punishable as such, but it is quite clear that if he has no other evidence to support him, it would be futile to institute a substantive case. Yet there could hardly be better evidence to show the real reason why the accused had earned the general reputation of being a habitual thief. We hold, therefore, that it is impossible to accept the proposition that evidence going to show that a substantive offence had been committed, or in other words evidence which might possibly form the basis of a charge of a substantive offence, is necessarily to be excluded in proceedings under s. 110, and cannot form the basis of an order under s. 112 and a finding under s. 118.

After eliminating, then, that portion of the notice which charges the accused with being a member of a gang of dacoits, we have remaining a notice which charged him with being an habitual thief and robber, and we have to consider whether there is any evidence on the record which could reasonably and properly in the exercise of judicial discretion be believed by the Magistrate and Judge as establishing that charge. Without weighing ourselves the exact value of the evidence, which we think we are not entitled to do in revision except in exceptional cases, we find that there is ample evidence upon which the lower Courts could, in the exercise of their judicial discretion, come to the opinion that the accused was an habitual robber and thief. It is unnecessary for us to detail all the evidence to which the Magistrate and the Sessions Judge referred. There is some of it which is clearly wholly irrelevant to the charge, either as it was made in the order under s. 112, or in the form to which we have amended it. It is quite irrelevant that the accused was a gambler. The fact that he gathered bad characters at his house does not go far enough to be in itself relevant. It would have been necessary to show that these bad characters were robbers, or were gathered there for the purpose of robbery or theft. In the absence of such evidence, they might very well have been gathered there for the purpose of gambling. After eliminat-

ing this and other evidence which is wholly irrelevant to the charge, we think there is ample grounds to justify the order. The only further criticism as to the admissibility of some of this evidence which we need particularly note is the suggestion that because the accused had been acquitted in two of the numerous cases put in evidence against him, no evidence of the allegations made in those cases against him was admissible. We cannot agree to the general proposition that the fact that he has been acquitted entitled the accused to have all evidence excluded of the incident which formed the subject of his trial. It is entirely a question of the value of that acquittal. It is perfectly certain that if he was acquitted on the ground that the case was totally false against him, no Magistrate or Judge would think of taking it into consideration against him. On the other hand, if he was only given the benefit of the doubt there is no reason why the incident should not be put in evidence and given whatever value it might be worth. As this argument was pressed upon us, we may give a simple illustration. *A* is charged with having committed dacoity. The evidence against him is based on that of two approvers with a certain amount of corroboration. The accused or his friends bribe the approvers to resile from their statements. The result is that the balance of the evidence is sufficient to raise a suspicion against him, but not sufficient to justify finding him guilty. Subsequently the approvers are put on their trial, and at that trial conclusive evidence is forthcoming that the accused and his friends bribed them to resile. Could any body reasonably say that the evidence of the fact that he had been suspected and charged with having committed a dacoity ought to be excluded in proceedings under section 110? We hold, therefore, that the fact that an accused person has been acquitted of a particular charge may diminish, will diminish in many cases and may even destroy wholly the value of the evidence, but does not render it inadmissible. We may add that Mr. Justice Mukerji has since seen the view that we have expressed above in regard to the case reported as *Ram Prasad* v. *Emperor* (1) and entirely concurs in our interpretation of his judgment therein. For the reasons we have given we see no reason to interfere with the order of the Magistrate, and the application is dismissed.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1094 OF 1924.

February 25, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Zafar Ali.

GULAB AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Death caused by hatchet blow by one accused—Second accused present but not taking part in assault—Murder—Sentence.

G and *C* two brothers proceeded to the house of the deceased, the former being armed with a hatchet and the latter with a stick. On arriving at the house of the deceased *G* gave a blow on the neck of the deceased with the hatchet as the result of which the latter died. *C* did not use his stick but stood near while *G* attacked the deceased:

Held, that both *G* and *C* were guilty of the offence of murder and that while *G* fully deserved the punishment of death, *C* who appeared to be acting under the influence of his brother and had inflicted no injury upon the deceased, should be sentenced only to transportation for life.

Appeal from an order of the Sessions Judge, Rawalpindi, dated the 19th November 1924.

Sayad *Mohsan Shah*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—On the night of the 23rd, 24th September 1924, Fazal Illahi, a Mochi of the village Charah in the District of Rawalpindi, was assaulted with a hatchet, while he was sleeping in the courtyard of his house. The medical witness, who conducted the *post mortem* examination, found an incised wound on the neck of the deceased; and declared that death was due to shock and hæmorrhage. The Sessions Judge of Rawalpindi has convicted the appellants, Gulab and Chanu, who are brothers of the murder; and has sentenced them under s. 302, Indian Penal Code, to death each.

Now, *Musammat* Fazal Jan, the wife of the deceased, who was sleeping on the night in question on a *charpoy* close to that of her husband, deposes that she woke-up on hearing her hushand's cry and saw Gulab and Chanu at the head and foot

respectively of his bed. She raised an alarm and the culprits took to their heels. Her outcry attracted to the spot her neighbours, and she at once told them that she had seen Chanu and Gulab by her husband's bed and that both of them had run away. One of the neighbours, Shah Sawar, P. W. No. 4, who was sleeping in his courtyard at a distance of 4 or 5 paces from the deceased's *charpoy*, confirms the statement of *Musammat* Fazal Jan that she immediately informed him of what she had seen and he further deposes that he himself saw two persons running away from the direction of the deceased's *charpoy*. Moreover, we have the evidence of Khuda Bakhsh, P. W. No. 6, to the effect that on the ensuing morning Gulab came to him and disclosed the fact that he had killed Fazal Illahi, and that his brother Chanu had also been implicated in the murder. Gulab expressed his desire to seek the help and advice of Bahadur Ali, *lambardar*, but was told by the witness that the *lambardar* had gone to Kahuta and was not in the village.

On the 28th of September the prisoner Chanu took the investigating party to a field close to his house and disinterred therefrom a hatchet on which the Imperial Serologist discovered traces of human blood. Gulab in the confession made by him to the Committing Magistrate on the 2nd of October, admitted that he had inflicted a wound on the neck of the deceased with a hatchet, but he tried to make out that he did not intend to use the sharp end of the hatchet. His brother Chanu also admitted that he had accompanied Gulab to the place where the deceased was sleeping, and that he himself was armed with a stick. He, however, explained that he did not strike the deceased with the weapon but was merely standing at a distance of 30 or 40 paces from his bed. Both the prisoners resiled from these confessions when they were examined again on the 28th of October, and attributed them to Police pressure. To this explanation they adhered before the Sessions Judge.

The motive for the murder is given by the deceased's father-in-law, Pira, who is collateral of the prisoners. Pira has no male issue, and his only daughter *Musammat* Fazal Jan was married to the deceased about five years ago. It appears that about two years before the incident in question he married a youug woman *Musammat* Barkat Jan by name, and that she contracted an illicit intimacy with Gulab. About five months before the murder Pira sent for his son-in-law, and asked him to live with him in his village Charah. This action of Pira excited the suspicion of Gulab and Chanu, who thought that Pira might gift his property to his son-in-law, and thereby deprive them of the inheritance. Further, there is ample evidence on the record that Fazal Illahi was an impediment to Gulab continuing his amorous relations with *Musammat* Barkat Jan, with the result that there were constant quarrels between Gulab and the deceased Fazal Illahi. Indeed, the *lambardar* of the village had to intervene and asked Fazal Illahi to go and live in Dhok Mohra about a quarter of a mile from the village, and Gulab migrated to another *dhok* about a mile from Charah.

There can be no doubt that there was bitter enmity between the deceased on the one side and Gulab on the other, and that Chanu naturally sided with his brother Gulab. The question, however, is whether the evidence on the record establishes the guilt of the prisoners. Now, the evidence of Fazal Jan, which has been summarised above, shows that Gulab inflicted the fatal blow and that Chanu is equally guilty of the murder. Her testimony receives support from the evidence of Khuda Bakhsh and Shah Sawar, and is further strengthened by the confessions made by both the accused before the Committing Magistrate. On this material we have no hesitation in holding that both the appellants have been rightly convicted of murder, and there can be no doubt that Gulab fully deserves the punishment of death.

As regards Chanu, it is admitted by the learned Counsel for the Crown that this prisoner did not inflict any injury upon the deceased ; and it appears that he was acting under the influence of his brother Gulab, when he accompanied the latter to the house of Fazal Illahi. In these circumstances the learned Counsel concedes that the extreme penalty of the law should not be exacted in his case. We accordingly accept the appeal of Chanu so far as to reduce the sentence of death to one of transportation for life.

We confirm the sentence of death inflicted on Gulab and dismiss his appeal.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 86 OF 1925.
March 4, 1925.
Present:—Mr. Justice Stuart.
RAMZAN—APPLICANT
versus
THE MUNICIPAL BOARD, BENARES—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), ss. 185, 307—Building erected without sanction—Notice to demolish, failure to comply with—Offence—Notice, proof of—Continuing fine, legality of.

In a prosecution in respect of an offence under s. 307 of the U. P. Municipalities Act, where the charge against the accused is that he has failed to comply with a notice by the Municipality to demolish a building erected by him without obtaining permission from the Municipality, the mere verbal assertion of the servants of the Municipality that the notice was issued, without producing the notice cannot be regarded as sufficient proof that the notice was so issued.

A sentence imposing a continuing fine in respect of an offence under s. 307 read with s. 185 of the U. P. Municipalities Act is illegal.

Amir Hasan Khan v. *Emperor*, 46 Ind. Cas. 150; 16 A. L. J. 527; 19 Cr. L. J. 694; 40 A. 569, followed.

Criminal reference made by the District Magistrate, Benares, dated the 14th January 1925.

REFERRING ORDER.—This is an application for revision of an order of the Joint Magistrate, Benares, convicting applicant under ss. 185, 307 of the Municipalities Act. From the record it appears that in April 1923 Ramzan applicant built a wall without first obtaining permission from the Municipal Board. This, which is an offence under s. 185 of the Act, has not been seriously disputed.

It is further alleged that on the 15th April 1923 he was served with a notice to demolish the wall within three days. On the 18th of April an officer of the Municipal Board, finding that this has not been complied with went to the spot to demolish the wall but was not allowed to do so by the applicant. The lower Court has found this offence under s. 307 of the Act proved. For the first offence the applicant has been convicted and I think rightly. The fine of Rs. 50 is not severe having regard to the narrowness of the *gali* where the wall was constructed. The second charge has also resulted in a conviction but I find that the notice has not been properly proved. It is not on the record as it should have been and the mere verbal assertion of a servant of the Board that such a notice has been issued cannot be regarded as sufficient proof that it was so issued.

Finally the latter part of the order contains the words "Failure to comply (with the order to demolish the wall) will as from December 1st involve a continuing fine of Rs. 2 per diem." If this is to be treated as an order imposing such a fine it is illegal and has been held so by most of the High Courts. The Allahabad ruling is contained in the orders passed in *Amir Hasan Khan* v. *Emperor* (1). If, it is to be treated as a warning, it was unnecessary and undesirable to specify the amount which could only be decided when a second prosecution had been successful. I, therefore, forward the record to the Hon'ble High Court with a recommendation that the conviction under s. 307 of the Municipalities Act be quashed and that the words referring to a continuing fine be deleted from the order. The record is forwarded under s. 438 of the Cr. P. C. with the explanation of the lower Court.

JUDGMENT.—I agree with the view taken by the learned District Magistrate. The conviction under s. 307, Municipalities Act is quashed and the words referring to a continuing fine are deleted from the order.

Z. K. *Conviction quashed.*

(1) 46 Ind. Cas. 150; 16 A. L. J. 527; 19 Cr. L. J. 694, 40 A. 569.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 216 OF 1925.
March 30, 1925.
Present:—Mr. Justice Martineau.
ATTAR SINGH—CONVICT—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Law Amendment Act (XIV of 1908), ss. 16, 17 (1), (2)—Exhortation to form unlawful association—Promoting meeting of unlawful association, what amounts to—Authority of accused to act on behalf of unlawful association, proof of.

The offence of promoting or assisting in promoting a meeting of an unlawful association implies that the association is already in existence. A person who merely urges the forming of an association cannot be said to promote or assist in promoting a meeting of that association, when the association itself had not come into existence, within the meaning of s. 17 (2) of the Criminal Law Amendment Act.

A certain association and all "*jathas*" organized by it or affiliated to it had been declared by the Government to be unlawful associations within the meaning of s. 16 of the Criminal Law Amendment

Act. Accused addressed a meeting in which he exhorted those present to organise themselves into *jathas* and to proceed to certain places in the name of the unlawful association. Accused gave out that he was acting on behalf of the association but there was no proof that he had been authorized by the association to act on its behalf :

Held, (1) that even if a *jatha* had been formed in response to the appeal of the accused it would not have been an unlawful association unless it was organized by or affiliated to the particular unlawful association which had been so declared by Government and that in the absence of evidence that the accused was authorized by that unlawful association to act on its behalf it could not be said that any *jatha* so formed was organized by or affiliated to that association ;

(2) that by urging his hearers to form themselves into *jathas* it could not be said that the accused had promoted or assisted in promoting a meeting of the *jathas* which had not come into existence within the meaning of s. 17 (2) of the Criminal Law Amendment Act ;

(3) that in the absence of evidence that the accused was acting on behalf or under the authority of the unlawful association the accused could not be said to have committed an offence under sub-s. (1) of s. 17 of the Criminal Law Amendment Act.

Petition, under s. 439, Cr. P. C., for revision of an order of the Sessions Judge, Rawalpindi, dated the 6th December 1924.

Mr. *Khazan Singh Suri*, for the Petitioner.

Kanwar *Dalip Singh*, Government Advocate, for the Respondent.

JUDGMENT.—The petitioner Attar Singh has been convicted of an offence under s. 17 (2) of the Criminal Law Amendment Act, the finding being that in a political *diwan* at Gujar Khan he exhorted the Sikhs present to organize themselves into *jathas* and to proceed to Jaito and Bhai Pheru in the name of the Shiromani Gurdwara Parbandhak Committee.

That Committee and all "*jathas*" organized by it or affiliated to it were by a Government Notification of the 12th October 1923, declared to be unlawful associations, and it is argued on behalf of the Crown that the petitioner, by his exhortation to the persons present in the *diwan* to organize themselves into *jathas* in the name of Shiromani Gurdwara Parbandhak Committee, promoted or assisted in promoting a meeting of an unlawful association.

I do not agree with the argument. In the first place, even if a *jatha* had been formed in response to the petitioner's appeal, it would not have been an unlawful association unless it was organized by, or affiliated to the Shiromani Gurdwara Parbandhak Committee. It would, therefore, be necessary for the prosecution to prove that the petitioner was authorized by the Shiromani Gurdwara Parbandhak Committee to organize *jathas* and of this there is no proof on the record for such authorization would not be proved by the mere fact of the petitioner giving out that he was acting on behalf of the Committee.

In the second place the offence of promoting or assisting in promoting a meeting of an unlawful association implies that the association is already in existence. I grant that a thing not already existing may be promoted, but the offence consists in promoting, or assisting in promoting, not an unlawful association, but a meeting of such an association, and it seems to me that the association must exist before a meeting of it can be promoted. It cannot be said that the petitioner, by urging his hearers to form themselves into "*jathas*" promoted or assisted in promoting meetings of the "*jathas*" when the "*jathas*" themselves had not come into existence. He is not, therefore, guilty of an offence under s. 17 (2) of the Criminal Law Amendment Act.

It is then argued that he assisted the operations of the Shiromani Gurdwara Parbandhak Committee, and, therefore, committed an offence under sub-s. (1) of s. 17. He has, however, not been charged with such an offence, and I think he cannot be said to have assisted the operations of the Shiromani Gurdwara Parbandhak Committee by urging the people to form *jathas* when there is no proof that he was acting on behalf or under the authority of the Committee.

There is a further finding that the petitioner is a member of the Shiromani Gurdwara Parbandhak Committee, but this is not supported by evidence, as the two witnesses who speak of his being a member have no personal knowledge of the matter and their statements are based on hearsay or surmise.

I accept the application for revision set aside the conviction and sentence and acquit the petitioner.

Z. K. *Revision accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 94 OF 1924 AND APPEAL FROM ORDER No. 136 OF 1924.

December 18, 1924.

Present:—Justice Sir Hugh Walmsley, Kt., and Mr. Justice B. B. Ghose.

Srimati TARU BALA DASI IN HER OWN RIGHT AND AS ADMINISTRATRIX TO THE ESTATE OF LATE CHARU CHANDRA MITRA—DEFENDANT—APPELLANT

versus

SURENDRA NATH MITRA AND THE MINOR SATYASANTI MITRA BY HIS GUARDIAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Compromise of suit—Minor and major parties—Leave not obtained—Adult parties, whether affected—Pardanashin lady—Ratification of transaction—Ageney, proof of—Counsel and client—Compromise of suit—English rule, application of.

Order XXXII, r. 7 (2) contemplates the case of a minor on one side ranged against adults on the other as regards the matter of compromise of a suit. It can have no reference to the effect of any compromise between adults although a minor may be a party to the suit. [p. 372, col. 1.]

The question of the effect of the compromise as between adults must be governed by the general law and not by O. XXXII, r. 7 (2), C. P. C. [*ibid.*]

Where a deed is executed by a *pardanashin* lady, there must be evidence of clear understanding by her of what liabilities she is taking and what is being given her. [p. 373, col. 1.]

Similarly, in the case of the ratification of a transaction entered into by the agent of a *pardanashin* lady, it must be proved that she had full knowledge of the facts. [p. 374, col 2.]

Any person seeking to bind a *pardanashin* lady by the act of her agent must give strict proof of such agency. [p. 373, col. 1.]

The common law rule as to the authority of a Counsel to compromise a suit without reference to his client, apart from being of doubtful force even in England, should not be applied in India, especially in the *muffasil*, where people may never have heard of the practice. [p. 371, col. 1.]

Neale v. *Gordon Lennox*, (1902) A. C. 465 at p. 469; 71 L. J. K. B. 939; 87 L. T. 41; 51 W. R. 140; 66 J. P. 757; relied on.

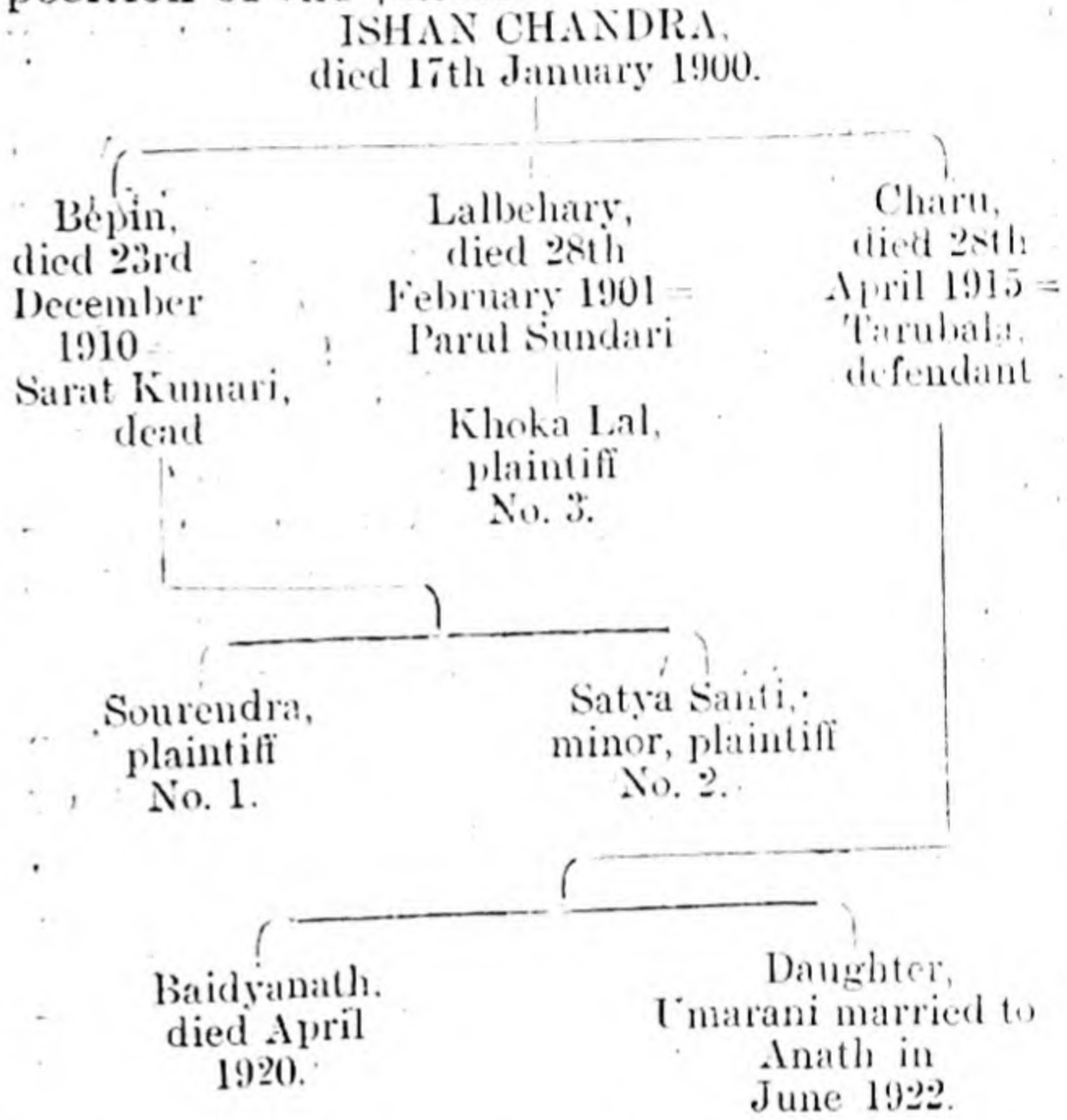
Appeal against a decree of the Subordinate Judge, Second Court, Hooghly, dated the 31st March 1924.

Mr. *B. L. Mitter*, Sir *P. C. Mitter*, Babus *Hemendra Chandra Sen* and *Surendra Nath Bose*, for the Appellant.

Messrs. *Langford James*, *S. C. Bose*, Babus *Ajit Ghose* and *Nando Lal Banerjee*, for the Respondents.

JUDGMENT.

Ghose, J.—These two appeals by the defendant arise out of a suit for partition and accounts. One is from an order under r. 3 of O. XXIII of the C. P. C. that a compromise be recorded, and the other appeal is from the decree passed in accordance with the compromise. The properties to be partitioned were valued at over 16 lacs of rupees and the claim for accounts was valued at Rs. 10,000. The parties formed a joint Hindu family governed by the Bengal School of Hindu Law. The following genealogical table will show the position of the parties.



Sourendra is guardian for his minor brother Satya Santi. Khoka Lal was a minor till February 1922 and his mother Parul Sundari was appointed guardian of his person and property during his minority under the Guardians and Wards Act. Tarubala took out Letters of Administration of the estate of her husband with the copy of his Will annexed after his death, and it is stated that she is entitled to the properties left by Charu as heir of her son Baidya Nath who had succeeded to the estate of his father. She has however been described as administratrix of the estate of her deceased husband in the plaint. All the persons lived in the family dwelling house at Hooghly till March 1923. It is alleged that since the death of Badya Nath disagreements began to arise between Tarubala and the other members of the family which eventually became so acute that Tarubala found it impossible to dwell in the house at Hughly and felt compelled to leave it on 21st March 1923 and take shelter in the house

of the father of her son-in-law. After leaving the family house the defendant demanded partition or the family properties and accounts from the plaintiffs through her attorney. Some correspondence passed between the attorneys of the plaintiffs and the defendant to which it is unnecessary to refer here. The plaintiffs anticipating the defendant filed the present suit in the Court of the Subordinate Judge at Hughly on the 12th April 1923. It appears that Jiten Roy, father of the son-in-law of the defendant, who is said to be a wealthy man, has been financing the defendant and acting in all matters in connection with the case on her behalf. There was no dispute between the parties as to the shares. But the dispute was whether certain properties belonged to the joint family and whether the joint family was liable for certain debts alleged to have been incurred by Charu. There was also serious controversy about the liability to render accounts by the different parties. One of the matters in dispute was whether certain properties described in schedule '*ga*' attached to the plaint, belonged exclusively to Charu or not. I need only refer to item No. 1 here, which is a colliery called Ranidih-colliery. Plaintiffs allege that this along with other properties in schedule '*ga*' was Charu's exclusive property. It appears that it was heavily mortgaged when it was acquired and the equity of redemption at the time of the suit seems to be of very small value. Defendant alleges that it is joint family property. This involves the question as to how the purchase-money for the property should be debited in accounting as it was paid by Charu out of the common till, and who would be liable to discharge the incumbrance on that property.

The defendant made an application for the appointment of a Receiver on various allegations on the 4th of June 1923. This was strenuously opposed by the plaintiffs. In the proceedings relating to the appointment of a Receiver four matters of dispute emerged as of primary importance. (1) The question of Ranidih Colliery already referred to: (2) a decree of Janaki Nath Roy against Charu and Sourendra for about a lac and fifty thousand rupees; (3) a claim by Hari Mohan Ghose for about fifty thousand rupees for which a suit is now pending on the Original Side of this Court: and (4) a sum of Rs. 50,000 obtained on an insurance policy on Charu's life, which sum was deposited in the common fund of the joint family. The dispute with regard to items (2) and (3) was whether these debts are payable by the joint family or by the defendant alone as representing the estate of Charu, and with regard to the 4th item, whether the defendant was entitled to get the money. Mr. N. N. Sircar, a Barrister and an Advocate of this Court of considerable experience, was instructed on behalf of the lady to conduct her case with regard to the appointment of a Receiver. Jiten Roy and his son Anath, the son-in-law of the lady, were instructing Mr. Sircar on her behalf. Attempts were made by the relations of the parties to bring about a settlement. One such attempt made in July 1923 by Rai Mahendra Chandra Mitra Bahadur, the brother of Ishan Chandra Mitra failed. Another gentleman Mr. S. M. Bose, Barrister-at-law, a relation of the parties, approached Mr. Sircar with a view to settlement It appears that by their efforts certain terms were arranged under which the plaintiffs agreed to pay Rs. 5,72,500 to the lady in certain instalments on certain conditions, and the lady was to give up all claims to the properties. Apparently the lady did not agree to the instalments and the rate of interest proposed. In one of his letters to Anath Mr. Sirkar wrote to him about the authority of Counsel to compromise a case and said, "My client in the case is a *parda nashin* lady incapable of judging for herself.....So far as I am concerned, I have no desire to force a settlement which is unacceptable to client but I certainly reserve to myself the right to retire from the case." This was on the 28th August 1923. The case, however, was not settled and it appears from Mr. Sircar's letter to Jiten Roy of the 29th August that he was preparing himself for arguing the case in Court. The hearing of the matter of the appointment of a Receiver had commenced on the 18th August and partly heard on the 25th August. The arguments were resumed on the 1st September and continued till the 3rd. The order in the order-sheet of that date concludes thus; "He (Counsel for the plaintiff No. 3) has not quite finished when there has been a talk of compromise and the case is adjourned to 5th September 1923 for further hearing." What happened on the 3rd September may be taken from the judgment of the Subordinate Judge as there

is no dispute about those facts before us. He says: "On this date the plaintiff's Counsel Mr. S. R. Das finished his arguments and then has sent a slip of paper containing certain terms of compromise from the Court verandah to Mr. Sarkar who was inside the Court room. As will be seen later on, those terms were discussed and accepted on both sides with some modifications and then embodied in the memorandum, Ex. I, which was signed by the defence Counsel, Mr. Sarkar, and also by the plaintiff No. 1 for himself and the minor plaintiff except the plaintiff No. 3 Khoka Lal, as he was absent from Court that day. The terms were signed by Khoka Lal on the 4th September 1923 in the afternoon." Later on, in his judgment he refers to the evidence of Mr. Sircar and proceeds thus: "From Mr. Sircar's evidence it is clear that the modifications suggested by Mr. Roy were then discussed with him by Messrs. Sircar and Das and ultimately the terms were settled and embodied in the memorandum and signed without any objection on any side." On the 5th September the order of the Court on a petition filed by the defendant was thus: "Defendant has filed a petition consented to by the plaintiffs praying for time for amicable settlement of the suit. *Ordered.*—That the suit be adjourned to the 15th September 1923 for further hearing. Parties do file the petition of compromise on that date." It is apparent that it was not the case of either party on that date that the suit had already been compromised. The order of the 7th September also shows that neither party asserted that the suit had already been compromised. Issues in the suit had not yet been settled. The order of the Court of the 10th September is also relevant, which runs thus: "Plaintiffs pray for a week's time for settlement of issues on the score that there has been a talk of compromise between the parties. *Ordered*—That the suit be adjourned to 15th September 1923 for settlement of issues. Parties do settle the issues on that date if the proposal for amicable settlement falls through." On the 15th September defendant filed a petition praying for a date being fixed for the hearing of her application for the appointment of a Receiver alleging that the proposal for compromise had not been finally settled. On that date plaintiffs filed a petition alleging that the terms had been settled and signed by the plaintiffs and Counsel for defendant as mentioned above. They filed a copy of the memorandum of the terms signed by Mr. Sircar and the plaintiffs and prayed that the compromise be recorded under O. XXIII, r. 3 of the C. P. C. The defendant raised various objections which were overruled by the Subordinate Judge and he ordered the compromise to be recorded and passed a preliminary decree in accordance with the compromise so far as it related to the suit. The defendant appeals both against that order and the decree. Before dealing with the matters in controversy before us, I should refer to the observation of the Subordinate Judge as to the application of the rule in England regarding the authority of Counsel to compromise a case without reference to his client. He appears to have held that the common law rule in England is applicable to this case, and he refers to the cases of *Strauss* v. *Francis* (1) and *Matthews* v. *Munster* (2). This is contested by the appellant. Even if this case exactly came under the rule in those cases I should be extremely reluctant to hold unless compelled to do so by any binding authority, that a rule of practice in England which has its root in different traditions and environments should be applied in this country, particularly in the *mufassil* where people never heard of any such practice. Moreover, there are two lines of cases in England as has been pointed out by Bankes, L. J., in *Shepherd* v. *Robinson* (3). I should rather follow, wherever possible, the *dictum* of Lord Halsbury, L. C. in *Neale* v. *Gordon Lennox* (4), where his Lordship said: "The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of Justice is so far bound by the unauthorised act of learned Counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard." I need hardly say anything further on the point as learned Counsel for the respondents in his careful argu-

(1) (1866) 1 Q. B. 379; 6 B. & S. 365; 35 L. J. Q. B. 133; 12 Jur. (N. S.) 486; 14 L. T. 326; 14 W. R. 634.
(2) (1887) 20 Q. B D. 141; 57 L. J. Q. B. 49; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260.
(3) (1919) 1 K. B. 474; 88 L. J. K. B. 873; 120 L. T. 492; 35 T. L. R. 220.
(4) (1902) A. C. 465 at p. 469; 71 L. J. K. B. 939; 87 L. T. 41; 51 W. R. 140; 66 J. P. 757.

ment did not rely upon the general authority of Counsel to compromise a case.

I shall now deal with the other grounds urged on behalf of the appellants and it would be convenient to take them in the inverse order of the argument of the learned Counsel. The first is that the agreement or compromise is not 'lawful' as mentioned in O. XXIII, r. 3 of the C. P. C. as no leave of the Court to enter into the compromise was obtained under O. XXXII, r. 7 of the Code by the next friend of the minor-plaintiff. The argument is two-fold, (1) that on the terms of sub-r. (2) of r. 7, O. XXXII the agreement is voidable by the defendant as against the adult plaintiffs, as it provides that such agreement shall be voidable against all parties other than the minor. I cannot accept this argument as it seems to me clear that that sub-rule contemplates the case of a minor on one side ranged against adults on the other, as regards the matter of compromise, and that it can have no reference as to the effect of any compromise between adults, although a minor may be a party to the suit. The question as between adults must be governed by the general law and not by this sub-rule. Secondly, it is said, that the compromise was entered into by the next friend of the minor against the imperative provision of sub-r. (1) of r. 7 and, therefore, it was not 'lawful'. But sub-r. (2) lays down what should be the effect of a breach of the provision of sub-r. (1) and I do not think that the agreement can on that ground be set aside as not being lawful. I should state here that application was made by the next friend of the minor-plaintiff for leave of the Court to compromise on the terms set out, on the 12th January 1924 during the course of the argument in the Court below, and that Court sanctioned the compromise on behalf of the minor by the order under appeal. In my opinion this ground urged by the appellant fails.

The second point taken is that the compromise is too vague and uncertain to be carried into effect and should not, therefore, be recorded. If the terms of an agreement are intelligible, and the agreement is binding between the parties it cannot be avoided by one of the parties on the ground that he does not understand whether a particular matter is included in those terms or not. It is urged that the four matters in dispute already stated have not been provided for, as to who should pay the encumbrance on the colliery and who should be liable to pay the debts due to Janaki Nath Roy and Hari Mohan Ghose and what would become of the money received on Charu's life insurance policy. In answer it is urged on behalf of the respondents that the clauses of the agreement are quite clear, because those who take shares in an encumbered property must pay the encumbrance according to their shares and the liability to pay debts is provided for by cl. 2 of the agreement. If the debts referred to are shown in the books of the estate the plaintiffs must pay them. Charu's insurance money is similarly provided for by cl. 3 as coming within the term "deposits". The appellant argues that she never understood the matter to be so. This however is relevant with reference to the question of ratification which I shall deal with later on. But it cannot be said that the terms are unintelligible on that ground. In my opinion the contention of the respondents should be accepted as sound that the terms of the agreement are not vague or indefinite.

I now come to the next two important questions: Whether Jiten Roy had authority to agree to the compromise on behalf of the defendant, and if not, did the defendant ratify the agreement and is, therefore, bound by it. It seems to me that it cannot be doubted on the evidence that Jiten Roy did agree to the compromise and there was discussion between him and Mr. Sarcar as to the terms before Mr. Sircar accepted them. It is immaterial to consider what led Jiten Roy to agree to those terms. We have to decide whether the lady is bound by his acts. The Subordinate Judge says: "Mr. Jiten Roy was all in all in respect to the litigation throughout and he is so even at the present moment. So Mr. Jiten Roy had full authority to compromise and the Counsel engaged by him was equipped with authority to enter into a compromise". It seems to me there is a confusion of ideas here. It is true that Jiten Roy was doing everything in the matter of conducting the litigation for the lady. A *pardanashin* lady in the situation of the defendant must find some body to advance her money for her litigation and to act for her generally, but it would be disastrous to the interests of *pardanashin* ladies

if we were to hold that a *tadbirkar* or a financier is authorised on behalf of a *pardanashin* to compromise a suit on any terms he thinks fit and thereby bind the lady. There is in this case no direct evidence of Jiten Roy's authority and there was no communication from the lady to her Counsel. The defendant as well as Jiten Roy swear as to the absence of any such authority. The Subordinate Judge disbelieves them, but that cannot establish the positive fact of the existence of authority, which must be proved. The learned Counsel for the respondents supports the conclusion of the lower Court somewhat in this way: "Jiten had been doing everything for the lady; there was a talk of compromise on what has been called the 'cash basis'; Jiten had been doing everything in that connection and the lady was prepared to compromise on the 'cash basis' if the terms had been accepted by the plaintiffs. Therefore Jiten had authority to compromise on certain terms, and it may be inferred from his conduct and other circumstances that Jiten had authority to compromise on other terms". I am unable to hold that such an inference can be legitimately drawn. An agent authorised to do a certain act cannot be held to be authorised to do another act in connection with the same business. It is quite true that Jiten was in a position to induce the lady to accept any terms he considered proper, but the decision must ultimately be hers. This was also realised by Mr. Sircar when he wrote to Anath Roy that his client being a *pardanashin* lady was not in a position to judge for herself. I am of opinion that Jiten Roy had no authority to consent to the compromise on behalf of the lady and that his acts cannot bind her. Any person seeking to bind a *pardanashin* by the act of her agent must give strict proof of such agency and there is no such proof in this case. *Azeezoonissa* v. *Baqur Khan* (5). Appellant's Counsel also relies upon the case of *Saratkumari Dasi* v. *Amulyadhan Kundu* (6) while the respondents rely on *Bhut Nath Sircar* v. *Ram Lall Sircar* (7). No case can be on authority as to the facts of another case which must be decided on the evidence in each case; but it is instructive that in *Saratkumari's case* (6) their Lordships of the Privy Council referred to the cases of *Tacoordeen Tewary* v. *Nawab Syed Ali Hossein Khan* (8) and *Shambati Koeri* v. *Jago Bibi* (9) laying down the principles by which the Courts are to be guided in dealing with transactions by *pardanashin* ladies, as applicable to the case of a compromise by a lady. The last case as well as the case of *Sudisht Lal* v. *Sheobarat Koer* (10) which it followed, deal with transactions by agents of *pardanashins*. The cases on the subject are numerous and the principles are clearly laid down, but they are sometimes lost sight of. Even where a deed is executed by a *pardanashin* lady herself there must be evidence of clear understanding by her of what liabilities she is taking and what is being given to her. *Annoda Mohini Roy Chowdhry* v. *Bhuban Mohini Debi* (11). This should be borne in mind in connection with the question of ratification by the lady which I am next proceeding to deal with. The appellant argues that the question of ratification could not be raised by the respondents as this was never alleged in their petitions in the lower Court but was only started during the course of their argument in that Court. I will assume that the question might be raised. There is no direct evidence of any ratification by the lady. During the course of her examination she was not asked a single question on the point. But it is urged that the statements of Jiten Roy and Anath to Mr. Sircar prove beyond doubt that the lady had ratified the transaction; and that is also supported by the conduct of the lady. The facts are these: Jiten Roy enquired of Mr. Sircar more than once on the 4th September through the telephone, whether Khoka Lal, plaintiff No. 3, agreed to the terms and said that the terms were very satisfactory and Khoka Lal would "cry off" Jiten also told him that the lady wanted Rs. 1,500 a month instead of Rs. 750 during the pen-

(5) 17 W. R. 393; 10 B. L. R. 205; 3 Sar. P. C. J. 100 (P. C.).

(6) 71 Ind. Cas. 632; 37 C. L. J. 501; 17 L. W. 481; (1923) A. I. R. (P. C.) 13; 32 M. L. T. 137; 27 C. W. N. 629; 25 Bom. L. R. 548; (1923) M. W. N. 393.

(7) 6 C. W. N. 82.

(8) 1 I. A. 192; 21 W. R. 340; 13 B. L. R. 427; 3 Sar. P. C. J. 368 (P. C.).

(9) 29 I. A. 127 at p. 131; 29 C. 749; 6 C. W. N. 682; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304 (P. C.).

(10) 8 I. A. 39; 7 C. 245; 4 Sar. P. C. J. 222; 5 Ind. Jur. 270; 3 Ind. Dec. (N. S.) 707 (P. C.).

(11) 28 I. A. 71; 28 C. 546; 5 C. W. N. 489; 11 M. L. J. 164; 9 Bom. L. R. 386; 7 Sar. P. C. J. 819 (P. C.).

dency of the partition proceedings as provided in cl. 7 of the memorandum of agreement. Mr. Sircar suceeded in inducing Khoka Lal and the other plaintiffs to consent to pay Rs. 1,400 a month and certain other terms of that clause were modified and put down in writing. Mr. Sircar then read out to Jiten the whole of the contents of the paper by telephone. Anath also saw Mr. Sircar on the 4th and Mr. Sircar asked him whether his mother-in-law has satisfied with the terms particularly about cl. 5 relating to the Hooghly house. Mr. Sircar says, "I understood from him that there was no question of his mother-in-law or her party being dissatisfied but he told (me) that he was sure Khokalal would not sign it." Whether the wish of the Roys was the reason for the thought is not certain, but they deny having made all these statements. They have been disbelieved by the Subordinate Judge and there can be no doubt that they made those statements to Mr. Sarcar. But to hold on the statements of such unreliable persons that the lady ratified the transaction would, in my opinion, be erroneous. They did not apparently give any straightforward answer to Mr. Sarcar that the lady had consented to the compromise and the conduct of the Roys in this matter was tortuous. There is evidence that on the 4th Anath saw, under instructions from his father, a Vakil of this Court and also a Barrister-at-Law with the object of getting out of the compromise, as they were under the belief that Counsel had authority to compromise a suit on any terms he thought fit. On the 6th it was clear that Mr. Sircar understood that there was a desire to get out of the agreement on the part of the defendant. Another fact should be mentioned. The lady was given a Bengali translation of the memorandum by Anath on the evening of the 3rd September. It is clear that she read it then. It is urged that it must be taken that she ratified the transaction since she did not raise any objection to the terms except with regard to the monthly payment of Rs. 750. Assuming that it was she who wanted more money the question is whether she understood all the terms and whether they were explained to her clearly. Did she understand whether she would have to pay the debts of Janki Nath Roy and Hari Mohan Ghose from her own share? Was she told whether those debts were shown in the books of the estate or not? We are informed that these are still matters in controversy. There is no evidence that she consented to the compromise with full knowledge of all these facts and full knowledge is essential on the question of ratification. Similarly it is difficult to say whether she understood that the life insurance money of Charu was given up, because in cl. 2 the word "deposits" has been mixed up with several other matters placed before and after it. I cannot, therefore, hold that there was any ratification by the defendant of the proposed agreement. Further, there was no communication of any ratification by the lady to the plaintiffs before she repudiated the transaction. It is clear that the plaintiffs themselves represented to the Court on the 10th September 1923 that there had been a talk of compromise and never said before the 15th September that there had been a completed agreement to settle. Nothing had happened between the 10th and the 15th which altered the situation. There is, therefore, neither any direct evidence of ratification nor can any inference be drawn from the evidence that the lady did ratify the transaction with full knowledge of the facts and the effect of it. There cannot be any doubt that Mr. Sircar acted as he did under the belief, on the materials placed before him, that he was acting in the best interest of his client. But much as we may desire that this litigation should be compromised and feel that it would be advantageous to the lady to settle it, I do not think, we can force her to accept the terms which she does not like. It is regrettable that the advisers of the parties did not take the ordinary precautions which must be taken while dealing with *pardanashins*.

On these grounds I am of opinion that the order of the lower Court and the decree based on the compromise must be set aside and the case remitted to that Court to be heard from the stage it had reached on the 3rd September 1923.

As all this was brought about by the acts of her Counsel and her advisers I think the defendant should pay the costs of the proceedings in the Court below as ordered by that Court but the defendants will recover her costs in this Court from the respondents. The hearing fee will be 10 gold *mohurs* in both the appeals. The costs of the supplementary paper-book incurred by the defendant are not recoverable by her.

Let the records be sent down to the Court below at once.

Walmsley, J.—I agree.

N. H. *Appeal allowed; Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 795 OF 1921.
March 4, 1925.

Present:—Mr. Justice Krishnan.

MUTHUSWAMI NAIDU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAYULU NAIDY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Partition—Property set aside for feeding the poor—Trust, whether created—Property alienated by trustee—Suit to recover possession of property from transferee, whether maintainable—Procedure.

On a partition taking place between the members of a joint family certain property was set apart for *vanabhojanam dharmam* and it was provided in the partition deed that they should remain with one *M* for the purpose of carrying out the object of the charity. *M* mortgaged the property set apart for charity and the mortgagee brought a suit on his mortgage and purchased the property himself in execution of the decree. Plaintiffs who were parties to the partition deed brought a suit to recover possession of the endowed property on the ground that the mortgage by *M* and the subsequent sale were not binding on the charity:

Held, (1) that the properties having been set apart for *vanabhojanam dharamam*, *i. e.*, for the feeding of the poor, they constituted a public charity. [p. 376, col. 1.]

(2) that *M* was the trustee of the endowed properties; [*ibid.*]

(3) that if *M* had mismanaged the trust he was liable to be removed by the Court in a suit properly framed for that purpose under s. 92 of the C. P. C. but that until he was so removed the plaintiffs had no *locus standi* to sue to recover possession of the property. [*ibip.*]

Second appeal against a decree of the Court of the Subordinate Judge, Trichinopoly, in A. S. No. 96 of 1920 (A. S. No.547 of 1919, District Court), preferred against that of the Court of the District Munsif, Srirangam, in O. S. No. 140 of 1918.

Mr. *T. Narasimha Iyengar*, for the Appellants.

Mr. *V. S. Seshachariar*, for the Respondent.

JUDGMENT.—In this case the suit was for possession of a land set apart for charities at the time when partition was effected between the plaintiffs and the other members of their joint family. The partition deed is evidenced by Ex. A, which says that 46 cents of land are set apart for *vanabhojanam* charities paying an assessment of Re. 1-3. It says in another portion of the document, that D. schedule properties, which are the properties set apart for *vanabhojanam* charities shall remain with Muthukrishna Naidu for *vanabhojanam Dharmam* to be celebrated in the month of Karthagai. The properties were being managed for the purposes of charity by Muthukrishna Naidu, who is the paternal uncle of the plaintiffs. He mortgaged this and other properties to the defendant for a certain sum of money. The defendant brought a suit on that mortgage and got the property sold in Court-auction and purchased it himself with the leave of the Court. The plaintiffs now sue to recover the property for the performance of the charity claiming that the mortgage and the subsequent sale are not binding on the property, the property having been dedicated to charity. The District Munsif gave a decree as sued for but the Subordinate Judge on appeal has dismissed the suit holding that so long as Muthukirshna Naidu and his sons are alive the plaintiffs have no cause of action for the recovery of the possession of the property and that plaintiffs must bring a suit under s. 92 of the C. P. C. to recover possession after removing Muthukrishna Naidu, from the trusteeship and to have a new trustee appointed and to recover the property, for the new trustee to manage it. It is argued before me that the reasons given by the Subordinate Judge are not right. The first contention of the appellants' learned Vakil is that under Ex. A under which the properties are set apart for charity, Muthukrishna Naidu has not been made the sole trustee but all that has been done is that he is to manage the charity on behalf of all members of the family entitled to the property including the plaintiffs; in other words Muthukrishna was merely acting as a manager and not as a trustee; he was to manage on behalf of the members of the family who had divided under Ex. A, for the purpose of carrying on the charity and that when Muthukrishna Naidu's management became injurious to the trust it would be open to the plaintiffs, as members of the charity, to set aside the Muthukrishna Naidu's management and take the management

themselves. I am not satisfied that this view of the provision in Ex. A is correct. I think Ex. A makes Muthukrishna Naidu the trustee for the charity and that before the plaintiffs can interfere and sue for possession of charity property, they must properly and legally remove Muthukrishna from the trusteeship. The charity being *vanabhojanam*, which was admitted to mean, according to the Subordinate Judge, the feeding of the poor, is a public charity; and being a public charity, to which a trustee had been appointed under Ex. A, I do not see how the plaintiffs can set aside that management, at their will and pleasure, and take upon the management themselves. Whether it be on the ground that Muthukrishna has mismanaged the charities, or on the ground that he had become insolvent, either of which may be a good ground, for removing him, I think he cannot be ignored by the plaintiffs; but he must be formally remove by Court and for that purpose a suit under s. 92, C. P. C., is necessary and this suit as brought is, therefore, not sustainable.

It was argued before me by the learned Vakil for the respondent that the object of the trust which is stated to be *vanabhojanam dharmam* in the month of Karthigai is too vague and, therefore, the trust itself should be held not to have been properly constituted. He relied upon *Sarat Chandra Ghose* v. *Pratap Chandra Ghose* (1) and *Runchordas Vandravandes* v. *Parvatibai* (2). I do not think these cases really apply because here we have got a definite object, namely, feeding the poor. I think that it is a proper and good charity. If it were a mere endowment for "*dharmam*" in general, the words used in the Privy Council case above cited, it would mean any kind of charity without any definiteness whatever or if property is dedicated to numerous kinds of charities as was the case in *Sarat Chandra Ghose* v. *Pratap Chandra Ghose* (1) it being left to the trusttee, to do what he thought fit in the matter the dedication should be set aside as being too vague and the charity is not properly constituted; but here the charity is *vanabhojanam*. I think it is definite enough to constitute a proper charity. Though I am not inclined to agree with the respondent's contention in this matter, I think the objection that the suit as framed is not sustainable must be upheld, and the second appeal must be dismissed with defendants' costs.

V. N. V. *Appeal dismissed.*

Z. K.

(1) 21 Ind. Cas. 194: 40 C. 252.

(2) 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N 621; 26 I. A. 71; 7 Sar. P. C. J 543; 12 Ind. Dec. (N. S.) 485 (P. C.)

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION FOR REVISION No. 51 OF 1925.

May 14, 1925.

Present:—Mr. Simpson, A. J. C.

SHIVA SEWAK—DEFENDANT—APPLICANT

versus

JANGLI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XX, r. 4—Judgment of Court, of Small Causes, contents of—Reasons, whether must be given.

A Court of Small Causes need not in its judgment give reasons for its decision and need not give even a concise statement of the case. It is enough if the point for determination is stated and a decision is given thereon.

Revision against an order of the Munsif, Bahraich, dated the 26th February 1925.

Mr. *Wasi Hasan*, for the Applicant.

Mr. *Raj Bahadur*, for the Respondent.

ORDER.—This is a Civil Court revision. The first ground is that the judgment of the Small Cause Court Judge is no judgment in law within the meaning of O. XX, r. 4, C. P. C. O. XX, runs as follows :—

"1. Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

2. Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

It is clear from the language of the Statute that a Court of Small Causes need not give reasons for its decision and need not give even a concise statement of the case. The judgment objected to runs as follows :

"This is a suit on a bond, the defendant denies it. The only issue is :—

Is the bond in suit genuine? I find the issue for the plaintiff. The claim is decreed in full with costs. O. XX, r. 1, C. P. C.

It is certainly short but it complies with the law. There was only one point

for determination. That is stated and the decision is given. The second ground is that the Court failed to give the real point for determination but Counsel has not informed me what the real point was. The pleadings do not disclose any point except one given in the judgment. The third point is that the Court acted wrongly and without jurisdiction in throwing out the written statement put in by the defendant-applicant and not keeping that on the record, and the fourth is that the Court acted without jurisdiction in returning to the applicant his application dated 26th February 1925 without passing any orders thereon. These points are not supported by any affidavit, and it was not explained to me what the substance of them is. It was the first ground on which stress was laid and I was referred to certain decisions which were supposed to mean that a Judge of Small Cause Court is really required by law to do what O. XX, r. 4 expressly sets out that he need not do. If any of these decisions bear this interpretation, I am unable to agree with them. No decision was referred to which is binding upon me. The application is dismissed with costs.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 287 TO 295 OF 1922.

February 4, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

BASANTA KUMAR KAPALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SATINDRA MOHUN TAGORE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of document—One contingency mentioned—Other contingencies, whether excluded—Landlord and tenant—Enhancement of rent—Bengal Tenancy Act (VII of 1885), s. 30—Second appeal—Particular words, construction of—Question of fact.

Whether mention of one contingency in a document excludes all other contingencies is a question to be determined with reference to the particular circumstances of each case. [p. 378, col. 2.]

The right to claim enhancement of rent from a tenant on the ground of a rise in the price of staple food crops was first given to the landlord by s. 30 of the Bengal Tenancy Act. Therefore, a covenant in a *kabuliyat* executed before the passing of the said Act, providing for enhancement of rent on excess lands being discovered in any future survey, does not negative the right of the landlord to claim enhancement under s. 30 of the Act. [*ibid.*]

The meaning attached to a particular word in a particular place is a question of fact and a finding thereon cannot be challenged in second appeal. [p. 378, col. 1.]

Appeal against a decree of the Special Judge, Tipperah, dated the 8th September 1921, modifying that of the Assistant Settlement Officer, Chandpur, dated the 7th June 1920.

Mr. *Mohendra Nath Roy* and Babu *Upendra Kumar Roy*, for the Appellants.

Sir *Provash Chandra Mitter* and Babu *Hiralal Chakravartty*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—These appeals are by the tenants against the decrees of the Special Judge of Tipperah from which the appeals we have just disposed of, namely, S. A. Nos. 2277 to 2280 of 1921, arose. It is argued on behalf of the tenants that certain tenancies which were recorded in the Record of Rights as *raiyati* holdings and which the learned Special Judge has found to be so, ought to have been recorded as tenures. The *kabuliyats* in these cases are described as *sarasari jimbadari kabuliyats*. The whole argument of the learned Advocate for the appellant centres round the meaning of the word '*jimbadari*.' We have been referred to the definition of the word '*zimmadar*' in Wilson's Glossary where it is stated that in Eastern Bengal it means a tenure or an under-tenure; and we are asked to hold that the tenancies created under these *kabuliyats* were all tenures. There is no doubt that in one part of Eastern Bengal, namely, in the District of Backerganj or in portions of that district the expression '*jimbadari*' ordinarily means a tenure; but it does not follow therefrom that the same meaning is to be given to this word in every part of Bengal. The word '*zimma*' is an Arabic word meaning charge or custody and *zimmadars* were created by *zemindars* who took upon themselves the charge of paying the Government revenue payable by the *zemindar*. Gradually the meaning of this word extended and included various sorts of tenancies. Whatever the meaning of this expression may be in other places the learned Special Judge of Tipperah is of opinion that in that district no definite meaning can be assigned to this word. It is also significant that these tenancies which are

described as '*jimbadari*' in the *kabuliyats* were recorded by the Settlement Officer of the District in the Record of Rights as *raiyati* holdings. It is expected that the Settlement Officer was conversant with the meaning attached to the word in the locality. In these circumstances the learned Judge seems to be perfectly justified in holding that, so far as the District of Tipperah is concerned, the word '*jimbadari*' has not been assigned any definite meaning and is of doubtful import. I am of opinion that the question as to whether a particular word bears a particular meaning in a particular place is a question more of fact than of law. In the view that no help as to the character of the tenancy is to be derived from the word '*jimbadar*' the learned Judge proceeded to examine the documents themselves and the conduct of the parties since the creation of the tenancies to ascertain the manner in which the lands were used by the tenants. Considering all these circumstances he has arrived at the conclusion that the tenancies were *raiyati* tenancies. We think that it is a conclusion of fact and it ought not to be disturbed in second appeal. The documents themselves give sufficient indication as to the nature of these tenancies. Therein it is mentioned that the tenants will not be entitled to cut trees, excavate tanks or to build permanent structures on the lands. These restrictions are inconsistent with the permanent nature of a tenure. Then again, conceding that the word '*jimbadari*' meant a tenure, the Judge as a judge of fact was within his rights in not attaching undue importance to a single expression but enquiring into the real nature of the interest on a consideration of the entire record. The result of this enquiry must be taken to be a finding on a question of fact.

The next point taken on behalf of the appellants is that on a consideration of the *kabuliyat* it ought to have been held that the *jama* of these tenancies were fixed and not liable to enhancement. This argument is divided into two heads. In the first place it is argued that the *kabuliyat* shows that the rent is not liable to be enhanced. This contention is based upon the fact that the document nowhere states that the rent should be enhanced except upon a future survey. There is, however, no stipulation in the document that the rent cannot be enhanced in any other way. In this connection it may be profitable to enquire into the meaning of the words '*sarasari jumbadari*' describing the tenancy created by the *kabuliyat*. '*Sarasari*' again is the word which has caused great trouble to the Assistant Settlement Officer. He has launched into a philological research deriving it from the Bengali word '*shor*' to move. It is a Persian word meaning 'ordinary' and it has acquired several other significances. In common parlance, it is used in the sense of rough, average or without any meticulous regard to details. For instance, *sarasari account* or *measurement* means a rough account or measurement. The use of this word in this connection shows that it is an ordinary *jimbadari* tenancy which means that no particular incident such as fixity of rent is attached to the tenancy. The *kabuliyat* does not give any indication that the rent is to be fixed for ever. It is, however, argued that because there is a covenant in the *kabuliyat* that if at the time of any future survey any excess area is discovered the tenant should be liable to pay enhanced rent on the different kinds of land, it indicates that the only mode of enhancement was fixed by the contract and, therefore, the landlord is not entitled to claim enhancement under s. 30, Bengal Tenancy Act, for rise in the price of staple food-crops. The answer to this is that at the time when the document was executed, the Bengal Tenancy Act did not come into operation and the landlord had not acquired the right of enhancing rent under s. 30, Bengal Tenancy Act. Whether mention of one contingency excludes all other contingencies is a question to be determined with reference to particular circumstances of each case. This condition is an ordinary term put in most contracts of that date when only one mode of enhancement of rent was open to the landlord.

The next branch of this argument is that the lease created by the *kabuliyat* was only a confirmatory lease as the tenancy existed from before and, therefore, the presumption under s. 50, Bengal Tenancy Act, should apply to these tenancies. It is remarked by the Assistant Settlement Officer that the defendants did not prove that the rent remained unchanged since the Permanent Settlement and that it was not the defendant's case that the tenancies existed at the time of the Permanent Settlement. In fact, in some of these *kabuliyats* there has been some increase from the original rent and

in all of them the expression used is 'settled,' indicating that the rent was settled at a certain figure. The use of the word settled shows that there was some variation of rent at any rate, the rent fixed by the *kabuliyat* did not exist from the time of the Permanent Settlement. The learned Judge on these considerations has held that the tenants have failed to rebut the presumption of correctness in favour of the Record of Rights. We do not think that in these circumstances we should be justified in interfering with the findings of the Court of Appeal below.

These appeals are accordingly dismissed with costs one gold *mohur* each.

Cuming, J.—I only propose to add a few words to the judgment which has just been delivered by my learned brother. Mr. Roy's argument is as to what meaning should be attached to the word '*jimbadari*.' The learned Advocate contends that the word '*jimbadar*' has been wrongly construed by the lower Appellate Court and he contends that the expression '*jimbadari*' means a tenure-holding and that the Judge has wrongly held it to mean a *raiyati* holding. The meaning attached to a particular word in a particular District is a pure question of fact. Therefore, the finding of the learned Judge as to the meaning of the word '*jimbadari*' is purely a question of fact and cannot be challenged in second appeal.

N. H. *Appeals dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NO. 109 AND 110 OF 1924.

January 21, 1925.

Present:—Mr. Dalal, A. J. C.

GUR PRASAD—PLAINTIFF—APPELLANT

versus

LALMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Execution of decree—Sale—Agreement to set aside sale and refund purchase-money—Suit to recover purchase-money, maintainability of—Construction of document—Compromise—Intention of parties.

After a sale in execution of a decree an agreement was entered into between the auction-purchaser, the decree-holder and the judgment-debtor whereby it was agreed that possession of two-thirds of the property sold should be returned to the judgment-debtor and that the auction-purchaser should withdraw from the Court two-thirds of the purchase-money deposited by him. In the meantime, however, another decree-holder had attached and withdrawn a portion of the money which had been deposited by the auction-purchaser in Court. The auction-purchaser brought a suit to recover two-thirds of the purchase-money on the basis of the agreement:

Held, (1) that the plaintiff's suit being based upon a contract arrived at between the parties after the execution sale had been confirmed was not barred by virtue of the provisions of r. 93 of O. XXI of the C. P. C.; [p. 380, col. 1.]

(2) that the intention of the compromise arrived at between the parties was that two-thirds of the purchase-money paid by the auction-purchaser should be refunded to him and that the judgment-debtor was, therefore, liable to refund that amount to the auction-purchaser and to make up the deficiency caused by the attachment and removal of a portion of the purchase-money by another decree-holder of the judgment-debtor. [p. 380, col. 2.]

In construing a compromise the intention of the parties should be enquired into and not what may appear on the face of the compromise which may have been prepared by some Pleader's clerk of small knowledge and little education. [p. 380, col. 1.]

Second appeal from a judgment and decree of the Subordinate Judge, Kheri, dated the 23rd January 1924, reversing that of the Munsif, Kheri, dated the 22nd September 1923.

Mr. *Ishwari Prasad*, for the Appellant.

Messrs. *Ram Bharose Lal, H. K. Ghosh* and *Raj Narain Shukla*, for the Respondents.

JUDGMENT.—The plaintiff, Gur Prasad, a purchaser at auction-sale held in execution of a decree by a Court, sued for the recovery of ⅔rds of the money Rs. 110 deposited by him in Court at the time of the sale. The sale was confirmed on 3rd April 1923. Lalman defendant to the present suit was decree-holder and the judgment-debtors were Raghu Nandan and others, defendants Nos. 2 to 5. After the sale was confirmed defendants Nos. 6 and 7 Jaswant and Baijnath sued for possession of ⅔rds of the grove by title paramount. The defendant No. 8 is one Gur Narain, another decree-holder of defendants Nos. 2 to 5, who obtained rateable distribution and removed Rs. 54-5-4 out of the money deposited by the plaintiff.

To the suit brought by Jaswant and Baijnath defendants Nos. 6 and 7 Gur Narain was not a party. The suit was compromised and it was agreed between the plaintiff, the decree-holder Lalman and the judgment-debtors, defendants Nos. 2 to 5 that the plaintiffs of that suit shall receive possession of ⅔rds of the grove, that Lalman shall receive ⅓rd of the money

deposited by the plaintiff of the present suit Gur Prasad and that the balance of the money shall be removed by Gur Prasad.

The Trial Court exempted Gur Narain but passed a decree for ⅔rds of the balance left after deducting Rs. 54 odd out of Rs. 110. This decree was passed against Lalman.

On appeal the learned Subordinate Judge of the lower Appellate Court was of opinion that the plaintiff was entitled to recover ⅔rds of Rs. 110 but in his opinion the suit was barred under the provisions of O. XXI, r. 93. He referred to a judgment of a learned Judge of this Court reported as *Ram Dayal* v. *Rampal Singh* (1) where it was held that return of money from Court may be obtained under O. XXI, r. 93 and that no separate suit lay. Both Lalman and Gur Prasad had appealed to the lower Appellate Court; Lalman's appeal was decreed and Gur Prasad's dismissed.

Two second appeals were instituted by Gur Prasad plaintiff in this Court.

I am of opinion that the facts of this case are distinguishable from those of the ruling cited by the lower Appellate Court. In the present case there was a fresh contract between Lalman, the defendants Nos. 2 to 5 and the plaintiff, and the plaintiff can sue on the basis of that contract. The plaintiff agreed to give up ⅔rds of the grove on the defendants Nos. 2 to 5 promising to refund to him ⅔rds of the deposit of Rs. 110. Defendants Nos. 2 to 5 are not represented here and proceedings have been taken against them *ex parte*. The learned Counsel, who appeared for Lalman, pointed out to the Court that the defendants Nos. 2 to 5 can take shelter behind the express term of the contract that the money was to be removed from Court. In my opinion the intention of the parties should be inquired into and not what may appear on the face of a compromise like the one between the parties which must have been prepared by some Pleader's clerk of small knowledge and little education. I hold that Gur Prasad consented to make over possession of ⅔rds of the grove to Jaswant and Baijnath on defendants Nos. 2 to 5, the judgment-debtors, promising to refund ⅔rds of the sale price paid by the plaintiff. According to the compromise Lalman was to receive ⅓rd of that amount and he has removed that amount.

(1) 51 Ind. Cas. 95; 22 O. C. 42, 6 O. L. J. 160.

For these reasons I am of opinion that a suit can lie against Lalman and the defendants Nos. 2 to 5, who were parties to the compromise, which substituted a new contract between the parties. Gur Narain was no party to that compromise and cannot be held liable to refund by a separate suit the money which he had withdrawn from Court. The appeal must fail against Gur Narain.

I think that it must fail against Lalman also because Lalman has done nothing beyond what was contracted for under the compromise.

As against defendants Nos. 2 to 5 the appeal must succeed. They are liable to pay to the plaintiff Rs. 73-5-3. It has been intimated to me that Rs. 19-8 are still lying in the Executing Court, so the equitable plan would be to grant a decree for the balance and direct the plaintiff to remove Rs. 19-8 from Court.

I set aside the decree of the lower Appellate Court so far as defendants Nos. 2 to 5, Raghunandan, Baldeo and Ram Chandra and Bhagwan minors under the guardianship of Raghunandan, are concerned and pass a decree against them for Rs. 53-13 3 with proportionate costs of all the Courts. I further direct that the plaintiff shall be entitled to recover the sum of Rs. 19-8 lying n deposit with the Executing Court.

Lalman shall bear his own costs of this Court while Gur Narain shall receive his costs of this Court from the plaintiff.

If this sum of Rs. 19-8 has been removed from the Executing Court either by Lalman or by defendants Nos. 2 to 5, the plaintiff shall be entitled to a further decree for that amount recoverable either from Lalman or from defendants Nos. 2 to 5 which ever of these parties removed the deposit.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 544 TO 555 OF 1923.

September 19, 1924.

Present:—Mr. Justice Devadoss.

APPASWAMI MOITHAI RAO—PLAINTIFF—APPELLANT

versus

GOPALASWAMY CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (11)

Landlord and tenant—Kasavargam *tenant in Tanjore District, house-site occupied by*—"Pagudi," *whether rent—Suit to recover* "pagudi"—*Jurisdiction of Revenue Court.*

In the absence of a finding that a house-site occupied by a *kasavargam* tenant in the Tanjore District was originally *raiyati* land or was once used for agricultural purposes, a payment made by the tenant to the landlord in respect of the house which is known as "*pagudi*" is not "rent" within the meaning of s. 3 (11) of the Madras Estates Land Act, and a suit by the landlord for the recovery of such "*pagudi*" is not maintainable in the Revenue Courts. [p. 381, col. 2.]

The mere fact that the tenants have been paying illegal cesses or that the landlord was able to exact something from the tenants for a number of years would not give to the landlord the right to collect such cesses. [p. 382, col. 2.]

Second appeals against the decrees of the District Court, West Tanjore, in A. S. Nos. 658, 659, 733 to 738 of 1920 and 80 to 83 of 1921, preferred against the decree of the Court of the Deputy Collector, Kumbakonam, in Summary Suits Nos. 8, 16, 9 to 12, 14, 15, 17, 13, 19 and 18 of 1919 respectively.

Mr. *E. Vinayaka Rao*, for the Appellant.

Mr. *A. C. Sampath Iyengar*, for the Respondents.

JUDGMENT.—The simple question in these second appeals is whether the plaintiff is entitled to get the *pagudi* from the defendants. Various contentions were raised in the Courts below. The District Judge found that the plaintiff was a land-holder within the meaning of that word as used in the Estates Land Act. Granting that the plaintiff is a land-holder, the question is whether he is entitled to get *pagudi* from the defendants.

The contention on behalf of the appellant is that the defendants are *kasavargam* tenants and, therefore, they are bound to pay the *pagudi* to the plaintiff. In the first place the tenure known as *kasavargam* tenure has not been the subject of any decision. The incidents of such a tenure are not known though Sadasiva Iyer, J., in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (1), thinks that *kasavargam* tenants are tenants newly introduced into a village by the land-holder for cultivation purposes on condition that they would give up their dwelling sites to the land-holder when they ceased to do cultivation. With due respect to the learned Judge I am unable to accept this as the incident of *kasavargam* tenure.

The plaintiff relies upon a *paimaish* account in which the word *kasavargam* is used. That would not decide the point for the land in dispute was occupied for several generations as house site. I am informed that there are 700 houses in this village and all of them seem to be on the same kind of tenure as the defendants in the present suit. Whatever may be the nature of the *kasavargam* tenure the question is whether the plaintiff is entitled to get *pagudi* from the defendants. The Deputy Collector who tried the case thought that *kasavargam* tenure meant service tenure and the services having been dispensed with the land-holder is entitled to money rent. There is no evidence as to the nature of the services and as to how long they were performed and when they ceased. There is no warrant for the assumption that money rent was imposed in lieu of services. Mr. Vinakaya Rao relied upon Ex. F as supporting his contention. Exhibit F is an agreement entered into between some of the persons who owned houses on the village site and the land-holder. It is suggested by Mr. Vinakaya Rao that all persons who owned houses in the village were parties to the document. Granting that that was so, this document cannot be relied upon for the purpose of enforcing the present claim. Under that document the house-holders undertook to pay a number of cesses or honorary payments to the landlord. Under the present Estates Land Act such cesses and voluntary payments could not be enforced as rent. Apart from that the question is whether *pagudi* can be called rent. Rent is defined in the Estates Land Act as what is lawfully payable in money or in kind or in both to a landlord for the use or occupation of land in his estate for the purpose of agriculture and in other words whatever is payable on account of the use and enjoyment of land taken for cultivation. There is no evidence that these house sites were ever agricultural land. Mr. Vinakaya Rao's argument is, it must have been dry or *punjah* land and persons who owned houses must have built them on such dry land. There is no evidence that the sites of houses were *raiayti* land or were used for purposes of agriculture. The onus is upon the land-holder to prove that his land was a *raiyati* land and that it was afterwards converted into house sites.

Much reliance is placed upon the presumption which the Courts have to raise under s. 23 and under s. 185. In the case of s. 28 that presumption will arise only

(1) 41 Ind. Cas. 788; 33 M. L. J. 84.

when there is a dispute whether the land is *raiyati* land or waste land; in the case of s. 158 the presumption would arise when the contest is whether the land is private land or *raiyati* land. A *raiyati* land does not include tank beds, threshing floors, cattle stands, village sites etc. Here we find there are a number of houses in the village. It is necessary to prove that the people built on land which was used for agricultural purposes before the plaintiff could claim rent from them. Reliance is naturally placed on the fact that the backyards are used for the purpose of raising kitchen vegetables and plantains etc. Anyone who is acquainted with the habits of the people of this Presidency would know that plantain leaf is a necessary thing and every backyard however small, always has a few plantain trees and a few cocoanut trees. The raising of kitchen vegetables or planting a few plantain trees or cocoanut palms would not convert a *nathem* or a house site or a backyard of the houses. It is quite clear that the owners of the houses were weavers and the back-yards were used for weaving purposes and these people have been there for several generations and the backyards having been so used for all those years, the onus is heavy upon the plaintiff to make out that the backyards were not used for any other purpose than for the purpose of spreading the loom on them. Mr. Vinakaya Rao wanted to rely upon the decisions in several cases to which the plaintiff and some of the defendants as well as some of the people who owned houses were parties. But those decisions do not stand in the way of the defendants raising their present contention. As I have already observed the Estates Land Act makes only rent recoverable from a tenant and so long as what is claimed is not rent, it does not matter whether they have been paying *pagudi* for a number of years or not. It has been held in several cases that the mere fact that the tenants were paying illegal cesses or that a landlord was able to exact something from the tenants for a number of years, would not give a right to the landlord to collect them. Whatever may be the right of the landlord against the defendants, certainly what he now claims is not rent and the District Judge was perfectly right in holding that the Revenue Court had no jurisdiction to entertain the suit for the enforcement of *pagudi*. I think the District Judge ought to have returned the plaints to be presented to the proper Court. Evidently the plaintiff did not ask for the return of the plaints and the fault is entirely on him. I think, in the circumstances, the proper order would be to direct, that the plaints be returned to the plaintiff for presentation to the proper Court, but inasmuch as all this litigation has been the result of the plaintiff filing a suit in the Revenue Court and carrying it on appeal to the District Court and here, I think he is bound to pay the defendants the costs incurred by them in all the suits in all the Courts up till now. Vakil's fee Rs. 300.

V. N. V. *Plaints returned to.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 196 OF 1924.

March 26, 1925.

Present:—Mr. Daniels, J. C.

DAN BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

SAHEB DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Partition—Khewat *recording separate* khatas *with definite shares and also* shamlat khata, *construction of—Presumption—Suit to disturb partition, maintainability of.*

Where a partition *khewat* records two separate *khatas* with definite shares and a third *khata* which is described as *shamlat* of the two former the *khewat* will always be construed as meaning, unless the contrary is stated, that the shares of the parties in the *shamlat khata* are in the same proportion as the shares which they hold in severalty. If evidence is admissible at all to rebut this construction very strong evidence would be necessary. [p. 383, col. 2.]

When, however, the partition has once been finally completed and confirmed, such evidence is not admissible and a suit the object of which is to disturb the allotment of the land in the final partition is not maintainable as being obnoxious to the provisions of s. 233 (*k*) of the U. P. Land Revenue Act. [*ibid.*]

Second appeal under s. 100, C. P. C., against a decree of the Subordinate Judge, Sultanpur, dated the 8th February 1924, reversing that of the Munsif, Sultanpur, dated the 12th November 1923.

Mr. *Bisheshwar Nath*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This litigation arises indirectly out of a partition which took place in the year 1910. By a previous partition two *pattis* Rana Singh and Guman Singh had been formed and certain land was *shamlat* to the two *pattis* in definite proportions. Bir Sahai, the predecessor-in-interest of the plaintiff, was a co-sharer to the extent of a half in *patti* Rana Singh. At the partition of 1910 a *patti* named after Bir Sahai was formed. In that *patti* were several *khatas*. Of these we are only concerned with *Khata* No. 3 belonging to Bir Sahai, area 22 *bighas* 13 *biswas*.

Khata No. 4 belonging to Sahib Dayal etc., defendants, area 11 *bighas*, 14 *biswas* and *Khata* No. 5, *shamlat* of *khatas* Nos. 3 and 4. Area 17 *bighas*, 13 *biswas*, 10 *biswansis*.

The plaintiff's case is that by calculating the separate share which his predecessor owned prior to 1910 and adding to it the share which he held in the *shamlat patti*, the total comes to 40 *bighas*, 9 *biswas*. In 1910 he was allotted a separate *khata* of 22 *bighas*, 13 *biswas* and is entitled to the balance of 17 *bighas*, 9 *biswas* out of the *shamlat*. The defendant on the other hand owned altogether 11 *bighas*, 17 *biswas*, 10 *biswansis*. He got a separate *khata* of 11 *bighas* 14 *biswas*. Therefore, only 3 *biswas*, 10 *biswansis*, or in round numbers 4 *biswas* remained to him in the *shamlat khata* and the remainder belonged to the plaintiff. The learned Munsif decreed his suit. The learned Subordinate Judge has dismissed it. He holds on the evidence that the plaintiff has failed to establish his allegations as to the disposal of the *shamlat* land shown in the *khewat* of 1314 F. or to establish his right to the amount which he claims in the partition of 1910. He is not prepared to rely on a paper called the *fard hissakashi* to show that part of the defendant's *shamlat* was transferred to Mahadeo Prasad. This is a finding of fact based on evidence. The only error of law alleged is where the learned Subordinate Judge goes on to say that he is not satisfied of the correctness of the respective shares of *shamlat* recorded in the *khewat* of 1314 F. There is of course a presumption under s. 44 of the Land Revenue Act of the correctness of this entry. This error however does not effect the Subordinate Judge's conclusion. The plaintiff has brought his case on an erroneous assumption. He assumes that there is a *hiatus* in the partition *khewat* of 1910, and that the *khewat* is silent as to the shares which the parties respectively held in the *shamlat*. This is by no means the case. Where a partition *khewat* records two separate *khatas* with definite share and a third *khata* which is described as *shamlat* of the two former, the *khewat* will always be construed as meaning, unless the contrary is stated, that the shares of the parties in the *shamlat khata* are in the same proportion as the shares which they held in severalty. If evidence were admissible at all to rebut this construction very strong evidence would be necessary. It appears to me however that when the partition has once been finally completed and confirmed, such evidence is not admissible, that the appellant is really trying to disturb the allotment of land by a partition, and that the respondent is right in contending that his suit is obnoxious under the provisions of s. 233 (*h*) of the Land Revenue Act. On all these grounds I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND APPEAL No. 78 OF 1925.

April 22, 1925.

Present:—Mr. Justice Stuart and Mr. Justice Boys.

FIRM KALLU MAL-DHAKKAN LAL—PLAINTIFF—APPELLANT

versus

FIRM BHAWANI DASS-REKHAB DAS—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 34—Book of account, entries in, corroboration of—Surrounding circumstances, whether may be referred to.

Section 34 of the Evidence Act does not limit in any way the nature of the material upon which the Court may rely to support the entries in a book of account. Such material may be in the shape of temporary vouchers, receipts or other documentary evidence. It might take the shape of sworn oral testimony. It is open to a Court to arrive at a finding as to the genuineness of a book of account by reference to the circumstances surrounding the transactions entered therein and the circumstances surrounding the existence of the account book. [p. 384, col. 2.]

Second appeal against a decree of the District Judge, Bulandshahr, dated the 13th of December 1924.

Dr. *N. C. Vaish*, for the Appellant,

JUDGMENT.—This is a case in which the plaintiff obtained a preliminary decree for rendition of accounts from the defendants who were commission agents. The Munsif referred the question of the accounts to a Commissioner. His order referring the case was not exactly in terms of O. XX, r. 17 of the C. P. C. but we may take it for the present purposes that it was an order intended to be under that rule. In view of our opinion on other points, we do not decide this and it is not necessary for us to do so. He ordered that account books should be filed in Court and gave the Commissioner authority to consider those account books. Twelve account books were filed and subsequently during the proceedings before the Commissioner four further account books were filed, the last of which to be filed is what is known as a "*sauda bahi*" or a "transaction account book". It is in regard to the acceptance of this *sauda bahi* in evidence that a second appeal has been filed in this Court. The Munsif arrived at a determination of the amount due holding the *sauda bahi* to be of no value. The lower Appellate Court arrived at a different determination holding the *sauda bahi* to be reliable. It has seldom been our fortune to read a more painstaking and capable judgment than that of the lower Appellate Court. The learned District Judge has gone into every single point with the most commendable thoroughness. It is objected before us that the *sauda bahi* was not admissible in evidence because it was not supported by any other evidence and, therefore, could not, in view of the provisions of s. 34 of the Evidence Act, be relied upon as the sole evidence of the transactions to which it purported to testify. The first question which arose on this point was, was there in fact nothing before the Commissioner and the Munsif to support the *sauda bahi* so as to render it inadmissible in view of the terms of s. 347? A second question which might arise is, do the terms of O. XX, r. 17 override the provisions of s. 347? The learned Judge stated this latter question at page 12 of his original judgment but he did not decide it nor do we find it necessary to do so, for we find that there has, in fact, been no breach of the provisions of s. 34 of the Evidence Act. The learned District Judge has dealt with this matter at page 13 of his judgment. The nature of the material required to support a *bahi* is not set forth in s. 34 of the Evidence Act; that only states that the statements in a book of account "shall not be alone sufficient evidence to charge any person with liability". It does not limit in any way at all the nature of the material upon which the Court may rely to support the statements in the books of account. Such material may take the shape of contemporary vouchers, receipts or other documentary evidence. It might take the shape of sworn oral testimony. It is not suggested in this case that there was any documentary evidence beyond the other books of account. We have not thought it necessary to consider how far those other books of accounts might or might not in themselves, though subsequent in date, support the *sauda bahi*. The point is at least arguable. We are left in doubt as to whether there was or was not any oral evidence in support of the *sauda bahi*. It is alleged on behalf of the appellant—the respondent is not represented here—that there was no such oral evidence. All that we have been able to find is the document in the form of an application filing the *sauda bahi*, apparently at the instance of the Commissioner because we find a hint of its existence in the last words of the deposition of the *munim*. The learned District Judge has referred to the possibility of corroboration by oral evidence but has not referred to any specific oral evidence given in this case; but he has referred in detail to many of the circumstances surrounding the transactions between the plaintiff and the defendants and the circumstances surrounding the existence of this *sauda bahi* and from all these circumstances it is clear that he accepted the genuineness of the *sauda bahi*. There in nothing in s. 34 to limit or define the material which the Court may rely upon as corroborating the account books. We think, therefore, that the learned Judge was justified in relying upon these account books and we may add that he was fully justified in fact. Under these circumstances there is no need to consider the second question that might have arisen as to whether O. XX, r. 17, C. P. C. supersedes the terms of s. 34 of the Evidence Act. Accepting, therefore, the findings of the learned Judge as good in law we dismiss this appeal under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

May 7, 1925.

Present:—Lord Atkinson, Lord Carson, and Sir John Edge.

Musammat BHAGWANI KUNWAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MOHAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Separation—Presumption—Burden of proof—Revenue papers, definition of shares in, effect of—Widow of joint member allowed to remain in possession in lieu of maintenance, effect of.

Given a joint Hindu family the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father. A person who alleges that the members of a joint Hindu family have separated must prove, unless it is admitted, that there was a separation at some material time. [p. 386, col. 1.]

A definition of shares in revenue and village papers by itself affords a very slight indication of an actual separation in a Hindu family and is insufficient to prove, contrary to the presumption of law, that the family to which the entries refer had separated. [p. 390, col. 2.]

A widow of a sonless prominent member of a joint Hindu family is sometimes allowed by the family to occupy possession of some of the family's land for her life for her maintenance. [p. 386, col. 2.]

Appeal from the decree of the Allahabad High Court, dated the 18th March 1920, reversing that of the Subordinate Judge, Cawnpore, dated the 30th November 1916.

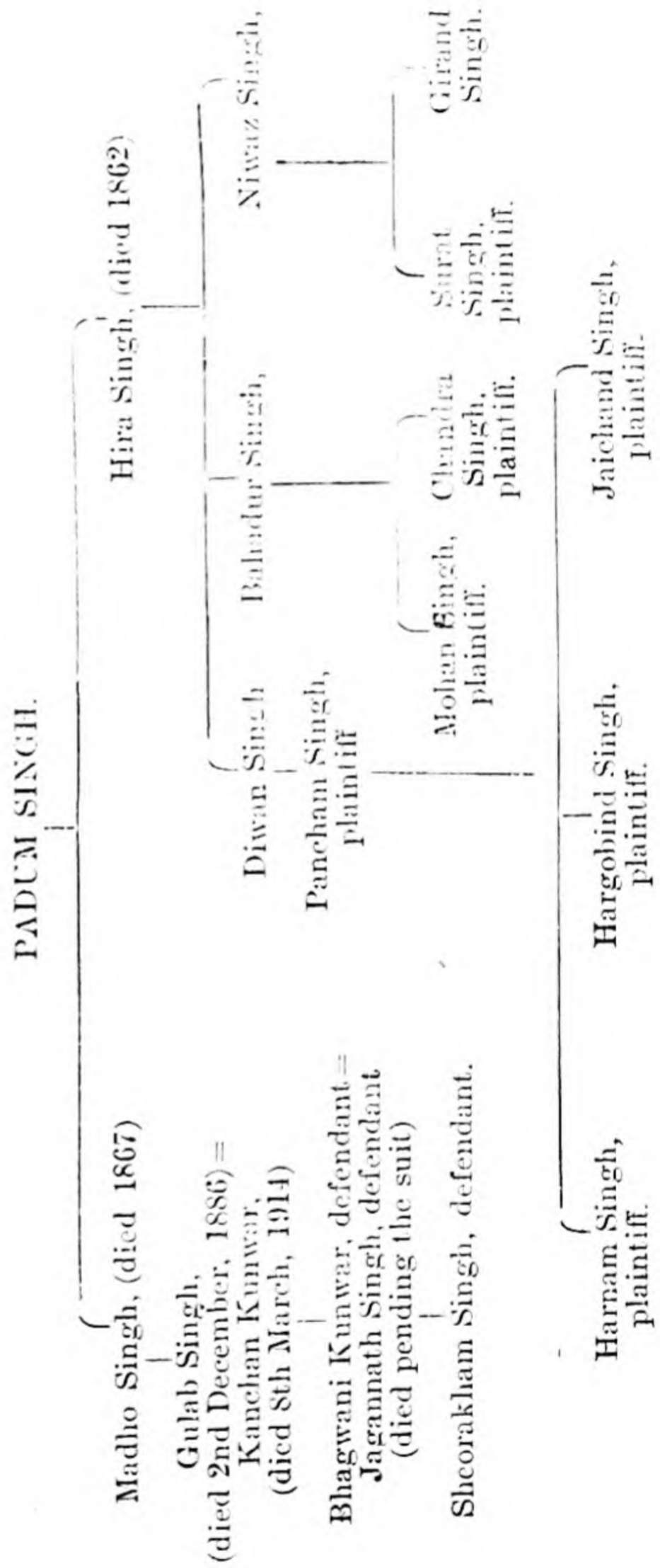
Messrs. *L. De Gruyther* and *J. M. Parikh*, for the Appellants.

Messrs. *George Lowndes* and *W. Wallach*, for the Respondents.

JUDGMENT.

Sir John Edge.—This is an appeal by defendants from a decree, dated the 18th March 1920, of the High Court at Allahabad, which reversed a decree, dated the 30th November, 1916, of the Subordinate Judge of Cawnpore, by which the suit had been dismissed.

The suit in which this appeal has arisen is a suit in which the plaintiffs claimed a decree for the proprietary possession of an eight-anna share in each of the villages of Auria (Auria Tikra) and Aurangpur Gahdewa and certain fractional shares in four other *zemindari* villages in the Cawnpore District by dispossession of the defendants, who were in possession and denied the title of the plaintiffs. The Subordinate Judge dismissed the suit; the High Court on appeal gave the plaintiffs the decree for the possession which they claimed. The parties were Hindus of the Thakur Gaur caste and were subject to the law of the Mitakshara. The following pedigree will sufficiently show how the parties were related, but their Lordships do not know which of the brothers Madho Singh and Hira Singh, or of the brothers Diwan Singh and Bahadur Singh, was the elder:—



The suit was brought on the 12th November 1914, in the Court of the Subordinate Judge of Cawnpore after the death of *Musammat* Kanchan Kunwar. When the suit was brought Bahadur Singh was about 80 years of age and Niwaz Singh was about

76 years of age. As Diwan Singh was not a party to the suit, although his son Pancham Singh was a plaintiff, their Lordships have assumed that Diwan Singh was then dead. The most material question in the suit is whether Gulab Singh was, when he died, joint with, or separate from, his cousins Diwan Singh, Bahadur Singh and Niwaz Singh.

Padum Singh and his sons Madho Singh and Hira Singh admittedly had constituted a joint Hindu family. Padum Singh died before his sons, and at his death Madho Singh and Hira Singh were joint. It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. That material time in this case must have been before the death of Gulab Singh. Hira Singh had died in 1862, and Madho Singh had died in 1867. Gulab Singh died sonless in 1886. The case of the plaintiffs was, and is, that Gulab Singh was until he died a member of the joint family, which, until he died, consisted of the then living male descendants in the male line of Padum Singh. The case of the defendants-appellants, is that Madho Singh and Hira Singh had separated, and consequently that Gulab Singh was separate from his cousins Diwan Singh, Bahadur Singh and Niwaz Singh. It happened in 1896 or in 1898 that the then members of the joint family separated. That separation did not take place at a material time so far as this suit is concerned, but the learned Subordinate Judge incorrectly held that the separation in 1896 or 1898 shifted the burden of proof, and that it was for the plaintiffs to prove that Gulab Singh was joint when he died in 1886. How far that misunderstanding of the law affected the Subordinate Judge in his consideration of the evidence in this suit, it is impossible to say, but he found on the evidence that Gulab Singh was separate at the time of his death. The High Court found on the evidence that Gulab Singh was, when he died, a member of the joint family.

Their Lordships will later express the conclusion at which they have arrived as to whether there had or had not been a separation before Gulab Singh died, but before doing so they will refer to another question which must be considered, although they agree with the conclusions at which the Courts below were in agreement on that subject. Their Lordships will now briefly state what that other question is.

The property in question in this suit came into the possession of Kanchan Kunwar shortly after the death of her husband Gulab Singh. The question which their Lordships will first consider is how and in what right did Kanchan Kunwar obtain and hold possession. That property had been entered in the revenue and village papers in the name of Gulab Singh, and Kanchan Kunwar, as his widow claimed to be entitled to the possession of it. That claim could not be maintained unless Gulab Singh had died as a separated Hindu. That claim by Kanchan Kunwar was, in fact, made, and she got possession, but, according to the case of the plaintiffs, she was allowed by Diwan Singh, Bahadur Singh and Niwaz Singh, who were then of age, to take possession under an agreement of compromise made between her and them, by which she was allowed possession of the property for her life for her maintenance, and not as property of which she had any right to the possession.

Gulab Singh was older than his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, and after Hira Singh and Madho Singh had died he was the head of the family, and appears to have acted generally as the family manager, and some villages, which were purchased after the death of Madho Singh with the income of the ancestral villages of the family, were purchased in the name of Gulab Singh. During Gulab Singh's lifetime his wife Kanchan Kunwar must have occupied a position of some importance in the family, and after her husband's death she doubtless wished to manage her own affairs independently of any interference by her husband's relations.

It has not been asserted in argument before their Lordships in this case, or, so far as they are aware, in any case before the Board, and they believe that it could not with truth be asserted before an Indian Court, that a widow of a sonless prominent member of a Hindu joint family is never allowed by the family to occupy possession of some of the family's land for her life for her maintenance. Their Lordships find that Kanchan Kunwar obtained possession of the lands in question under that agreement of compromise for her life for her maintenance, and not in any right of hers as Gulab Singh's widow. The agree-

ment of compromise was an oral agreement, but there is documentary evidence which is only consistent with such an agreement, and to some of that documentary evidence reference will now be made.

During Gulab Singh's lifetime his name had been entered in the revenue papers as that of the owner in possession of shares in some villages, and the names of his cousins, Diwan Singh, Bahadur Singh and Niwaz Singh, had been entered in the revenue papers as the names of the owners in possession of shares in the same or other villages. When Gulab Singh died it was necessary that application for mutation of names should be made to the revenue authority of each village in the revenue papers of which his name had been entered as the owner of a share or shares. Such applications are made by or on behalf of the person or persons claiming to be entitled to the share or shares of the deceased share-holder, and when opposed an inquiry is held by an official of the Revenue Authority.

An application for mutation of names was made on Gulab Singh's death in the case of each village in which his name was entered in the revenue papers as the holder of a share. Those applications were made by Diwan Singh, Bahadur Singh and Niwaz Singh, and as Kanchan Kunwar was known to be a claimant for mutation of name, her deposition was taken. Their Lordships will now refer, by way of illustration, to what happened in the case of the village of Aurangpur Gahdewa, in respect of which the name of Gulab Singh was entered in the Settlement *Khewat* of 1873 as the owner of an eight-anna share.

"No. 741c.—APPLICATION OF BAHADUR SINGH, ETC.

"Name of village—Aurangpur Gahdewa, *pargana* Bilhaur. Head—mutation on the ground of succession.

"Substance.—Application for expungement of the name of Gulab Singh, deceased, and entry of the names of Bahadur Singh, Diwan Singh and Newaz Singh, cousins, in respect of an 8-anna *zemindari* share under s. 97, Act No. XIX of 1873.

"SHOWETH:—

"That Gulab Singh, *zemindar* of an 8-anna share in village Aurangpur Gahdewa, *pargana* Bilhaur, died on the 7th of *Aghan Sudi, Sambat* 1942. These three cousins, Bahadur Singh, Niwaz Singh and Diwan Singh, are the heirs in possession of the property of the deceased in equal shares. He has left no issue besides these applicants. It is, therefore, prayed that the name of the deceased may be removed from, and those of these heirs entered in the public records.

"PETITIONERS:—Bahadur Singh, Diwan Singh and Niwaz Singh, heirs of Gulab Singh, *zemindar* of village Aurangpur Gahdewa, *pargana* Bilhaur. Dated the 12th February 1887.

"Filed by Diwan Singh and written by Ram Narayan.

"(Sd.) DIWAN SINGH, in autograph.

"This application was made to-day by Diwan Singh.

"Held.—Let the Registrar Kanungo first make a report as to the correctness of the share. 12th February 1887.

"Signature of Naib-Tahsildar."

The application is in the vernacular. The term which has been translated as "heirs" must mean not heirs in the English acceptation of the term but the persons who claimed as surviving co-sharers of Gulab Singh to have their names entered.

On the 4th April, 1887, Kanchan Kunwar made her deposition before the Kanungo. So far as is material it was as follows:—

"Gulab Singh, my husband, the *zemindar* of *Mauza* Aurangpur Gahdewa, *pargana* Bilhaur, died a natural death, four months ago. The deceased left no son. Regarding the entry of name in respect of the property left by the deceased husband, some points have been agreed to be settled between Diwan Singh, Bahadur Singh and Niwaz Singh and me. For the Settlement of the same I have sent for Jagannath Singh, my son-in-law, from *Mauza* Katra, district Banda. On his arrival, the points will be settled mutually in a week and then my general-attorney, Roshan Lal, will present himself and will make statement about the mutation of names in this case. So long as the points are not settled mutually, I cannot make any statement about the entry of name in respect of the property of the deceased."

Subsequently *Musammat* Kanchan Kunwar made another deposition in the presence of the Kanungo in relation to entering the names in respect of Aurangpur Gahdewa, which, as translated, was, so far as is material, as follows:—

"The points which were to be settled between Diwan Singh and others and me have all been settled and, under the mutual agreement, the entire property left by my

deceased husband in *Mauza* Aurangpur Gahdewa, *pargana* Bilhaur, has been allotted to me and put in my possession. Therefore, the name of the deceased may be struck off and my name entered in respect of the entire property left by the deceased in the said village. Diwan Singh, Bahadur Singh and Niwaz Singh, the heirs of the deceased, have no connection with the property in the said village in my lifetime.

"Signature of Kanungo."

The words "Diwan Singh, Bahadur Singh and Niwaz Singh, the heirs of the deceased, have no connection with the property in the said village in my lifetime" can only mean that Kanchan Kunwar was allowed to be in possession for her life for her maintenance. The learned Judges of the High Court in their judgment observed in reference to that deposition of Kanchan Kunwar :—

"It may be remembered that there is always a reluctance among members of a Hindu family to confer on female members an absolute interest in property belonging to their husbands or fathers, and had it been intended that Kanchan Kunwar was to have an absolute interest in the property [illegible] to be recorded in her name, [illegible] ould have been distinctly stated in the depositions not only of Kanchan Kunwar herself, but also of the male members of the family whose statements were also recorded in the mutation proceedings. We are, therefore, unable to hold that Kanchan Kunwar acquired an absolute interest under the compromise which was effected after the death of Gulab Singh."

Musammat Kanchan got possession of the shares in the villages in question under that agreement of compromise and she never had any other right or title to them, and she could not under the circumstances obtain against the co-sharers of the joint family any title by prescription. It has, however, been suggested in this appeal that she had acquired a title by prescription. Whether she acted in accordance with that agreement of compromise or contrary to it, is immaterial; she had no other title to the villages in question and could grant or convey no title of any kind to the villages which would be effective for any purpose beyond the term of her own life.

Musammat Kanchan Kunwar, as appears by her deposition of the 4th April 1887, wished to consult her son-in-law, Jagannath Singh, on the subject of the agreement o compromise. As will now appear, her son-in-law, Jagannath Singh, who was a defendant in this suit and is now dead, but is represented by his son Sheorakham Singh, must have had with his wife Bhagwani Kunwar, who was Kanchan Kunwar's daughter, much influence over Kanchan Kunwar. On the 12th May, 1892, *Musammat* Kanchan Kunwar by a deed purported to give the eight-anna share in the village Auria to her daughter Bhagwani Kunwar. In that deed *Musammat* Kanchan Kunwar asserted that on the death of Gulab Singh she had entered into proprietary possession of the eight-anna share, and that on her death her daughter "would succeed to the whole of the estate of my husband Gulab Singh under the Hindu Law."

Their Lordships may here observe that Kanchan Kunwar, in a written statement which she had filed in Court on the 26th January, 1888, in a suit in which she was a defendant, had alleged that "the property of Gulab Singh deceased was taken by Bahadur Singh, Diwan Singh and Niwaz Singh, and they became liable for the entire amount payable and for collection of the outstanding debts, while this defendant got for her maintenance the shares in the *zemindari* property specified at the foot. In these circumstances the defendant and the shares specified at the foot should be exempted." At the foot of her written statement she specified the shares in the six villages in question in this suit, including the eight anna share in *Mauza* Auria.

On the 12th August, 1892, *Musammat* Kanchan Kunwar executed a deed of mortgage in favour of her son-in-law, Jagannath Singh, by which she purported to mortgage all the rest of the property of which she had been allowed under the agreement of compromise to take possession for her life for her maintenance. In that deed she asserted that all the properties she was mortgaging "are up to this time owned and possessed by me as proprietor without the participation of anyone else, and I have no co-sharer or co-parcener therein." On that mortgage Jagannath Singh brought a suit for foreclosure on the 14th February, 1907, against *Musammat* Kanchan Kunwar, and on the 7th March, 1907, obtained a decree for foreclosure. On the 15th November, 1907, that decree for foreclosure was made absolute. Their Lord-

ships have no hesitation in finding that the deed of gift of the 12th May, 1892, the mortgage of the 12th August, 1892, and the suit for foreclosure of the 14th February, 1907, were all collusive and fraudulent, and were intended to make evidence that *Musammat* Kanchan Kunwar had held the lands in dispute as absolutely her own with as complete a right to dispose of them as a Hindu separated childless man might have to dispose of his self-acquired property. *Musammat* Kanchan Kunwar, her daughter and her son-in-law must have known perfectly well that she had no right to make the deed of gift or the mortgage.

As their Lordships have already mentioned, the Subordinate Judge in his judgment, which was delivered on the 30th November 1916, found that Gulab Singh was separate at the time of his death, and the High Court found on appeal that there had been no separation. Gulab Singh had died twenty-eight years before the suit was instituted, and on the question whether the family had been joint or separate in 1886 each Court had to rely mainly on such documentary evidence as had been produced. It appears to their Lordships from the judgment of the Subordinate Judge that he had been much influenced in finding that Gulab Singh was separate when he died from the fact that Bahadur Singh and Niwaz Singh had not given evidence in the suit. He must have forgotten that it had been proved on the 15th March, 1916, by Mohan Singh that his father Bahadur Singh was 79 or 80 years old, and was quite helpless or unable to give evidence, and that his uncle Niwaz Singh was 76 or 77 years old, and that his tongue was paralysed and he was unable to speak or make a statement. The Subordinate Judge was also very much influenced in his finding by the fact that the day-books, also referred to as cash-books, which contained the family accounts had only been produced, and that the ledgers which had been kept by the family had not been produced, and he obviously did not accept as reliable, the evidence as to what had become of the ledgers. The explanation of the non-production of the ledgers was given by Mohan Singh, who, when he gave his evidence, was 49 years old and could not have been more than 17 years old when Gulab Singh died. This is how Mohan Singh explained why the ledgers had not been produced:—

"I have not filed the ledgers of all the day-books filed by me inasmuch as they are not with me. I brought them to file them in the Court at Cawnpore. The said ledger was kept in the house of Manmunno Babu and Karan Babu. Manmunno Babu is elder and Karan Babu is younger. I used to keep all my luggage and papers in a room of those very persons, *i. e.*, Manmunno Babu and Karan Babu. The house of Manmunno Babu and Karan Babu fell down owing to heavy rain this year in the month of *Bhadon* and consequently those ledgers got buried under the same house. Those ledgers were kept in two '*bastas*.' I did not make a search for them in my house. The ledgers which got buried were kept by me in the room of Manmunno Babu and Karan Babu in 1904. The account-books and the papers which were filed by me in the case instituted in 1904 and taken back from the Court were kept by me in that very house of Manmunno Babu three or four years ago. The papers which were filed by me in the case instituted in 1904 were the same papers as were taken out of the room of Manmunno Babu and filed in this case. I did not file the ledgers in this case because they had become rotten. (Consequently the witness stated:) When the case was instituted they were not rotten. Now this year in the month of *Bhadon* and Kunwar when the house fell down on account of heavy rain they were rotten."

That is not an impossible explanation and it may be true. The High Court considered Mohan Singh's explanation as far from satisfactory, but Sir Grimwood Mears, C. J., and Mr. Justice Banerji, who heard the appeal in the High Court, stated in their judgment that "the absence of the ledgers does not, in our opinion, detract from the value of the entries in the cash-books to which we have referred." The learned Counsel who argued this appeal on behalf of the appellants commented strongly on the non-production of the ledgers, and contended that if they had been produced they would have shown that the family had separated. What the ledgers would have shown if they had been produced their Lordships do not know, but the entries in the family cash-books which were put in evidence are clear and unambiguous, and point to the only legitimate conclusion that the accounts were the accounts of a joint family.

The main contention of the learned Counsel for the appellants was that the entries of the names of the owners in possession of the shares in the villages which were made at the Settlement of 1873 should be regarded as conclusive on the question as to whether Gulab Singh, Dewan Singh, Bahadur Singh and Niwaz Singh were joint or separate, and at great length he drew their Lordships' attention to those entries. From those entries it appears that at the Settlement of 1873 Gulab Singh was the owner in possession of shares in certain villages, but whether it may be inferred from those entries or from any of them that he was the separate or sole owner of any of the shares is quite another matter. Their Lordships will now give some examples from village *khewats* of the Settlement of 1873 to show how the names of co-sharers were entered as the owners of shares. In doing so they will omit particulars which are immaterial. In the Settlement *Khewat* of *Mauza* Aurangpur Gahdewa of 1873 the entry is "Name of *lambardar*, Gulab Singh; names of co-sharers, Gulab Singh, son of Madho Singh, Thakur Gaur, *yotra* Bharduaj, resident of Baranpur Kanjri, *pargana* sheorajpur; amount of share, 8-annas; remarks, this is owned by a single man." The entry in the Settlement *Khewat* of 1873 of *Mauza* Baranpur Kanjri is "Names of sharers...Gulab Singh, son of Madho Singh, half, and Bahadur Singh, Dewan Singh and Niwaz Singh, sons of Hira Singh in equal shares ½," and bracketed opposite that particular entry is "⅓rd . . . ." The entry in the Settlement *Khewat* of 1873 of *Mauza* Baranpur is "Names of co-sharers, Gulab Singh, son of Madho Singh, caste Thakur Gaur, resident of Baranpur Kanjri, 10 pies, 1 *fif*, 7 *kirans*, 2 *jaus*, 4 *tunds*, 9 *dants*, and Bahadur Singh, Dewan Singh and Niwaz Singh, sons of Hira Singh, caste and residence as aforesaid, 5 pies, 4 *fifs*," and as to the "*shamlat*," of the *mauza* the entry is ". . . Gulab Singh, the amount of the ancestral share being 5 pies, 4 fifs, and Diwan Singh, Bahadur Singh and Niwaz Singh, in equal shares, 5 pies, 4 fifs . . ." The entry in the Settlement *Khewat* of 1873 of *Mauza* Siurajpur is "Names of '*lambardars*,' Gulab Singh and Ram Sahai '*lambardar*'; names of co-sharers, Gulab Singh, son of Madho Singh, caste and residence as mentioned above, 11 pies, 8 *fifs*, 9 *kirants*, 7 *jaus*, 2 *tunds* and 5 *dants*, Bahadur Singh, Diwan Singh and Niwaz Singh, sons of Hira Singh, caste and residence as aforesaid, in equal shares, 5 pies and 4 *fifs*. . . ." The entry in the Settlement *Khewat* of 1873 of *Mauza* Mau is "Name of *lambardar*, Sheo Charan Lal and Niwaz Singh, *lambardars*; Names of co-sharers, Niwaz Singh, Bahadur Singh and Dewan Singh, sons of Hira Singh, caste Thakur Gaur, '*gotra*' Bharduaj; residents of Baranpur Kanjri, *pargana* Sheorajpur, in equal shares, 5 annas, 4 pies." Ramarks..... Niwaz Singh lives jointly with his two brothers. No adjustment of account is made. . . ." Their Lordships do not draw from the above entries or from any other similar entries which were made in the Revenue Settlement of 1873 to which they were referred by the learned Counsel any inference that Gulab Singh had separated from his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, or that there had been any separation in the joint family. But if the learned Counsel's prolonged argument on the entries was in any way sound, Gulab Singh must have separated from his cousins before the Settlement of 1873 was held.

In *Nageshar Bakhsh Singh* v. *Ganesha* (1), in an appeal from Oudh, in which the learned Counsel already referred to had argued the case for the appellant then before the Board, it was in that case decided by the Board that a definition of shares in revenue and village papers, by itself, affords a very slight indication of an actual separation in a Hindu family, and is insufficient to prove, contrary to the presumption of law, that the family to which the entries refer had separated. In the judgment delivered in that case by the Board, the Board referred with approval to a judgment of Birdwood, J., of the High Court at Bombay, in *Bhagoji* v. *Bapuji* (2) that "at the hearing the lower Appellate Court should have its attention directed to the ruling in *Fatma* v. *Darya Saheb* (3) in which it was held that the Collector's book is kept for purposes of revenue and not for purposes of title. The fact of a person's name being entered in the Col-

(1) 56 Ind. Cas. 306; 47 I. A. 57; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 23 O. C. 1; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 42 A. 368; 13 L. W. 622 (P. C.).

(2) 13 B. 75; 7 Ind. Dec. (N. S.) 51

(3) 10 B. H. C. R. 187.

lector's book as occupant of land does not necessarily of itself establish that person's title to defeat the title of any other person." The same observation appears to their Lordships to apply to entries of the names of persons in Settlement *khewats* as the names of co-sharers in a *mauza*.

Immediately following the quotation in reference to the judgment of Birdwood, J., the Board in the case of *Negeshar Bakhsh Singh* v. *Ganesha* (1) at page 70 * said: "The Board refer in particular to the judgment of Sir John Edge in *Gajendar Singh* v. *Sardar Singh* (4). In their opinion the statements of principle now to be quoted are of significance and are sound as applied not only in Allahabad, but in India as a whole. The main proposition is, of course, widely familiar—namely, that 'given a joint Hindu family—the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father.' The learned Judge further refers to "experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares"; and the Board sees no reason to differ from, but approves of, his pronouncement to the following effect: 'A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated.'"

This Board cannot read Act XIX of 1873, the North-Western Provinces Land-Revenue Act, 1873, which applied to the Settlement of 1873, as making the definition of the shares of co-sharers in a Settlement *khewat* conclusive of a separation in a joint Hindu family.

If an actual partition of the joint family property by Madho Singh and Hira Singh, or by Gulab Singh and his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, had been proved, it would be evidence that they had altered their title to it as joint owners and had become separate owners; but a mere definition of shares in revenue and village papers, unless it was proved that such definition of shares was with a view to a then partition, would not, in their Lordships' opinion, by itself be conclusive evidence even that an actual partition was then intended.

The attention of their Lordships has been drawn to the matters from which the Subordinate Judge and the High Court drew different conclusions on the question whether Gulab Singh had died as separate from his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, and they agree with the High Court and its reasons for finding that there had not been any separation. Those reasons with which their Lordships agree are epitomised by the High Court in the concluding paragraph of the High Court judgment, and are as follows:—

"Upon a consideration of the case as a whole and of the evidence which has been adduced by the parties, we have come to the conclusion that all the *indicia* of a joint Hindu family are present in this case. There was first of all the nucleus of joint ancestral property which belonged to Padam Singh. There is next the presumption of Hindu Law that the sons of Padam Singh, who originally must have been joint, continued to be joint so long as they lived, until the contrary was shown. No evidence has been given to prove that they ever separated or that after their death a separation took place between Gulab Singh and the sons of Hira Singh. We have then the facts that property was acquired sometimes in the name of one member and sometimes in the name of another; that debts incurred in the name of one member were discharged by another; that debts were incurred and mortgages were taken in the names of members of both branches jointly; that a common account was kept relating to the income and expenditure of the family; that in these accounts the expenses of funerals and of religious and other ceremonies connected with different members of the family were jointly entered; that there were common servants who made collections and otherwise served all the members of both branches; that the affairs of the family were looked after by the different members, whether the property stood in the name of any particular member or not

(4) 18 A. 176 at pp. 179, 180; A. W. N. (1896) 23; 8 Ind. Dec. (N. S.) 824.

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and that there is nothing to prove that an actual separation ever took place. In view of all these circumstances we are unable to hold that the family was a separate family and to agree with the conclusion of the Court below. In our opinion it has been satisfactorily established that the family of the sons of Padam Singh was a joint family at the time of Gulab Singh's death, so that upon the death of Gulab Singh's widow the property in dispute passed to the appellants, the surviving male members of the family."

The appellants in the High Court were the plaintiffs.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellants:—Mr. *H. Polak.*

Solicitors for the Respondents:—Mr. *Douglas Grant.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 586 OF 1922.

November 3, 1924.

Present :—Mr. Justice Devadoss.

LAKSHMINARAYANA IYER—PLAINTIFF—APPELLANT

versus

PACKIRI CHETTIAR AND OTHERS—DEFENDANTS Nos. 2, 4 TO 7—RESPONDENTS.

Practice—Trust property—Permanent lease—Non-payment of rent—Suit for recovery on ground of forfeiture—Appeal—Plea of invalidity of lease, whether can be raised.

Where in a suit by a trustee to recover possession of trust property from a lessee on the ground of forfeiture owing to non-payment of rent the Trial Court finds against the forfeiture, it is not open to the plaintiff in appeal to rely upon the invalidity of the lease on account of its permanent character. Such a plea ought to be specifically put in issue, so as to enable the defendant to raise the appropriate pleas in defence.

Appeal against the decree of the Court of the Subordinate Judge of Negapatam, in A. S. No. 55 of 1921, preferred against that of the Court of the District Munsif of Tiruturaipundi, in O. S. No. 251 of 1919.

Mr. *V. Sandaresa Iyer*, for the Appellant.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.—It is alleged on behalf of the appellant that the lease being a permanent lease, it is invalid and that the plaintiff is entitled to recover possession of the property from the defendants. It is also alleged that the Subordinate Judge was not justified in finding that the lease was granted for necessity, and, therefore, it is binding on the trust. The plaintiff brought the suit for recovery of possession of the plaint land on the ground that the lessee failed to pay rent and, therefore, he forfeited the lease. Both the Courts have found against the forfeiture. The contention of the defendants was that the plaintiff purposely refused to receive the rent in order to set up a case of non-payment of rent. On the pleadings in the case the judgments of the lower Courts are correct. But it is urged before me that a permanent lease of trust property by a trustee is invalid and, therefore, the plaintiff is entitled to recover possession of the same. If this point had been specifically put in issue, the defendants would have been able to show either necessity or some other ground which would have been a good defence to the plaintiff's suit. The plaintiff did not choose to rest his case on the ground of the invalidity of the lease but rested his case solely on the ground of the alleged failure of the defendants to pay rents. If such a case had been put forward, the defendants would have had an opportunity of meeting it. When it was raised in appeal before the Subordinate Judge he found the lease to be good on the ground of necessity. If the plaintiff was entitled to raise that contention in appeal, then no doubt the Subordinate Judge was entitled to find on the facts that the lease was binding upon the trust. But I do not think that the plaintiff ought to have been allowed to raise this contention in appeal as the matter did not rest merely upon a bare question of law but upon facts. A permanent lease under certain circumstances may be for the benefit of the institution; and it cannot be said that a trustee who acts for the benefit of the institution acts beyond his powers and the trust is not bound. Again it may be that the present trustee may have ratified the act of his predecessor by receiving rent or by doing any other act; it may be a question whether he should be allowed to recover possession from the lessee after having accepted rent from him for a number of years. Another question would also arise whether in the case of land which is

absolutely of no use to the trust and which by the labour and capital by the lessee has been improved, it is open to the trustee to ask for possession of the property without paying for the value of improvements solely on the ground that the lease is a permanent lease and the grant of such lease was beyond the powers of the trustee. These are questions which have to be considered when a trustee sues for possession for land by the trustee on the ground of the invalidity of a permanent lease.

The judgment of the Subordinate Judge is correct and I do not think there is any ground to interfere in second appeal. The Second Appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 103 OF 1924.

May 11, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Musammat GANGA DEVI AND ANOTHER —AUCTION-PURCHASERS—APPELLANTS

versus

RAM PRASAD AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Sale of property in excess of that ordered to be sold, legality of—Application to set aside sale, nature of—Appeal, whether lies.

An application by a judgment-debtor that an auction-sale should be set aside on the ground that the sale had taken place in contravention of the decree and that the property sold was in excess of that ordered to be sold falls within the purview of s. 47 of the C. P. C., and an order setting aside the sale on such an application is open to appeal.

A sale of property in excess of that directed to be sold under the decree is absolutely illegal.

First appeal from an order of the Subordinate Judge of Farrukhabad, dated the 25th February 1924.

Mr. *Gulzari Lal*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This is an appeal from an order directing a sale to be set aside. Under the mortgage decree, which was in execution, the property mortgaged consisted of a one-third share in 12 *biswas* and odd in the village in dispute. This share was situated in a certain *patti*, but in the sale proclamation the share advertised for sale was stated to be 7 *biswas* 13 *biswansis* share in that *patti*, and then the area and the revenue of the entire *patti* were given. The sale was accordingly completed of the 7 *biswas* 13 *biswansis* share in that *patti*. The judgment-debtor applied to the Court for setting aside the sale on the ground that the decree did not direct the sale of so large a share. This application has been allowed and the entire sale set aside.

A preliminary objection is taken to the appeal that this was not an application under O. XXI, r. 90, but was under s. 151 of the Code and, therefore, no appeal lies. We, however, think that the application must be treated to be one under s. 47 of the C. P. C. because the sale had taken place in contravention of the decree and the property sold was in excess of that ordered to be sold. Under such circumstances an appeal would lie.

It cannot be disputed that the sale of 4 *biswas* and odd share alone could have been ordered, and not of the 7 *biswas* 13 *biswansis*. That being so, the sale of the share in excess of 4 *biswas* and odd was absolutely illegal.

Mr. Gulzari Lal, the learned Counsel, for the appellants has properly offered to pay the whole of the sale price for one-third of 12 *biswas* odd which could have been properly sold and which he says his clients are willing to retain. Under these circumstances we allow the appeal in part and modifying the order of the Court below direct that the sale be confirmed with regard to one-third of 12 *biswas* and odd only on payment of the amount fetched at the auction-sale and that the sale with regard to the remainder be set aside. We direct the parties to bear their own costs of this appeal.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1670 OF 1922.

November 14, 1924.

Present:—Mr. Justice Venkatasubba Rao.

SUBBIAH MOOPANAR—PLAINTIFF—APPELLANT

versus

PONNAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Settlement deed—Settle-

ment on settlor and others—Prohibition against alienation without concurrence of all—Estate created—Alienation by settlor of one item, validity of.

A deed of settlement provided "Myself, my mother and wife shall jointly enjoy the undermentioned properties. No alienation by one of us singly shall be valid. If an alienation is to be made, it shall be done by us three together, and if it is made without the consent of all the three, it shall not be valid. My heirs shall enjoy absolutely after lifetime". The settlor alienated one of the properties mentioned in the deed in favour of the plaintiff. In a suit by the alienee for possession:

Held, (1) that the words "my heirs" could not be construed as words of limitation, and that the heirs took as *grantees*, a remainder having been created in their favour;

(2) that the settlor who had only a joint interest in the properties mentioned in the deed along with his wife and mother was not entitled to alienate one specific item of property and that the plaintiff's suit must, therefore, fail.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in A. S. No. 15 of 1922 (A. S. No. 859 of 1921, on the file of the District Court, Tinnevelly), preferred against that of the Court of the District Munsif of Tinnevelly, in O. S. No. 206 of 1920.

Mr. *K. S. Sankara Iyer*, for the Appellant.

Mr. *T. L. Venkatarama Iyer*, for the Respondents.

JUDGMENT.—The first defendant was a dissolute young man. His relations, finding that he was wasting his property, got him to execute the deed, dated the 17th July 1919. It deals with seven items of immoveable property and is described as a deed of settlement The question to be decided in this appeal is, what is the true construction of this instrument? In my opinion, it creates a joint interest in the first defendant, his mother and his wife, for their lives, with a remainder in favour of the first defendant's heirs. The words are these :—

"Myself, my mother and wife shall jointly enjoy the undermentioned properties. No alienation by one of us singly shall be valid. If an alienation is to be made, it shall be done by us three together, and if it is made without the consent of all the three, it shall not be valid. My heirs shall enjoy absolutely after our lifetime."

I cannot construe the words 'my heirs' as words of limitation. The heirs are intended to take as grantees and, in my opinion, there is a remainder given under the instrument to the heirs of the first defendant. The document is not very happily worded and although there is a recital that one of the objects of getting this document executed was to provide for the debts binding upon the first defendant, there is in fact no clause, which deals with the debts mentioned at the foot of the document. But I do not think it is necessary to pursue this matter further.

Two months after the execution of this deed of settlement, the first defendant purported to sell to the plaintiffs one of the seven items comprised in it. The lower Court has held that the plaintiff purchased the property, with the knowledge of the previous document and with the object of rendering its provisions ineffective. But the point that has to be determined is this, if the first defendant had only an interest conjointly along with his mother and his wife, in all the seven items of property, specified in the deed of settlement, can he convey any interest to the plaintiff, in one specific item, out of the 7 items, in virtue of the sale-deed, executed in favour of the plaintiff? I am clearly of the opinion that the plaintiff cannot claim that he has become the purchaser of the specific item conveyed to him. It has been contended by the learned Vakil for the appellant that it may be open to the plaintiff, to file a suit for partition against the mother and the wife of the first defendant and urge that, as a matter of equity, the specific item of property, with which we are concerned, should be allotted to the share of the first defendant. It is not necessary to decide this question, for the disposal of this appeal. Another question, which has been raised, is whether the restraint upon alienation is such as falls within s. 10 of the Transfer of Property Act. In my opinion, it is not necessary to decide this question either. I propose to say nothing in regard to what the plaintiff may be able to urge, if he files a suit for partition. In the view I have taken, that the first defendant is not competent to transfer one specific item of the seven items of the property, the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

PATNA HIGH COURT.

APPEALS Nos. 691, 1299, 1030 AND 1144 TO 1152 OF 1923.

March 30, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

Babu GONDA SINGH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

JITAN MAHTO AND OTHERS—DEFENDANTS —RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 67—Landlord and tenant—Bhaoli *holding—Arrears of rent—Interest, whether can be claimed*—Dahiyak, *claim for—Finding that* dahiyak *is not illegal cess—Appeal, second—Finding, whether can be challenged.*

An entry in the Record of Rights described the landlord's claim on account of *dahiyak* as an *abwab*. The lower Appellate Court looked at the *zemindari* collection papers for many years and came to conclusion that the charge on account of *dahiyak* was not an illegal cess within the meaning of the Bengal Tenancy Act :

Held, that the finding of the lower Appellate Court was one of fact based on evidence and could not be challenged in second appeal.

Where in the case of a *bhaoli* holdings there is no evidence that the rent is payable quarterly, interest under s. 67 of the Bengal Tenancy Act is not chargeable on arrears of rent.

Appeal from a decision of the Additional District Judge, Patna, dated the 23rd April 1923, modifying that of the Munsif, Patna, dated the 21st December 1921.

Messrs. *S. M. Mullick* and *Jalgobind Prasad Sinha*, for the Appellants.

Mr. *Bimala Charan Sinha*, for the Respondents.

JUDGMENT.

Mullick, J.—The first question in the case is whether *dahiyak* is to be allowed to the plaintiffs. This has been viewed by the Munsif as an *abwab*. The Additional District Judge, however, in appeal finds that it is not an *abwab* but that it is a part of the *hakmi* share of the *bhaoli* rent. He holds that the share of the *malik*, instead of being 20 seers, is 22½ seers and he disagrees with the entry in the Record of Rights which classes the claim on account of *dahiyak* as an *abwab*. The learned Judge, however, does not in terms say that the Record of Rights is rebutted; but on reading his judgment it is clear that what he means is that the presumption attaching to the Record of Rights had been rebutted and that the charge on account of *dahiyak* is not an illegal cess within the meaning of the Bengal Tenancy Act.

It is contended that the learned Judge had no evidence before him for coming to this finding; but it appears that he looked at the *zemindari* collection papers for many years and came to the conclusion that the *zemindar* had been realizing at the rate of 22½ seers and not at the rate of 20 seers in the maund. I think there was evidence before the learned Judge and that his finding in regard to *dahiyak* cannot be challenged in second appeal.

The next point is whether the learned Judge's finding as to the years in which sugar-cane was grown and as to the *raiyats* by whom it was grown is supported by evidence. On behalf of the landlords, who are the appellants before us, it is contended that the learned Judge has made a case of his own and has acted quite regardless of the evidence before him. But it appears that although there was evidence given by the plaintiffs with regard to sugar-cane having been grown by the tenants, Baiju, Etwari and Bedu for more than one year the learned Judge did not rely upon that evidence but went upon the admission of the tenant Nanhku who said that he had grown sugar-cane for one year only. In the circumstances we cannot say that there was no evidence for the finding that sugar-cane was grown only in the year 1325 *F. S.*

The third point is that the learned Judge should have given either interest or damages. Now the holdings being *bhaoli* and there being no evidence that rent was payable quarterly, interest under s. 67 of the Bengal Tenancy Act was not chargeable. Interest might have been claimable under the Interest Act, but the claim is not put under that enactment.

Then as regards the claim for damages, the learned Judge had a discretion in the matter and the question cannot be agitated in second appeal.

The result, therefore, is that the only point in which the learned Judge's decree will be varied is as to the *hakmi* share which will be calculated in the proportion of 9 to 7, that is to say 22½ seers in the maund. The appeals are, therefore, decreed in this modified form with costs. Hearing-fee will be Rs. 16 in each case.

Ross, J.—I agree.

Appeal allowed.

Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 170 OF 1924.
May 7, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Daniels

Lala PITAM LAL—PLAINTIFF—APPLICANT

versus

BALWANT SINGH—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 152—Amendment of decree—Appeal, dismissal of, for default, effect of—Decree for money, satisfaction of—Court, power of, to amend decree.

Where an appeal is dismissed in default, there is no decree of the Appellate Court in which the decree of the Trial Court merges. In such a case the Trial Court is not deprived of jurisdiction to amend the decree.

A Court is not bound to amend a decree under s. 152 of the C. P. C., and where a Court acts under the erroneous impression that it cannot refuse an application for amendment which has been made to it, it fails to apply its mind to the case correctly and acts with material irregularity in the exercise of its jurisdiction, inasmuch as it fails to exercise any discretion at all.

Per *Daniels, J.*—When a decree for money has been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment of the decree under s. 152 of the C. P. C.

Civil revision from an order of the Subordinate Judge, Budaun, dated the 26th of July 1924.

Mr. *N. P. Asthana*, for the Applicant.

Mr. *P. L. Banerji*, for the Opposite Party.

JUDGMENT.

Sulaiman, J.—This is an application in revision from an order amending a decree. A mortgage-decree for sale was passed by the Court below which was appealed against to this Court. The question of the liability to pay costs was raised in appeal but the appeal was dismissed for want of prosecution. The judgment-debtors satisfied the decree in full, and the case was struck off. Three years afterwards the respondent Balwant Singh applied to the Court below to have the decree amended on the ground that it was not in strict accordance with the judgment. The learned Subordinate Judge, who disposed of this application, felt himself compelled to grant the application because he imagined that he had no discretion to refuse it. He clearly says: "I think, however, that that course is not open to me." He would have dismissed the application had he thought that he had any discretion in the matter for he distinctly remarks "I may, however, note in passing the circumstances which would have made it peculiarly desirable to exercise one's discretion against the applicant in this case *if one had the power to do so.*" Having thought himself compelled to grant the application, he has ordered that the decree should be amended.

One of the points raised on behalf of the applicant is that the Court below had no jurisdiction to amend the decree because the matter had been brought up in appeal and was disposed of by the Appellate Court. This contention is, in my opinion, not sound because there was no decree passed on appeal but merely an order dismissing the appeal for default. There is thus no decree of the Appellate Court in which the First Court's decree had merged. It cannot, however, be doubted that under s. 152 of the C. P. C. the Court had power, under the peculiar circumstances of this case, to refuse the application if it felt inclined to do so. The Court was not bound to grant the application. I have already referred to the fact that the Court would have dismissed the application if it had felt that it had power to do so. Under these circumstances the Court below has not applied its mind to the case correctly, and has acted with material irregularity in the exercise of its jurisdiction because it has not exercised its discretion at all. I would allow the revision and setting aside the order of the Court below, dismiss Balwant Singh's application for amendment of the decree with costs.

Daniels, J.—I concur. I would be prepared to go a step further and hold that when a decree for money had been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment under s. 152 of the C. P. C.

By the Court.—The application for revision is allowed and the order of the Court below is set aside and Balwant Singh's application is dismissed with costs in both Courts including in this Court fees on the higher scale.

Z. K. *Revision allowed.*

PATNA HIGH COURT.

CIVIL APPEAL No. 88 OF 1922.

April 23, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

AGHORI KOERI AND OTHERS—APPELLANTS

versus

B. KISHUNDEO NARAYAN MAHTA AND OTHERS—RESPONDENTS.

Land Acquisition Act (1 of 1894), ss. 11, 30—Landlord and tenant—Occupancy lands, acquisition of—Apportionment of compensation—Landlord, whether entitled to share in compensation.

Where occupancy lands are compulsorily acquired the landlord is entitled to a share of the compensation if there is no custom of transferability of the holding without the consent of the landlord, or if at the time of the acquisition the landlord had the right to enhance the rent of the holding within 20 years of the date of the acquisition, although it would be difficult to assess the money value of the compensation to which the landlord may be entitled.

Appeal from a decision of the District Judge, Darbhanga, dated the 16th January 1922.

Mr. *Janak Kishore*, for the Appellants.

Messrs. *S. M. Mullick*, *S. N. Bose*, *Rai Guru Saran Prasad* and *T. N. Sahay*, for the Respondents.

JUDGMENT.

Adami, J.—This appeal arises out of an acquisition of certain lands for the expansion of the Agricultural Farm at Pusa. The Deputy Collector, in respect of the occupancy lands, awarded full compensation to tenants. The landlords made a reference against this decision to the District Judge and the result was that the District Judge found that out of the compensation paid to the occupancy *raiyats* one-fourth should be paid to the landlords on the ground chiefly that occupancy holdings were not transferable without the consent of the landlords and on the ground that the landlord was entitled to compensation by reason of his right of reversion and right to enhance the rents.

Mr. Janak Kishore, on behalf of 72 of the tenants only, raises this question before us, namely, whether the landlords were entitled to receive this 25 per cent. out of the compensation awarded to the tenants.

Now, the Land Acquisition Deputy Collector in his note of reference stated that the village note mentioned that the holdings were transferable without the landlord's consent and that there was no evidence adduced to show that *salami* was payable on transfer by the *raiyats*. The learned District Judge has come to a finding in the opposite direction. He states that the village note does not support the custom of transferability without the landlord's consent and that it has been the custom to pay *salami* of 25 per cent. on transfer of an occupancy holding. For us to be able to decide this appeal, it is necessary to have before us good evidence both as to the custom of transferability and as to the payment of *salami*. Such evidence is not on the record. The village note even is not before us although both Courts have referred to it. We have looked at the evidence and it is scanty, and is insufficient to show to our satisfaction whether there is the custom of transferability or not.

For a right decision of this question, whether any amount should be taken out of the compensation awarded to the tenants to be paid to the landlords it is necessary to decide whether the custom of transferability exists. It is also necessary to find out whether the landlords had at the time of the acquisition the right to enhance the rent within 20 years of that date; and we must send back this case in order that full evidence may be taken to enable a decision on these points. It has to be remembered that if there is no custom of transferability without the consent of the landlords, the landlords will be entitled to some compensation for the right this implies, and at the time the restriction is detrimental to the tenant's claim to full compensation. If, on the other hand, there is a right of transferability without the consent of the landlord, the landlord will not be entitled to a share in the compensation.

Then as to the question of enhancement, if, within the next 20 years, the landlord could have enhanced the rent, as shown by Maclean, C. J., in the case of *Bhupati Roy Chowdhury* v. *Secretary of State* (1), the landlord would be entitled to some amount of compensation, although, as pointed out by the learned Chief Justice, it will be difficult to estimate the money value of that compensation.

Let, therefore, the case be sent back to the District Judge in order that the following two issues may be decided:—

(1) Whether a custom of transferability without the consent of the landlord exists in the village, and

(1) 5 C. L. J. 662.

(2) Whether the landlord had accruing to him within the next 20 years the right to enhance the rent under the Bengal Tenancy Act?

After taking evidence on these issues and coming to a finding, the District Judge will return his finding to this Court. The parties will be at liberty to adduce such evidence as may be necessary to prove their respective cases. The finding should be returned to this Court within two months from the date of the receipt of the record.

Costs will abide the result of the appeal.

Das, J.—I agree.

Z. K. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1474 AND 1106 OF 1923.

March 6, 1925.

Present:—Mr. Justice Mukerji.

Lala PARBHU LAL—PLAINTIFF—APPELLANT

versus

CHATTER AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration, whether notice—Mortgage—Sub-mortgage, registration of—Notice to mortgagor.

A registration of a subsequent transaction affecting immoveable property is no notice to persons who were parties to earlier transactions affecting such property.

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. J. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 (P. C.), followed.

A mortgagor cannot, therefore, be held to have been affected with notice of a sub-mortgage executed by the mortgagee merely by reason of the registration of the sub-mortgage.

Second appeal from a decree of the District Judge, Agra, dated the 11th of August of 1923.

Mr. *N. P. Asthana*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal and Appeal No. 1106 of 1923 arise out of similar facts. It appears that certain persons executed an usufructuary mortgage in favour of three persons Badam, Uday Ram and Charanji Mal. Badam made a mortgage to the plaintiff-appellant in the present appeal and Uday Ram and Chiranji Mal executed a simple mortgage in favour of the appellant in the other appeal. Among the properties mortgaged was the interest of the mortgagors as usufructuary mortgagees. The plaintiffs brought their respective suits to recover money and claimed the right to bring to sale the mortgagee interest of Badam in one suit and Uday Ram and Chiranji Mal in the other. The mortgagors of these mainly contended that they had satisfied the usufructuary mortgage and redeemed the property and that, therefore there was nothing to be sold.

Both the Courts found against the plaintiffs. They held, *inter alia*, that the original mortgagors had no notice of transfer of the mortgagee rights and were, therefore, not bound to pay the money to the present plaintiffs-appellants instead of to their original mortgagees.

Two points have been taken in the memorandum of appeal. The first is that registration is notice. This point has been fully and finally settled by the case of *Tilakdhari Lal* v. *Khedan Lal* (1), by their Lordships of the Privy Council, who held that a registration of subsequent transactions was no notice to persons who were parties to earlier transactions. In the case before their Lordships of the Privy Council it was urged that a prior mortgagee should be charged with the notice of a subsequent registered transfer. Their Lordships repelled the argument. On the same principle it cannot be said that the original mortgagors would have notice of the transfer in favour of the respective plaintiffs merely by reason of the fact that the transfers in their favour were registered. This argument, therefore, fails.

The second argument was that, on the facts as found by the Court below, a notice in law was established. The point is really a question of fact and the finding of the Judge below should be conclusive. The learned Counsel, however, read out the judgment of the learned Appellate Judge and I am satisfied that he has not misapplied any rule of law or has not drawn any improper conclusion from the facts before him. The direct evidence of transfer consisted of a letter sent by post which was received back with the word 'refused' marked on it. There is no evidence to show that the letter had ever been tendered to the original mortgagors or that they had written the

(1) 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. J. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 (P. C.).

word 'refused.' The next item of direct evidence was an application to the Sub-Registrar presented on the day the deed of redemption was registered asking him not to register the deed. The Judge finds that it was not proved that the application had been presented before the deed was actually registered. Evidently the learned Judge means that the application may have been presented after the executant had appeared and acknowledged the execution of the document. The finding, therefore, was a legitimate finding from the facts proved.

The appeals fail and the present one is dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL APPEAL No. 69 OF 1922.
June 27, 1924.
Present :—Mr. Justice Das
and Mr. Justice Ross.

LACHMI PRASAD TEWARI AND OTHERS —DEFENDANTS—APPELLANTS

versus

BABUNANDAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of document—Ambiguity—Surrounding circumstances, whether can be considered—Finding of fact—Appeal, second.

Where a document is ambiguous, the Court is entitled for the purpose of construing the document to look into the surrounding facts and its conclusion upon those facts would be a finding of fact binding in second appeal.

A sale certificate described the property sold as "2 annas out of 16 annas in *Mouza* T appertaining to *taluk mahal* B, *Pergana* G, *touzi* No. 1685 etc.":

Held, that the certificate meant what it said, namely, that under it 2 annas out of 16 annas in *Mouza* T had passed to the purchaser and that it was not open to the construction that what was purchased was 2 annas in the residuary share No. 1685, and that consequently there was no ambiguity in the sale certificate which entitled the Court to look into the surrounding facts for the purpose of construing the sale certificate.

Appeal from a decision of the Subordinate Judge, Muzafferpur, dated the 8th April 1921, confirming that of the Munsif, Muzufferpur, dated the 17th June 1920.

Mr. *Saroshi Charan Mitter*, for the Appellants.

Messrs. *L. N. Singh* and *B. N. Mitter*, for the Respondents.

JUDGMENT.

Das, J.—The question in this appeal turns upon the construction of a sale certificate (Ex. E). If the learned Subordinate Judge is right in his view that the document is ambiguous, then he was entitled to look into the surrounding facts and his conclusion upon those facts would be binding on us in second appeal. The first question, therefore, is, is the Subordinate Judge right in taking the view that there is some ambiguity in the document?

The material portion of the sale certificate is in this term:—"2 annas 3 *kauris* 1 *dant* and 10 *rains* out of 16 annas in *Mauza* Telya Chapra appertaining to *taluka mahal* Bishunpur, *Pergana* Gadasand, *Touzi* No. 1685, *elaka Thana* and Sub-registry Paru area of which is 32 acres and 30 poles, *jama* of the entire *mahal*, Rs. 941-14-8, *jama* of the share to be sold is Rs. 25-2-0 under register of 1228 *F. S.* in which the *jama* of every village is separately recorded." The only question is, what was it that was purchased by Narsingh Tewari represented in this action by the defendants first party, the appellants in this Court. The defendants contended that what was purchased by Narsingh Tiwari was 2 annas 3 *kauris* odd out of 16 annas in Telya Chapra. The contention of the opposite side is that this document is ambiguous, for it is open to the construction that what was purchased by Narsingh Tewari was 2 annas 3 *kauris* etc., in the residuary share No. 1685. The contention of the respondents found favour with the Court below and the learned Judge went into extrinsic evidence and came to the conclusion that what was purchased by Narsingh Tewari was 2 annas 3 *kauris* etc., in *Mouza* Telya, separate account No. 3 I am unable to concur in this view. There is, in my opinion, no ambiguity whatever in the sale certificate. The error in the judgment of the learned Subordinate Judge consists in thinking that what was purchased by Narsingh Tewari was 2 annas 3 *kauris* odd in the residuary account No. 1685; but this is not what the sale certificate says. In my opintion the sale certificate means what it says, namely, that under it 2 annas 3 *kauris* odd out of 16 annas in *Mouza* Telya passed to the defendants first party. It is conceded that if this view be correct then the plaintiffs' suit must fail.

I would allow this appeal, set aside the judgment and decree passed by the Courts

below and dismiss the plaintiffs' suit with costs in all the Courts.

Ross, J.—I agree.

Z. K. *Appeal allowed*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 826 OF 1925.

March 26, 1925.

Present:—Mr. Justice C. C. Ghose.

ROBINDRA NATH DUTT—PLAINTIFF

versus

ABDUL AHAD & Co.—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXXVII, r. 1—Limitation Act (IX of 1908), Sch. I, Art. 5—Suit on negotiable instrument—Summary procedure—Admission of plaint—Limitation.

Article 5 of Sch. I to the Limitation Act of 1908 is not applicable to suits under O. XXXVII of the C. P. C. [p. 401, col. 1.

Mr. *P. C. Basu*, for the Plaintiff.

JUDGMENT.—In this matter a point of some novelty has arisen. Mr. P. C. Basu, Counsel on behalf of Robindra Nath Dutt, applies for admission of the plaint under O. XXXVII of the C. P. C., the suit being one purporting to be laid under O. XXXVII of the C. P. C.

The cause of action has arisen on non-payment of principal and interest due on a promissory note executed by the defendant so far back as the 29th July 1922. The executant of the promissory note undertook to re-pay the principal with interest at the rate of 12 per cent. per annum on demand. The Master, before whom the plaint was presented in the first instance, refused to admit it as a plaint under O. XXXVII, on the ground that the suit has not been brought within six months from the date when the debt became due and payable and he accordingly held that the plaint would not be admitted. As I understand the matter, the Master raised no objection to the admission of the plaint as a suit brought in the ordinary manner on a negotiable instrument, the period of limitation in respect of which is three years.

Mr. Basu urges that the suit should be treated as one under O. XXXVII of the C. P. C., and he argues in the following manner. He says that under Art. 5 of the Limitation Act of 1877 the period of limitation in respect of suits under Ch. XXXIX of the C. P. C., 1882 (which corresponds to O. XXXVII of the C. P. C.) was six months from the date on which the debt became due and payable but that there has been a material alteration in the language of Art. 5 of the present Limitation Act and that the effect of the alteration is that the period of six months prescribed therein is applicable now only to suits instituted under the summary procedure referred to in s. 128 (2) (*f*) of the present C. P. C., and cannot be made applicable to suits under O. XXXVII. In other words, Mr. Basu's contention is that the period of limitation under the old Limitation Act in respect of suits coming within the category of suits referred to under O. XXXVII, of the Code has now been done away with and at present there being no other Article in the Limitation Act specially applicable to suits under O. XXXVII, suits under O. XXXVII must now be taken to be covered by the ordinary period of limitation, *viz.*, a period of three years. As I have said the point is of considerable novelty and although the Limitation Act was passed at the same time as the present C. P. C., and although as far as I am aware it has never been suggested up to the present moment that the limitation in respect of suits under O. XXXVII of the C. P. C., is other than six months it is clearly incumbent upon me to examine Mr. Basu's centention having regard to the changes made in the Limitation Act.

Section 128 of the C. P. C., which relates to rules which may be made by the High Courts in respect of matters therein set forth occurs in Part X of the Code and the first section in that Part, *viz.*, s. 121, enacts that "the rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part." It would, therefore, seem to follow *prima facie* that the rules made under s. 128 of the C. P. C., could only refer to amendments of the First Schedule to the Code and in particular to rules in respect of certain matters therein set forth. It would seem to follow further that rules made under s. 128 (2) (*f*) of the C. P. C., cannot have reference to suits referred to in r. 2 of O. XXXVII, in respect of which rules for summary procedure have been made by the Legislature itself and in respect of

which no rules have been made by the High Courts under the rule-making power vested in them. That being so, in my opinion, subject to what may be urged by the defendant when he appears in this suit, Art. 5 of the present Limitation Act cannot refer to suits under O. XXXVII of the C. P. C. It seems to me, however, that it was the intention of the Legislature when they amended Art. 5 of the Limitation Act to prescribe a period of limitation of six months to all summary suits but that the intention of the Legislature has not been expressed in clear and apt words in Art. 5 of the present Limitation Act, with the result that strictly speaking and subject to what I hear further in the course of this suit, suits under O. XXXVII are not now governed by Art. 5 of the present Limitation Act. I am, therefore, compelled to say that I have no other alternative but to admit this plaint under O. XXXVII of the C. P. C. The plaint will, therefore, be admitted. I think the matter requires serious consideration by the Legislature and I have been just now informed that the matter is awaiting consideration by the Legislature.

The plaintiff must pay his own costs of this application.

Z. K. *Application granted.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 53 of 1923.

November 26, 1924.

Present:—Sir Victor Murray Coutts-Trotter, Chief Justice, and Mr. Justice Srinivasa Iyengar.

THE OFFICIAL ASSIGNEE OF MADRAS —APPELLANT

versus

BASUDEVADOSS BADRINARAYANA DOSS—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Equitable mortgage, creation of—Intention of parties—Patta *relating to land in* muffassil, *whether document of title.*

What is requisite for the creation of an equitable mortgage is, first, an intention to create a security and, secondly, such intention evidenced by a document which can be described as a document of title. [p. 402, col. 1.]

A *patta* in respect of land situated in the *muffassil* is a document by deposit of which in the City of Madras an equitable mortgage over the property to which the *patta* relates can be validly created. [p. 402, col. 2.]

Appeal from the judgment of Mr. Justice Ramesam, dated the 19th February 1923, passed in the exercise of Insolvency Jurisdiction of the High Court, in Insolvency Petition No. 82 of 1921.

The Advocate-General, for the Appellant.

Messrs. *Nugent Grant* and *K. S. Narayana Iyengar*, for the Respondent.

JUDGMENT.

Coutts-Trotter, C. J.—I am of the same opinion and have had doubts in this case but the argument that concludes the matter to my mind is the fact which is known to everyone familiar with these matters, *viz.*, that, in many cases, the piece of paper which we call a *patta* is the only document that a *raiyat* holds in respect of his land, and that to say he cannot effect a valid equitable mortgage of that piece of paper, would be in effect to say that he could not equitably mortgage his land at all—a result which I cannot believe to have been the desire of or contemplated by, the framers of the Transfer of Property Act. I would rather wish to guard myself against the suggestion of my learned brother that, where a Statute gives a definition for an instrument that definition can be controlled by the understanding of the common people with regard to it, but I do not think that the decision of this case turns on that.

Finally, I have to say this. As this is a subject-matter with which I am very unfamiliar, I should require very grave reason indeed to dissent from the opinion of two of my colleagues to whom the subject is familiar and who are acquainted with the landtenures of this Presidency in a way in which I cannot pretend to be.

I, therefore, agree in the result.

Srinivasa Iyengar, J.—The only point raised and argued in this appeal is whether a *patta* in respect of land in the *moffussil* of the Presidency is such a document as by deposit of which in the City of Madras an equitable mortgage over the property can be said to be validly created. The contention is that a *patta* is not a title-deed or a document of title relating to property and that, therefore, the deposit of a *patta* cannot serve to create an equitable mortgage over the property. It is true that a *patta* has been held in various cases not to be a title-deed, but in none of those cases had the question been raised or had to be decided with respect to a *patta* being a

title-deed or a document of title for purposes of the creation of a mortgage by a mere deposit. It is quite true that a *patta* is not a title-deed in all senses of that expression or for all purposes but at the same time it is clear that what is requisite for the creation of an equitable mortgage is, firstly, an intention to create a security and secondly, such intention evidenced by a document which can be described as a document of title. There is no question here in this case about the intention. Is then a *patta* in respect of land a document with respect to property such as would be sufficient by being deposited, to evidence the required intention? It must vary according to the conditions of the country, and the consciousness on the part of the members of the community. In England it has been held that all the material documents of title need not be deposited and that a complete title need not be shown by the deeds deposited to the depositor's interest in the estate. [*Ex parte Whetherell* (1).] In that case Lord Chancellor Eldon was inclined to hold that that would be taken to be a sufficient deposit which could be taken upon looking at the instruments to amount to evidence that the estate was meant to be security. Thus in the absence of title-deeds a receipt for purchase-money containing the terms of an agreement for sale was deemed sufficient. [*Goodwin* v. *Waghorn* (2).] In the case of copyholds, copies of Court-rolls and in the case of leaseholds land, an office copy of the registered lease, have been held to suffice. In Ireland a map of the property was by deposit held to create an equitable mortgage. [*Simmons* v. *Montague* (3).] So far as South India is concerned, there is no doubt that a *patta* has generally been regarded as a document of title. I use the words "documents of title" and not "title-deed." because it may be that there is some plausible distinction between the two expressions. I have no hesitation in holding that a *patta* has always been regarded by people in this country as a document of some evidence with regard to possession if not also to title. The original meaning of the word "*patta*" appears to have been a "lease" but it has always been used to indicate what is called occupancy right, that is, whether it be under a landlord who is a *zemindar* or under the Government as suzerain occupancy right, which is really recognized to be practically proprietary right in the soil. Having regard to this meaning that the expression '*patta*' has acquired among the landowning classes, it will lead to serious results if it should be held that a *patta* is not such a document of title as by depositing which an equitable mortgage could not be created. As a matter of fact, I am not at all sure whether in respect of a very large percentage of property in the country there are any documents of title at all other than *pattas*.

I, therefore, hold that the learned Judge was right in holding that a *patta* was such a document as by depositing which an equitable mortgage could be created. The appeal, therefore, fails and is dismissed with costs on the Original Side scale.

V. N. V. *Appeal dismissed.*
Z. K.

(1) (1805) 11 Ves. Jun. 398; 32 E. R. 1141.
(2) (1835) 4 L. J. (N. S.) Ch. 172; 41 R. R. 208.
(3) (1909) 1 Ir. R. 87; 10 Ir. L. R. 618.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 43 OF 1924.
February 27, 1925.
Present:—Mr. Justice Heald and Mr. Justice Chari.

MAUNG PO NYUN—APPELLANT
versus
MA SAW TIN—RESPONDENT.

Buddhist Law, Burmese—Divorce on ground of desertion—Equal wives—Partition—Wife obtaining divorce, share of.

Defendant's wife quarrelled with him and left him. A few months later he asked for the plaintiff in marriage, representing falsely that he had divorced his first wife. He married the plaintiff and took her to live with him in his mother's house where he had lived with his first wife. Subsequently he left the plaintiff and went to live with his first wife. Plaintiff thereupon brought a suit for divorce on the ground of desertion and for partition and possession of the property of the marriage:

Held, (1) that the plaintiff and the first wife of the defendant were wives on an equal footing and that the plaintiff was not a "lesser wife"; [p. 403, col. 2.]

(2) that the defendant deserted the plaintiff and that the plaintiff was, therefore, entitled to divorce on the ground of desertion and to partition and possession of two-thirds of the immoveable property and two-thirds of the jointly acquired property, having regard to the fact that the defendant's first wife was alive. [p. 403, col. 2; p. 404, col. 1.]

First appeal against a decree of the District Court, Myaungmya, in C. R. No. 27 of 1923.

Mr. *Hay*, for the Appellant.

Mr. *Mya Bu*, for the Respondent.

JUDGMENT.—The parties are husband and wife, and respondent, the wife, sued appellant, the husband for divorce on the ground of desertion and for partition and possession of the property of the marriage. Appellant said that respondent was merely a "lesser wife" and that he never deserted her, but on the contrary she deserted him. He also alleged that being a "lesser wife" she was not entitled to get any property on divorce. The Court found that appellant had married another wife before he married respondent, that that woman quarrelled with him and left him, that a few months later appellant asked for respondent in marriage, saying falsely that he had divorced his earlier wife, that he married respondent and took her to live with him in his mother's house where he had lived with the earlier wife, that soon after his mother's death over three years ago he left respondent and went to live with the earlier wife, and that, amounted to desertion and entitled respondent to divorce. As for the partition of property the learned Judge held that the two wives were on equal footing and had equal rights under the Burmese Buddhist Law of divorce, and under that law the party in fault was bound to forfeit the whole of the property, that the other wife's interests must nevertheless be protected, that the other wife's interest in the husband's property would be one-third, that respondent also would be entitled in her own right to one-third of the property acquired by appellant after his marriage with her, that respondent if she were the sole wife would have been entitled to all the husband's property, but that because there was another wife it would be inequitable to give her all the husband's share after deducting the shares of the two wives, but would be fair to give half the husband's share to respondent and leave the other half for the husband and the other wife. On this basis respondent would have been entitled to considerably more than she claimed, but as she claimed only one-third of the lands and house and one-sixth of the rents and profits, the learned Judge gave her a decree for divorce and for partition and possession of a one-third share of the house and lands and Rs. 3,362 as representing one-sixth of the rents and profits. Appellant appeals on the grounds that respondent was not entitled to a divorce, that she was proved to have been a "lesser wife" and that, therefore, if she was entitled to divorce she was not entitled to partition, that if she was entitled to partition she was not entitled to any share of the properties which he already possessed at the time when he married her or of those which he inherited after he married her, and that she could not in any case be entitled to any share of the rents and profits. We see no reason to disagree with the lower Court's finding on the evidence that appellant deserted respondent and that, that desertion entitled respondent to divorce. We see no reason either to disagree with the lower Court's finding that respondent and the first wife were wives on an equal footing, and no authority has been produced to show that the second of two wives who are on an equal footing is not entitled to any property if she divorces her husband. It is admitted that the Burmese Buddhist Law Books do not lay down any rule for partition on the divorce of the husband by one of two or more wives of equal status and that there is no case in law on the subject. It is, therefore, necessary to decide the matter in accordance with the principles of justice, equity and good conscience, having regard of course to the general rules of Burmese Buddhist Law so far as those rules can be applied. On a divorce by mutual consent or as by mutual consent, there would be no objection to partition, but if the second wife were entitled to divorce for the husband's misconduct, there is a divorce with forfeiture of all the husband's property; then the first wife might seem to be prejudiced if she were left with the husband and entirely divested of all interest in any property, since it is contrary to the principles of Burmese Buddhist Law that neither of a married couple should be able to obtain partition of the property of the marriage otherwise than on divorce, and that would clearly be the effect of allowing the second wife to take all the husband's interest in the property. In this case although respondent claimed divorce for appellant's misconduct she did not claim the whole of his interest in the property. What she did claim was one-third of the immoveable property and one-sixth of the property jointly acquired during the marriage with her. As we have found that appellant deserted respondent and that she was, therefore, entitled to divorce with possession of all the husband's interest in the property,

respondent would, on the above basis, be entitled to two-thirds of the immoveable property and to two-thirds of the jointly acquired property. She has, however, claimed only one-third of the former and one-sixth of the latter and she has been given a decree in accordance with her claim. For the reasons which we have given, we see no reason to believe that that decree was wrong or that appellant has been in any way prejudiced by it. We, therefore, dismiss his appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL REVISION No. 10 OF 1924.

January 26, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

NIRMAL KUMAR SINGH NOWLAKSHA —APPLICANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Income Tax Act (XI of 1922), ss. 22, 23—Return filed by assessee not accepted—Assessment—Notice to assessee to produce evidence in support of return, absence of, effect of—Waiver—Prejudice to assessee.

Per *Greaves, J.*—If an Income Tax Officer is not satisfied with the return submitted by an assessee he is bound to serve on the assessee the notice specified in sub-s. (2) of s. 23 of the Income Tax Act, but such notice may be taken to have been waived by the assessee where before the assessment takes place he produces all the evidence within his possession in support of the return and does not specifically demand that a further opportunity should be given to him to produce any further evidence. [p. 405, cols. 1 & 2.]

It is a sufficient compliance with the provisions of sub-s. (2) of s. 23 of the Income Tax Act on the part of an Income Tax Officer either to give notice to the assessee to attend or notice to produce evidence in general terms. The sub-section does not impose upon him any obligation to specify the points upon which evidence should be given. [p. 405, col. 2.]

Per *Mukerji, J.*—The law intends that there should be two opportunities given to an assessee for the purpose of supporting the return which he has submitted. Under s. 22 of the Income Tax Act he is given an opportunity to submit such accounts or documents as the Income Tax Officer may require. When a return is submitted under that section the Income Tax Officer may proceed to deal with the matter on the basis of the return and may not require the assessee to produce any further material. He may, as required by sub-s. (4) of that section, call upon the assessee to produce or cause to be produced such accounts or documents as the Income Tax Officer may require. Under sub-s. (2) of s. 23 of the Act the law gives the assessee a further opportunity of producing any evidence on which the assessee may rely in support of the return. Under that section when the Income Tax Officer has reason to believe that the return made under s. 22 is incorrect or incomplete he is bound to serve upon the person who made the return a notice requiring him on a day therein specified either to attend at the Income Tax Officer's office or produce or cause to be produced any evidence on which he may rely in support of his return. The intention of the law clearly is that if the Income Tax Officer makes up his mind not to assess the income on the basis of the return upon the ground that the return is incorrect or incomplete, the assessee is entitled to know the position and to have an opportunity of producing evidence in order to support the return. [p. 406, col. 2; p. 407, col. 1.]

Ordinarily a notice issued under sub-s. (2) of s. 23 of the Income Tax Act should contain the points upon which the assessee has to produce evidence. [p. 407, col. 1.]

An assessee at the time of submitting his return produced along with it his evidence in support thereof, namely, his accounts. The accounts were examined for two days and then an assessment was made but not on the basis of the accounts. The assessee did not give the Income Tax Officer to understand that he had any further evidence in support of his return. No notice was, therefore, issued to the assessee under sub-s. (2) of s. 23 of the Income Tax Act before the assessment was made:

Held, per *Greaves, J.*—That under the circumstances of the case the notice under sub-s. (2) of s. 23 of the Income Tax Act must be taken to have been waived by the assessee; [p. 405, col. 2.]

Per *Mukerji, J.*—(1) that the failure of the assessee to produce any further evidence at the time of submitting his return could not be construed as a waiver on his part to have a notice issued on him under sub-s. (2) of s. 23 of the Income Tax Act; [p. 407, col. 2.]

(2) that the provisions of sub-s. (2) of s. 23 were mandatory and that non-compliance with them had prejudiced the assessee and he was entitled to an opportunity to produce any further evidence which he might desire to produce in support of his return. [*ibid.*]

Reference made by the Commissioner, Income Tax, Bengal, under s. 66 (3) of the Indian Income Tax Act.

Babus *Tark Chandra Chakravarty* and *Prafulla Chandra Chakravarty*, for the Applicant.

Babus *Surendra Nath Guha* and *M. Nuruddin Ahmed*, for the Government.

JUDGMENT.

Greaves, J.—This is a Reference made to us by the Commissioner of Income Tax in accordance with a previous direction of this Court. The respondent was called upon by the Income Tax Officer of Murshidabad to forward a return under the provisions of s. 22 of Act XI of 1922. Considerable delay occurred in furnishing the return and extensions of time were granted on several occasions. Ultimately, on the 11th October the return was filed and so

far as I have been able to ascertain this return which was filed by the *gomasthas* or servants of the respondent was examined on the 12th and the 13th of October in the presence of the *gomasthas*. On the 13th of October an assessment was made upon the respondent. It appears that the respondent's return of the profits of his six businesses was accepted, but that the Income Tax Officer refused to accept the deductions which the respondent sought to make in respect of the expenses of his business and made a percentage deduction from the profits to represent the legitimate deductions for expenditure incurred and we are told that this percentage was calculated without any relation to the actual facts of the expenditure incurred. An appeal was presented against the assessment to the Assistant Commissioner of Income Tax of the Burdwan Range and he upheld the assessment and the Commissioner refused to make a reference. An application was accordingly made to this Court and the Commissioner was directed to make the reference which is now before us. It is now necessary to turn to the provisions of the Act. Section 23 of the Income Tax Act provides that if the Income Tax Officer has reason to believe that the return made under s. 22 is incorrect or incomplete he shall serve on the person who made the return a notice requiring him on a day specified therein either to attend at the office of the Income Tax Officer or produce or cause to be produced at the office any evidence on which the assessee relies in support of the return. Sub-s. (3) provides that on the date specified in the notice the Income Tax Officer after hearing such evidence as the assessee may produce and any other evidence which he may require on specified points shall by an order in writing assess and determine the sum payable on the basis of such assessment. Sub-s. (4) provides for cases in which there is a failure to make a return under s. 22 or failure to comply with the notice issued under sub-s. (4) of s. 22. The sub-section further deals with a failure to comply with all the terms of a notice issued under snb-s. (2) of s. 23. There is no doubt that if the Income Tax Officer is not satisfied with the return he is bound to serve the notice specified in sub-s. (2). In the present case not such notice was served, but I think that the notice was waived. The return was made in person, as I have already stated, on the 11th of October and it was examined on the 12th and the 13th of October in the presence of the servants of the assessee. I cannot conceive that there was not considerable discussion at any rate with regard to the items which were disallowed and it must be that arguments were urged and reasons adduced by the servants of the assessee as to what items of expenditure should have been allowed. Apparently, no application was made by the servants of the assessee to adduce any further evidence, oral or documentary, with regard to the items disallowed and the only conclusion which I can draw is that no other evidence was available and that after the interview on the 12th and the 13th when the accounts were examined all matters were urged by the servants of the assessee which could have been urged against the disallowance. It has been urged before us that there is some obligation on the Income Tax Officer to serve a notice indicating the points on which evidence should be produced. I do not find any such indication in s. 23. It is true that under sub-s. (3) it is open to the Income Tax Officer, if he so desires, to require evidence to be produced on specified points but he is not bound to specify any point on which evidence is required, and ,in my opinion, it is a sufficient compliance with the provisions of the section on his part either to give notice to attend or notice to produce evidence in general terms and in my view the reference to "all the terms of notice" in sub-s. (4) means all the terms of the notice directed to specified points if the Income Tax Officer thinks fit to specify any special points on which he requires evidence. But as I have already stated, I do not think that the section imposes upon him any obligation to directly specify the points upon which evidence should be given. In my view, in the present case although no notice was served under sub-s. (2) of s. 23 as required by the Act this was waived and I think that the servants of the assessee were fully aware of all the matters in the return which were questioned by the Income Tax Officer and that they should not now be given any further opportunity of adducing evidence which they did not ask or desire to adduce either on the 12th or the 13th of October. But my learned brother takes a different view and as I do not think that this is a ques-

tion upon which there should be a reference to a Third Judge and, as I understand, he thinks that the assessee should have a further opportunity of adducing evidence with regard to the items which were disallowed. I do not think that I should stand in the way.

The result will be that this judgment and that of my brother Mukerji will be forwarded to the Commissioner in accordance with the provisions of s. 66, sub-s. (5) in order that he may dispose of the case in conformity with the judgment.

Mukerji, J.—This is a Reference made by the Commissioner of Income Tax under the provisions of s. 66, sub-s. (3) of the Income Tax Act, XI of 1922. The Reference has been made in pursuance of an order passed by this Court, on the 28th August 1924, in Civil Rule No. 478 of 1924. The circumstances under which the order was passed by this Court and the facts out of which the Reference arises have been set out in detail in the judgment just delivered by my learned brother and it will not be necessary for me to re-capitulate them.

The Commissioner of Income Tax states in his reference that in the present case no notice under s. 23, sub-s. (2) was issued on the assessee because the assessee at the time of submitting his return produced along with it his evidence in support thereof, namely, his accounts. He states that the accounts were produced and examined for two days before the assessment was made; he further states that the assessee did not give the Income Tax Officer to understand that he had any further evidence in support of his return. He accordingly is of opinion that although there may have been a technical non-compliance with the provisions of s. 23, sub-s. (2), the issue of a notice was superfluous and that the procedure followed by the Income Tax Officer, though not in strict accordance with the provisions of the section, was not, under the circumstances of the case, either unreasonable or inequitable; and in that view of the matter he recommends that the assessment should not be held to have been invalidated.

It is conceded that so far as the provisions of s. 22 of the Income Tax Act are concerned they have been duly complied with. It is stated, as I have already said, in the letter of Reference that the return was duly submitted and that accounts were also submitted in support of the return and also that the accounts were examined prior to the assessment for two days. The question under these circumstances is whether, after all this, it was necessary to give the assessee a further opportunity under the provisions of s. 23, sub-s. (2) to adduce any evidence in support of the return. The Commissioner seems to suggest the object of issuing a notice under sub-s. (4) of s. 22 is practically the same as that of issuing a notice under sub-s. (2) of s 23. In this, however, I am unable to agree. Reading ss. 22 and 23 of the Act, it seems to me clear that the law intends that there should be two opportunities given to the assessee for the purpose of supporting the return which he has submitted. Under s. 22 of the Act, he is given an opportunity to submit such accounts or documents as the Income Tax Officer may require. When a return is submitted under that section the Income Tax Officer may proceed to deal with the matter on the basis of the return and may not require the assessee to produce any further material or he may, as required by sub-s. (4) of that section, call upon him to produce or cause to be produced such accounts or documents as the Income Tax Officer may require. Under s. 23, sub-s. (2), the law gives the assessee a further opportunity of producing any evidence on which the assessee may rely in support of the return. It is true that for two days in the presence of the assessee's officer the accounts were examined by the Income Tax Officer. At the end of those two days the proceedings, in my opinion, came to a stage at which s. 23, sub-s. (1) could be availed of if the Income Tax Officer was satisfied that the return made under s. 22 was correct and complete, but not beyond that stage at all. After the examination of the accounts for two days during which presumably the assessee's officer had an opportunity of explaining the accounts to the Income Tax Officer, and I may take it also of producing such evidence as he could produce in order to show that the return was correct and complete, the Income Tax Officer had to determine whether he should proceed under the first paragraph of s. 23. If he was of opinion that the return was correct and complete he could assess the income of the assessee on the basis of such return. Evidently, the Income Tax Officer was not of opinion that the return was

correct or complete and, therefore, he did not think fit to proceed under sub-s. (1) of s. 23. When he came to be of that opinion, he should have proceeded under sub-s. (2) of that section. The law provides that under those circumstances, before proceeding to make an assessment in accordance with his own judgment under the provisions of sub-s. (4) of s. 23, he should give the assessee an opportunity of producing further evidence. Under s. 23, sub-s. (2) when the Income Tax Officer has reason to believe that the return made under s. 22 is incorrect or incomplete he is bound to serve upon the person who made the return a notice requiring him on a day therein specified either to attend at the Income Tax Officer's office or produce or cause to be produced any evidence on which such person may rely in support of his return. Under sub-s. (3) of that section, if such evidence is produced, the Income Tax Officer after hearing such evidence as may be produced, and such other evidence as he may require, on specified points, shall assess the income of the assessee. Under sub-s. (4) of s. 23 if there is a failure to comply with all the terms of notice issued under sub-s. (2) of s. 23 the Income Tax Officer shall make the assessment to the best of his judgment. The intention of the law clearly is that if the Income Tax Officer makes up his mind not to assess the income on the basis of the return upon the ground that the return is not correct or complete the assessee is entitled to know the position and to have an opportunity of producing evidence in order to support the return.

A further question arises as to what should be the terms of a notice issued under sub-s. (2) of 23. The wording of the sub-section is to the effect that the notice issued under that sub-section should require the assessee either to attend at the Income Tax Officer's office or to produce or cause to be produced any evidence on which such person may rely in support to the return. That sub-section standing by itself would seem to indicate that a general notice calling upon the assessee to appear or to produce evidence or cause it to be produced is sufficient. On a perusal of sub-ss. (3) and (4) of s. 23, however, it seems to me that ordinarily the notice that is to be issued under sub-s. (2) should contain the points upon which the assessee has to produce evidence, if he thinks fit, for under sub-s. (3) the expression "on specified points" appears to be governed not only by the word "required" but also by the word "produced" appearing in that sub-section; and in sub-s. (4) dealing with the question of failure to comply with the terms of notice issued under s. 23, sub-s. (2), the Legislature speaks of failure to comply with "all the terms" of the notice under that sub-section. Moreover, it seems to me, to be only fair that if an opportunity is to be given to an assessee to produce evidence in order to show that the return submitted by him is correct and complete he should be told, if possible, specifically, what the points are upon which such evidence is to be produced. In the present case it is conceded that no notice at all was served upon the assessee under the provisions of sub-s. (2) of s. 23. I am not prepared to hold that because the assessee's officer was present at the office of the Income Tax Officer for two days at an earlier stage, there was a proper or substantial compliance with the provisions of the law; and with the utmost deference to the opinion of my learned brother, I am unable to hold that the failure of the assessee to produce any further evidence at that stage, can be construed as a waiver on his part to have a notice issued on him under sub-s. (2) of s. 23. The further opportunity, which the law allows the assessee by reason of the provisions of sub-s. (2) of s. 23, he has not had in the present case; and I am, therefore, of opinion that the non-compliance with the terms of that sub-section, which is admitted on all hands, has prejudiced the assessee.

Apart from all this the provisions of sub-s. (2) of s. 23, to my mind, are mandatory, and no appeal in respect of an assessment made under sub-s. (4) of that section lies to the Assistant Commissioner. Under such circumstances there is no reason why the mandatory provisions of an enactment in a Taxing Statute like the Income Tax Act should not be strictly observed in the matter of making an assessment under its provisions.

I, therefore, think that our answer to the Reference that has been submitted to us should be that the provisions of s 23, sub-s. (2) not having been complied with the assessment made has been invalidated and should be set aside and made over again in due compliance with the law.

Order set aside.

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1057 OF 1923.

March 6, 1925.

Present:—Mr. Justice Sulaiman.

Musammat NUR BIBI AND OTHERS —DEFENDANTS—APPELLANTS

versus

Sheikh ALI AHMAD—PLAINTIFF—RESPONDENT.

Muhammadan Law—Divorce—Deed of divorce not signed in presence of wife, validity of—Single pronouncement, whether irrevocable—Acknowledgment of divorce obtained by compulsion, whether binding.

Under the Muhammadan Law a deed of divorce is not defective merely because it is not signed in the presence of the wife. [p. 408, col. 2; p. 409, col. 1.]

Waj Bibee v. *Azmut Ali*, 8 W. R. 23, followed.

When the language of a deed of divorce clearly indicates that the intention is to make an irrevocable divorce, it is not necessary that the deed should contain three pronouncements of divorce. [p. 409, col. 1.]

A deed containing an acknowledgment of a divorce having taken place, as distinct from a pronouncement of the divorce itself, obtained under compulsion is not binding on the husband. Such an acknowledgment is wholly ineffective if it is proved that it was in fact untrue. [*ibid.*]

Second appeal from a decree of the Subordinate Judge, Jaunpur, dated the 6th of April 1923.

Mr. *Majid Ali*, for the Appellants.

Mr. *Mushtaq Ahmad*, for the Respondent.

JUDGMENT.—This is a defendants appeal arising out of a suit for restitution of conjugal rights. The plaintiff's case was that the defendant No. 1 was his legally wedded wife, that he had come to the house of her father when on the 6th of June 1922 her father and brothers forcibly under a threat of injury to his person and life made him sign a document purporting to be a deed of divorce, that accordingly no valid divorce was pronounced by him and that even if there was a divorce it was a revocable one and he revoked it by registered notices on the 17th of June 1922.

The contesting defendant No. 1 in her written statement denied that there had been any coercion or compulsion and pleaded that a valid divorce had been pronounced and that it was an irrevocable one.

The Court of first instance although finding that some moral force might have been used in obtaining the document came to the conclusion that even if it was obtained under compulsion it was valid. It thought that a valid and irrevocable divorce had been pronounced, and accordingly dismissed the suit. On appeal the lower Appellate Court has come to a contrary conclusion. It has found that the defendants Nos. 2 to 5 had prepared a plot to secure a deed of divorce and everything was ready from before, that they took the plaintiff to the house of one Abdul Rahim who appears to be a *badmash* of Benares that there were some 5 or 10 men sitting with *lathis*, and that there the plaintiff was forced to execute the deed of divorce. It found that the plaintiff had been forced to sign the document. As to whether there had been an oral pronouncement by the plaintiff it came to the conclusion that the story of the defendants was quite false. It believed that the plaintiff did not utter the word of divorce orally. It accordingly decreed the claim.

The defendants have come up in appeal and on their behalf it is urged that even if the document had been obtained under compulsion it effected a valid divorce. On the other hand the replies on behalf of the respondent are (1) that a divorce obtained by coercion is revocable; (2) that the deed not having been executed in the presence of the wife was inoperative; (3) that the document contains only one pronouncement and not three, and the divorce on this ground also was revocable and (4) that it did not amount to a pronouncement of divorce at all but a mere acknowledgment that a divorce had been effected and as a mere acknowledgment it is invalid.

It is true that the majority of the Hanifi jurists have taken an extremely narrow view that a divorce pronounced under compulsion also is effective, though the opinion is by no means absolutely unanimous. The Shafai lawyers, on the other hand, hold such a divorce to be altogether invalid. In view of the opinion which I have formed on the terms of the document itself it is unnecessary for me to consider whether by the opinion that the divorce under compulsion is effective, it is meant that it is wholly valid and irrevocable, or whether that though it is not null and void yet it is revocable. Nor is it necessary to consider whether the view of the Hanifi lawyers is against public policy as has been suggested by some commentators. The question of revocation also, therefore, does not arise.

The deed, however, is not defective merely because it was not signed in the pre-

sence of the wife *vide* the case of *Waj Bibee* v. *Azmut Ali* (1).

The objection that the deed does not contain three pronouncements of divorce is also of no avail to the plaintiff. It is true that the lower Appellate Court has found that the word 'three' in it is a subsequent interpolation. But when the language of the document clearly indicates that the intention was to make an irrevocable divorce it is not necessary that the triple form should be used.

The plea of divorce, however, falls to the ground because of the finding that the plaintiff did not pronounce the divorce orally but merely signed the deed Ex. A. The operative portion of it may be translated as follows:—"While in full possession of my senses and having divorced my wife *Musammat* Nur Bibi in the presence of several persons, I declare and put it down in writing etcetra etcetra." The language of the document makes it clear that the divorce had taken place before the document was signed and the document itself contains a declaration that such divorce has been effected. The finding of the lower Appellate Court is that the signature on this deed was obtained under compulsion. All that is proved then is that under compulsion the husband acknowledged that he had already divorced his wife. This is quite a different thing from actually pronouncing the divorce itself.

On the question as to whether an acknowledgment of a divorce as distinct from the pronouncement of the divorce itself obtained under compulsion is binding on the husband, there is a perfect unanimity of opinion even among the Hanifi lawyers. Such an acknowledgment is wholly ineffective if it is proved that it was in fact untrue.

It follows that the view of the lower Appellate Court that no valid divorce has in the eye of the law taken place was correct.

In view however of the strained relations between the parties I would direct under O. XXI, r. 33 (1), C. P. C., that the decree against the wife shall not be executed by her detention in prison. It will be open to the plaintiff to take any other step that may be allowed to him by law. The injunction against the other defendants will, of course, hold good. With the above remarks the appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 8 W. R. 23.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 36 OF 1924.

November 21, 1924.

Present:—Justice Sir Victor Murray Coutts-Trotter and Mr. Justice Srinivasa Iyengar.

M. P. P. S. T. PALANIAPPA CHETTIAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

S. N. SUBRAMANIA CHETTIAR AND ANOTHER—APPLICANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Execution of decree—Assignment in writing—Transferee, who is—Third person, whether can claim to be the real transferee—*Benami *transaction—Procedure.*

The "transferee" referred to in O. XXI, r. 16 of the C. P. C., is the transferee named as such in the assignment in writing. [p. 410, col. 2.]

Where there has been a transfer of a decree to a particular person under an instrument in writing, another person is not entitled to come to the Court and say that the transferee mentioned in the instrument is a mere *benamidar* for himself and that he is the real owner of the benefit secured by the transfer. [*ibid.*]

The rule of law that where a person's name appears on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless it comes within the words of O. XXI, r. 16 of the C. P. C., and there has been an assignment in his favour either in writing or by operation of law, is no ground for holding that a person otherwise a stranger to the Court can come forward and allege that the decree does not belong to the transferee and that the latter is a *benamidar* for himself. [p. 410, col. 1.]

Manikkam v. *Tatayya*, 21 M. 388; 8 M. L. J. 48; 7 Ind. Dec. (N. S.) 631, not followed.

Abdul Kareem v. *Chukhun*, 5 C. L. J. 253, dissented from.

The scheme of the Code is that the transferee of a decree by assignment in writing or by operation of law merely files his application for execution of the decree setting out either in it or in an affidavit which he files in support thereof that he is the transferee either by operation of law or by any particular instrument in writing, and thereupon the Court orders execution or rejects the application. [p. 410, col. 1.]

Appeal from an order of Mr. Justice Kumaraswami Sastri, dated the 2nd of April 1924, and passed in the exercise of the Original Civil Jurisdiction of this Court in C. S. No. 98 of 1911.

Messrs. *K. Rajah Iyer* and *V. Ramasami Iyer*, for the Appellants.

Mr. *E. Vinayaka Rao*, for the Respondents.

JUDGMENT.

Coutts-Trotter, C. J.—The rule of law that, where a person's name appears

on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless it comes within the words of O. XXI, r. 16, of the C. P. C. and there has been an assignment in his favour either in writing or by operation of law seems to me to be no ground for holding that a person, otherwise a stranger to the Court can come, forward and allege that the decree was not his (the transferee's) and that he was a *benamidar* for himself. The learned Judge probably felt himself bound by *Manikkam* v. *Tatayya* (1) but I entertain no doubt whatever that that case was wrongly decided and was an unwarranted departure from and an extension of the words of the Statute. I accordingly come to the conclusion that this appeal must be allowed with costs in this Court as well as in the Court below.

I may add that the circumstances of the case, which was allowed to crawl on, to the very last day of a long period of limitation, are extremely suspicious. But all that we are concerned with is the simple point of law. I ought to add, I think, that it follows from this expression of opinion that we must also dissent from the decision reported as *Abdul Kareem* v. *Chukhun* (2).

Srinivasa Iyengar, J.—I agree that the appeal should be allowed with costs. The petitioner applied in the Original Side not only for execution of the decree under O. XXI, r. 16, but also by an independent Judge's summons for bringing his name on the record as a transferee decree-holder. There is no provision, in the Procedure Code, for any such application. I am not at all sure whether, what is called "bringing on the record the transferee decree-holder" is not really a survival from times, previous to the Procedure Code. The scheme of the Code is that the transferee by assignment in writing or by operation of law merely files his application for execution of the decree setting out either in it or in an affidavit he has filed in support thereof. That he is the transferee either by operation of law or by any particular instrument in writing and thereupon the Court orders the application for execution or rejects it. Therefore, we must treat the present application really as an application under O. XXI, r. 16. The contention of the respondent is that he was entitled to such execution because he was the real owner under the transfer executed to R. M. M. Subramania Chetty, who was his agent and who had obtained an instrument in writing, transferring the decree to his name. If the case of the petitioner were that the transfer was obtained by the agent in his name but in the *vilasam* of the firm of which he was the agent, then there could have been no objection whatever, to execution being granted on the application of the petitioner, because the appearance of the *vilasam* in the name of the transferee, would really be to the firm, or person bearing the *vilasam* even apart from its serving to secure the benefit of the transfer to the firm represented by the *vilasam*. But in this case, the transfer was to the agent personally. The question, therefore, is whether, if there has been a transfer to a particular person under an instrument in writing, any other person is entitled, to come to the Court and say that that transferee was a mere *benamidar* and that he, the applicant, is the real owner of the benefits secured by the transfer. It seems to me that O. XXI, r. 16. is perfectly clear on the point. It speaks of the decree being transferred by assignment in writing, or by operation of law and provides that in such cases the transferee may apply for execution. When the Statute speaks of "an assignment in writing" and "the transferee" the proper construction of the words would necessitate our holding that the transferee referred to is the transferee named as such in the assignment in writing. To hold otherwise would be not to give proper effect to the words of the Statute. The learned Vakil for the respondent has drawn our attention to *Mannikkam* v. *Tatayya* (1). We are constrained to hold that it is a wrong decision. I am not able to understand what the learned Judge who delivered the main judgment in the case could have meant when he referred to the word "representative" in s. 244 of the old Procedure Code, as comprising the real owner, under the transfer of a decree. If such a person was the representative of the decree-holder or his transferee, then it follows that, under the express terms of s. 244, he could have no right of separate suit, but in another sentence in the same judgment the learned Judge speaks of two remedies being open to such a person, that is the real owner under the transfer of a

(1) 21 M. 388; 8 M. L. J. 48; 7 Ind. Dec. (N. s.) 631.
(2) 5 C. L. R. 253.

decree, namely, one by way of application to the Executing Court and another by way of separate suit, which is obviously opposed to s. 244, C. P. C. However, that may be, we have no hesitation in holding that that case was wrongly decided. It is also clear that the C. P. C. did not really intend to prevent *benamidars* coming in and making application to the Court on the general basis of the law relating to *benami* transactions. In s. 66 of the Code express provision is made for Courts not recognising the *benami* character of purchases, made at execution sales held by Court. We have also no doubt whatever that the express terms of O. XXI, r. 16, exclude any such contention. The earlier case referred to in argument, *Abdul Kareem* v. *Sukkan* (2), having proceeded on the same basis as that of the judgment in *Manikkam* v. *Tatayya* (1) should also be held to have been wrongly decided and we, therefore, refuse to follow it. It would lead to very serious consequences if we should allow the law of *benami* to have any operation with regard to suits and proceedings and records of Court, and if only on that ground, it would be desirable to disallow any such contention. We are, however, fortified in that view by the actual terms of the Statute, and therfore, if follows that the applicant for execution in this case was wrongly granted execution of the decree.

This appeal should be allowed, and the respondent's petition for execution, as well as that for bringing himself on the record as transferee decree-holder, should be dismissed with costs.

V. N. V.
Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 595 OF 1923.
March 19, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Boys.
Musammat GHUMNA AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAM CHANDRA RAO AND ANOTHER—PLAINTIFFS AND *Musammat* PARBHAWATI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Transfer of immoveable property in consideration of future illicit intercourse, whether void—Immoral condition attached to gift, effect of—Voidable transfer, whether can be avoided by successor of transferor.

In the case of a voidable transfer of immoveable property, it is open to the heirs of the transferor to claim that there was no absolute transfer of the property in favour of the transferee but only a qualified transfer subject to the right of the transferor to avoid it if he chose to do so, and they can claim the property by avoiding the deed of transfer which could have been avoided by their predecessor. [p. 412, col. 1.]

Where the consideration for the transfer of immoveable property is future illicit connection between the transferor and the transferee, the consideration is both immoral and opposed to public policy and the transfer is void *ab initio*. [p. 412, col. 2.]

There is a distinction between an immoral consideration for a gift and an immoral condition which is subsequently attached to the gift. If the consideration is itself immoral the transfer falls to the ground. On the other hand if a subsequent condition is tried to be attached to a perfectly valid gift then the condition being immoral is void, but the gift remains unaffected. [p. 413, col. 1.]

Ram Sarup v. *Bela*, 6 A. 313 at p. 321; 11 I. A. 44; 4 Sar. P. C. J. 493; 3 Ind. Dec. (N. S.) 672 (P. C.), distinguished.

Thasi Muthukannu v. *Shunmugavelu Pillai*, 28 M. 413; 15 M. L. J. 286, relied on.

Second appeal from a decree of the District Judge, Benares, dated the 31st January 1923.

Dr. *S. N. Sen*, for the Appellants.

Sir Dr. *Tej Bahadur Sapru*, Messrs. *L. Banerji* and *Gadadhar Prasad*, for the Respondents.

JUDGMENT.—This is an appeal by defendants Nos. 4 and 5 who are transferees *pendente lite* arising out of a suit brought by the plaintiffs as the heirs of one Rama Kant for possession of a house by avoidance of a deed of gift, dated the 21st of November 1921. The plaintiffs claimed that the deed of gift had been obtained by fraud and was also void as being for an immoral and illegal consideration. They further alleged that their father Moreshwar Rao who would have been the heir to the deceased Rama Kant had become a *sanyasi* and, therefore, must be treated as civilly dead and the plaintiffs were the real heirs. The claim was contested by the transferees and the plaintiffs' right to maintain the suit or to challenge the relation was disputed.

Both the Courts below have given the plaintiffs a decree.

The facts as found are as follows:—

Rama Kant deceased became infatuated with *Musammat* Prabhawati, defendant No. 2, who is at present undergoing a sentence of transportation for life. She and Gobind defendant No. 1, (who has since been hanged and who was passing as her

husband) along with another person entered into a conspiracy to obtain the house by way of gift from Rama Kant and then to murder him. In order to obtain their object, they got a deed of gift executed by him and assured him that *Musammat* Prabhawati would live with him and in fact they executed a contemporaneous agreement under which it was agreed that they all would live and mess together and no one would be able to dispose of his or her property in the lifetime of the other and that after Gobind Rao's death, if the two other persons disagreed or separated, they would have certain specific shares in the property and that if any two died the third would be the complete owner. The deed of gift and the agreement were registered on the 25th of November 1921, and within a month of their registration Rama Kant was murdered by the donees. The donees and the other conspirator were put upon their trial and convicted. While the criminal case was pending the present plaintiffs instituted the suit, and it was during the pendency of the suit that the donees purported to make a gift of this house to the two persons whom the present appellants represent.

The plaintiffs' right to maintain the suit in view of the fact that their father has become a *sanyasi* has not been challenged in second appeal.

The main point urged before us is that the Courts below were wrong in holding that the said gift can be avoided by the present plaintiffs. The contention before us has been that the gift, if voidable, could only have been avoided by the deceased Rama Kant, if he exercised his option during his lifetime, and that if for any reason he failed to exercise such option that right did not survive to his heirs the present plaintiffs.

We are quite unable to accept this contention. It is not quite correct to say that the right of exercising such an option is like a personal contract which does not survive to the heirs of the promissor. The right is given to the promissor under Statute. Furthermore, a deed of gift is more than a mere contract. It is a conveyance. The present plaintiffs can claim that there was no absolute transfer of the property at all but it was a qualified transfer, *i.e.*, subject to the right of the transferor to avoid it if he chose to do so. The plaintiffs, therefore, can claim the property by avoiding the deed of gift which could have been avoided by their predecessor. There does not seem to be any valid ground for saying that the right does not survive to the present plaintiffs. This is specially so in the case where the donees themselves have prevented the transferor, by murdering him, from exercising his right of option. It seems to us that the plaintiffs can claim the property and ignore the gift because it was not absolutely binding on Rama Kant provided of course they come within the period of limitation as they have done in this case.

In analogous cases it has been held that in case where an immediate reversioner who has a right to avoid an alienation made by a Hindu widow without legal necessity, dies before he exercised his option, his heir can maintain a suit, *vide Sarju Prasad Rout* v. *Mangal Singh* (1) decided by a Bench of which one of us was a member. In the case of *Muhammad Muzammil-ullah Khan* v. *Mithu Lal* (2) a Full Bench of this Court held that even a transferee of joint family property can avoid an alienation which was voidable on the ground of want of legal necessity. On principle, therefore, there seems to be no good ground for holding that the present plaintiffs as heirs of Rama Kant cannot avoid the gift which was voidable at the option of Rama Kant merely because Rama Kant was murdered before he could avoid it. The view taken by the Court below was, therefore, correct.

We would go further and hold that in this case on the findings of the lower Appellate Court the deed of gift was not only voidable but was void *ab initio*. The learned District Judge has found that the donor made a gift of the property to a husband and wife on condition that he should have physical enjoyment of the latter. The consideration for the transfer, therefore was the future illicit connection between the donor and *Musammat* Parbhawati. Such an agreement was obviously both immoral and opposed to public policy within the meaning of s. 23 of the Indian Contract Act. Accordingly it is altogether unlawful. Being unlawful it could not be a valid consideration for the deed of gift at all. The result, therefore, is that the deed was not only voidable but was absolutely void from the very beginning and it was not even necessary for Rama

(1) 87 Ind. Cas. 294; 23 A. L. J. 254; L. R. 6 A. 201 Civ.; (1925) A. I. R. (A.) 339.
(2) 11 Ind. Cas. 220; 8 A. L. J. 901; 33 A. 783.

Kant to have it avoided by a suit. He could have merely ignored it. In this view of the matter the question whether such a right survived to the present plaintiffs, the heirs, does not arise.

The learned Advocate for the appellants has contended that the condition that Rama Kant should have the physical enjoyment of *Musammat* Parbhawati was in itself void but the gift would not be void. He has strongly relied on a remark in the judgment of their Lordships of the Privy Council in the case of *Ram Sarup* v. *Bela* (3) where their Lordships said that an immoral condition *attached* to a gift would be void itself but the gift itself would not be so. But the facts of that case were quite different. There, as their Lordships found, the gift as originally made was absolutely unconditional and was complete at the time when the actual transfer took place, but the parties subsequently tried to import into the gift a condition which was immoral. That is why their Lordships spoke of a condition being attached to the gift. It is obvious that there is a clear distinction between an immoral consideration for a gift, and an immoral condition which is subsequently attached to a gift. If the consideration itself is immoral, the transfer falls to the ground. On the other hand if a subsequent condition is tried to be attached to a perfectly valid gift, then the condition, if immoral, is void, but the gift remains unaffected. That a transfer in consideration for future immoral connection is vitiated, is fully borne out by authority, *vide* the case of *Thasi Muthukannu* v. *Shunmugavelu Pillai* (4).

On the findings, therefore, the transfer was for an immoral and illegal consideration and was absolutely void and was not binding either on Rama Kant or his heirs, the present plaintiffs.

The appeal must be dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed*

(3) 6 A. 313 at p. 321; 11 I. A. 44; 4 Sar. P. C. J. 493; 3 Ind. Dec. (N. S.) 672 (P. C.).
(4) 28 M. 413; 15 M. L. J. 286.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 222 OF 1923.
January 2, 1925.
Present:—Mr. Justice Page.
ASKARAN CHOUTMAL—PLAINTIFF
versus
THE E. I. RY. CO.—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Counsel, traditions and privileges of—Counsel, authority of, to compromise suit—Compromise out of Court, whether binding on client—Recording of compromise—Duty of Court.

The sanctity of contracts would be greatly imperilled if a Court were to permit a person acting under no mistake of fact and no misapprehension as to his capacity to contract and who to all intents and appearances had entered into a contract, subsequently to resile therefrom by unfolding a mental reservation of the existence of which no mention had been made at the time when the contract was entered into. To hold such a person to the agreement which he had made is merely to apply the common law principle that a person's intention is to be ascertained from his acts, and the Court is not concerned to enquire what the uncommunicated mental processes may have been which at the material time were exercising his mind. [p. 414, col. 2.]

The rights, privileges and obligations of an Advocate of the Calcutta High Court are, and since its foundation have been, the same as those of Counsel entitled to practise in what is now the High Court of Justice in England. [p. 415, col. 2.]

The authority of an Advocate remains the same whether he appears as Counsel in the High Court or in Courts subordinate thereto. When Counsel appear in Courts other than the High Court they carry with them the traditions and privileges of their profession and the sanctions of their high calling. [p. 416, col. 1.]

An Advocate of the High Court in the course of conducting a case is clothed with authority to compromise a suit in which he has been retained as Counsel. A compromise entered into by Counsel would be valid and binding upon the parties even although it had been effected contrary to the express intentions of the client, unless the prohibition has previously been communicated to the other side. Such a compromise should in a proper case be recorded in the manner prescribed in r. 3 of O. XXIII of the C. P. C. [p. 417, col. 2.]

In considering whether such a settlement has been arrived at as would justify the Court in passing a decree under O. XXIII, r. 3 of the C. P. C., the question as to which the Court has to be satisfied is not whether the order was a final order or a perfected order but whether it was an agreed order. But a litigant is not entitled *ex debito justitiæ* to an order under the rule or to a decree in a suit brought to enforce a compromise effected by Counsel merely because the Court is satisfied that Counsel in bringing about the settlement possessed authority as Counsel in that behalf. [p. 418, col. 1.]

Whether or not the Court is satisfied that a suit has been adjusted by an authority, agreement or compromise which the Court is bound to enforce must depend upon the circumstances of each case. [p. 419, col. 1.]

The apparent authority of Counsel who is retained to conduct a suit to bind his client by his admissions and acts is restricted to acts and admissions in Court,

and such acts and admissions out of Court do not bind the client unless in fact they are authorized by the client or by his agent duly authorized in that behalf. The nature of the duty which an Advocate accepts by undertaking to appear for a client indicates that he is clothed with authority to bind his client only when he is in fact engaged in the actual management of the suit. [p. 419, col. 2.]

A compromise effected by Counsel out of Court and not assented to by the client is only binding upon the client if it was expressly authorized or is subsequently ratified by the client or by his agent authorized in that behalf. [*ibid.*]

Mr. *A. N. Chaudhuri*, for the Plaintiff.
Mr. *Langford James*, for the Defendant.

JUDGMENT.—This motion raises a question of general interest and importance relating to the authority of Counsel to compromise a suit. The material facts are simple and can readily be ascertained. The suit out of which this motion arises was brought to recover a sum of Rs.3,117-13 as damages for the non-delivery of a consignment of *ghee* which the defendant Company had accepted for transportation. On the 11th November 1924 the suit was in the list for hearing, but was adjourned by consent. On the 20th or 21st November Mr. A. K. Roy, Counsel for the plaintiff and Mr. S. K. Gupta, Counsel for the defendant, in the presence of Mr. Sushil Sen, Solicitor for the plaintiff, held a meeting in the Bar Library for the purpose of negotiating a settlement of the suit. Mr. Gupta suggested that the claim should be settled for Rs. 1,500. Mr. Roy asked for Rs. 2,000, and eventually it was agreed that a decree should be passed for Rs. 1,750 in full settlement of the plaintiff's claim and costs. On the 24th November Mr. Sen requested Mr. Gupta to move the Court that the terms of the setllement be recorded and a decree passed in accordance therewith. Mr. Gupta expressed his willingness to do so. Late in the afternoon on the 24th November, however, Messrs. Morgan & Co., Solicitors for the defendant Company, received a letter from the defendant refusing to agree to a settlement, and expressing a desire that the suit should be fought out. On the 25th November Mr. Gupta informed Mr. Sen in Court that the defendant was not willing to accept the proposed terms of settlement. On the 3rd December the plaintiff launched this motion that the settlement be recorded, and a decree passed in accordance therewith. I am satisfied on the affidavits—indeed it is not disputed—that Mr. Gupta agreed to the above terms of settlement with Mr. Roy. Mr. Satish Chandra Bose, an assistant in Messrs. Morgan & Co.'s office, however, stated in an affidavit (para. 5) that "Mr. Gupta suggested Rs. 1,500, Mr. Roy suggested Rs. 2,000 : then Mr. Sushil Sen suggested Rs. 1,750, upon which Mr. Gupta kept quiet. Mr. Gupta did not exclude the possibility of the matter being re-opened should clients think otherwise, but he did not make it clear, but as is usual in such matters there was always a mental reservation of reference to clients." On the 27th November 1924 Messrs. Morgan & Co. writing to Messrs. Dutt & Sen, Solicitors for the plaintiff, stated that "it was no doubt tacitly agreed between Counsel that the suit should be settled on the terms mentioned but there was always a reservation of reference to clients." Admittedly, Mr. Gupta did not communicate either to Mr. Roy or to Mr. Sen the "mental reservation" which Mr. S. C. Bose stated was in Mr. Gupta's mind. On the contrary Mr. Gupta appeared to be giving his consent unreservedly to the proposed settlement, and, in my opinion, the sanctity of contracts would be greatly imperilled if the Court were to permit a person, acting under no mistake of fact and no misapprehension as to his capacity to contract, and who to all intents and appearances had entered into a contract, subsequently to resile therefrom by unfolding a mental reservation of the existence of which no mention had been made at the time when the contract was entered into. To hold such a person to the agreement which he had made is merely to apply the common law principle that a person's intention is to be ascertained from his acts, and the Court is not concerned to enquire what the uncommunicated mental processes may have been which at the material time were exercising his mind. I hold, therefore, that on the 21st November Counsel, purporting to act on behalf of the parties, agreed to settle the suit. And upon the evidence I am further of opinion that the parties did not thereafter agree to treat the compromise so entered into as cancelled or at an end. The question which I have to determine is whether the above agreement to settle the suit is binding upon the parties. Now I am satisfied—indeed the plaintiff does not contend to the contrary—that the defendant

Company neither expressly authorised nor subsequently ratified the said agreement. If it had done so the question of the extent of Counsel's authority would not have arisen, for the authority of Mr. Gupt and Mr. Roy to enter into the agreement would in that event have been derived from the mandate which they had received from the parties, and the fact that they happened to be Counsel would have been immaterial. I have, therefore, to consider whether in the above circumstances Mr. Roy and Mr. Gupta as Counsel were clothed with authority to bind their clients by the compromise which they effected. In this judgment when using the term "Counsel" I intend to refer in India to Advocates entitled to practise on the Original Side of the High Court, and I must not be taken to refer to Vakils or Attorneys, for with respect to their authority and status different considerations arise. Now, the position of Counsel who are retained to act in a cause on behalf of clients is not always understood. It is of the utmost importance, however, to the community at large, as well as to the legal profession, that the relation of Counsel to their clients should be fully appreciated; the more so, inasmuch as "the old order changeth giving place to new," and the roll of Advocates entitled to practise on the Original Side of the High Court, which heitherto has been confined to persons entitled to practise as Barristers in England and Ireland, or as members of the Faculty of Advocates in Scotland, has been enlarged so as to include under certain conditions Vakils and Attorneys who have not necessarily received any legal training in Great Britain or Ireland. It is essential, therefore, that the Vakils and Attorneys so admitted who are bound in all respects to confirm to the practice obtaining, and are subject to the same obligations and rules of professional etiquette as Advocates, practising, on the Original Side of the Court, should be under no misapprehension as to the rights and obligations which attached to them as Advocates of the High Court. Moreover, since the hearing of this motion my learned brother Bepin Behary Ghose, J., sitting with Walmsley, J., on the Appellate Side of the Court, in First Appeal No. 94 of 1924 and Miscellaneous Appeal No. 136 of 1924, [*Taru Bala Dasi* v. *Surendra Nath Mitra* (1)] passed the following observations: "Before dealing with the matters in controversy before us, I should refer to the observation of the Subordinate Judge as to the application of the rule in England regarding the authority of Counsel to compromise a case without reference to his client. He appears to have held that the common law rule in England is applicable to this case, and he refers to the cases of *Strauss* v. *Francis* (2) and *Mathews* v. *Munster* (3). This is contested by the appellant. Even if this case exactly came under the rule in those cases, I should be extremely reluctant to hold unless compelled to do so by any binding authority, that a rule of practice in England which has its roots in different traditions and environments should be applied in this country, particularly in the *moffusils* where people never heard of any such practice." After citing a passage from the judgment of Lord Halsbury, L. C., in *Neale* v. *Gordon Lenmox* (4) to which I shall hereafter have occasion to refer, His Lordship added "I need hardly say anything further on the point as learned Counsel for the respondent in his careful argument did not rely upon the general authority of Counsel to compromise the case." Now, the above observations are *obiter dicta*, for in that case their Lordships held that in fact no concluded or valid agreement had been effected, but so opposite is the view which B. B. Ghose, J., expressed to the question which I have to determine on this motion that I feel constrained to express my opinion as to whether it is correct. With great respect I am unable to subscribe to the doctrine that the status of an Advocate of the Calcutta High Court differs from that of a Barrister in England. I apprehend that the rights, privileges and obligations of an Advocate of the Calcutta High Court are, and since its foundation have been, the same as those of Counsel entitled to practise in what is now the High Court of Justice in England. The traditions and environments in which Counsel in England carry on their practice to the honour of their profession long ago were implanted in India, and have ever been the pride and mainstay of the Advocates of the Calcutta High Court. I should decline to entertain

(1) 88 Ind. Cas. 369; 41 C. L. J. 213; 29 C. W. N. 597.

(2) (1866) 1 Q. B. 379; 6 B. & S. 365; 35 L. J. Q. B. 133; 12 Jur. (N. S.) 486; 14 L. T. 326; 14 W. R. 634.

(3) (1888) 20 Q. B. D. 141; 57 L. J. Q. B. 49; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260.

(4) (1902) A. C. 465 at p. 469; 71 L. J. K. B. 939; 87 L. T. 41; 51 W. R. 140; 66 J. P. 757.

any suggestion that in the future Advocates will not foster and maintain the traditions which hitherto have obtained in the Calcutta High Court, and I should disassociate myself from any attempt which might be made to detract from the privileges of Counsel, or to limit the authority which attaches to Advocates of the High Court. In my opinion, the authority of Advocates remains the same whether they appear as Counsel in the High Court or in Courts subordinate thereto. The rights and obligations of Counsel, in my judgment, do not vary according to the Court in which they happen to be appearing, for the authority of Counsel is derived not from the fact that they are appearing in any particular Court, but from the status which they acquire on being admitted to the roll of Advocates. I am of opinion that where Counsel appear in Courts other than the High Court they carry with them the traditions and privileges of their profession, and the sanctions of their high calling. Now, it is not unfrequently asserted that the relation of a client to his Counsel is that of a principal to an agent. In truth the relationship is of a very different nature. The authority of Counsel is not in any sense incidental to a contract into which he has entered with his client. "Barristers," wrote Sir William Blackstone, (Commentaries Vol. 3 p. 27) "may take upon them the protection and defence of any suitors whether plaintiff or defendant, who are, therefore, called their clients like dependants upon the ancient Roman orators. Those indeed practised gratis, for honour merely, or at most for the sake of gaining influence; and so likewise it is established with us that a Counsel can maintain no action for his fees, which are given not as *locatio vel conductio* but as *quiddam honorarium* ; not as a salary or hire, but as a mere gratuity which a Counsellor cannot demand without doing wrong to his reputation." In *Colledge* v. *Horn* (5) Chief Justice Best said: "I cannot allow that the Counsel is the agent of the party." In *Swinfen* v. *Lord Chelmsford* (6) Chief Baron Pollock observed "We are all of opinion that an Advocate at the English Bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express, or implied. Cases may indeed, occur, where, on an express promise (if he made one) he would be liable in assumpsit; but we think a Barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty in the proper discharge of which not merely the client, but the Court in which the duty is to be performed, and the public at large, have an interest." And later—"The conduct and control of the cause are necessarily left to Counsel. If a party desires to retain the power of directing Counsel how the suit shall be conducted, he must agree with some Counsel willing so to bind himself. A Counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, Counsel would perform their duties under the peril of an action by every disappointed and angry client."

Again—"I think it right to express my own opinion, that provided that an Advocate acts honestly, with a view to the interests of his client, he is not responsible at all in an action. It seems admitted on all hands that he is not responsible for ignorance of law, or any mistake in fact, or for being less eloquent or less astute than he was expected to be. According to my view of the law a Barrister, acting with perfect good faith and with a single view to the interests of his client, is not responsible for any mistake or indiscretion or error of judgment of any sort." In *Strauss* v. *Francis* (2), Mr. Justice Blackburn, as he then was, stated his view of the rule in memorable words: "Mr. Kenealy has ventured to suggest that the retainer of Counsel in a cause simply implies the exercise of his power of argument and eloquence. But Counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of Counsel by his reputation for honour, skill, and discretion. Few Counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do

(5) (1825) 3 Bing 119 at p. 121; 10 Moore 431; 3 L. J. (o. s.) C. P. 181; 28 R. R. 606; 130 E. R. 459.

(6) (1860) 5 H. & N. 890 at p. 920; 29 L. J. Ex. 382; 6 Jur. (N. S.) 1035; 2 L. T. 406; 8 W. R. 545; 157 E. R. 1436; 120 R. R. 873.

everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause: and if within the limits of this apparent authority he enters into an agreement with the opposite Counsel as to the cause, on every principle this agreement should be held binding." "No Counsel," added Mellor, J., "certainly no Counsel who values his character, would condescend to accept a brief in a cause on the terms which the plaintiff's Counsel seems to suggest, *viz.*, without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter Counsel, the only course is to return the brief." In *Hutchinson* v. *Stephens* (7) Lord Langdale, M. R., remarked: "With respect to the task, which I may be considered to have imposed upon Counsel, I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honourable and important services which they constantly perform as ministers of justice, acting in aid of the Judge before whom they practise. No Counsel supposes himself to be the mere advocate or agent of his client to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every Counsel, knowing what is due to himself and his honourable profession, are qualified not only by considerations affecting his own character as a man of honour, experience and learning, but also by considerations affecting the general interest of justice. It is to these considerations that I apply myself; and I am far from thinking that any Counsel who attends here will knowingly violate or silently permit to be violated, any established rule of the Court, to promote the purposes of any client or refuse to afford me the assistance which I ask in these cases." In *Mathews* v. *Munster* (3) Lord Esher laid down the rule as follows:—"This state of things raises the question of the relationship between Counsel and his client which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and never have adopted that phraseology which seems to me to be misleading. No Counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn. But when the client has requested Counsel to act as his Advocate he has done something more, for he thereby represents to the other side that Counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of Counsel. The request does not mean that Counsel is to act in any other character than that of Advocate or to do any other act than such as an Advocate usuly does. The duty of Counsel is to advise his client out of Court and to act for him in Court, and until his authority is withdrawn he has with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client." And Bowen, L. J., stated that "Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party." It is, in my opinion, settled law that an Advocate of the High Court in the course of conducting a cause is clothed with authority to compromise a suit in which he has been retained as Counsel. In *Nando Lal Bose* v. *Nistarini Dassi* (8), Maclean, C. J., observed that "there cannot, I think, be any reasonable doubt at the present day that Counsel possesses a general authority, an apparent authority, which must be taken to continue until notice be given to the other side by the client that it has determined to settle and compromise the suit in which he is actually retained as Counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained." [See also *B. N. Sen & Bros.* v. *Chunilal Dut & Co.* (9).] In my opinion, such a compromise would be valid and binding upon the parties even although it had been effected contrary to the express instructions of the client, unless the prohibition had previously been communicated to the other side. [*Struass* v. *Francis* (2), *Mathewes* v. *Munster* (3) *Welsh* v. *Roe* (10) and *Shepherd* v.

(7) (1873) 1 Keen 659; 2 Myl. & C. 452; 6 L. J. Ch. 206; 1 Jur. 524; 40 E. R. 712; 48 E. R. 461.

(8) 27 C. 428; 4 C. W. N. 169; 14 Ind. Dec. (N. S.) 282.
(9) 83 Ind. Cas. 611; 51 C. 385; (1924) A. I. R. (C.) 651.
(10) (1918) 87 L. J. K. B. 520; 118 L. T. 529; 62 S. J. 269; 34 T. L. R. 187.

Robinson (11).] In some cases in which the compromise of a suit has been effected by Counsel in Court it has been held that the Court will not order a decree to be drawn up in accordance with the settlement, but will leave the party to enforce the agreement by filing a suit. [See *Green* v *Crockett* (12) and *Richardson* v. *Eyton* (13).] In my opinion, however, in India the Court in such cases ought not to put the parties to the expense of further litigation by bringing a separate suit upon the agreement, but in a proper case should exercise the powers which it possesses under O. XXIII r. 3, [See the observations of Mathew, L. J., in *Neal* v. *Gordon Lennox* (14).] Again there is authority to be found in support of the following propositions that until a consent order has been drawn up the party may under certain circumstances resile from an agreement to settle a suit to which he has assented, and that in respect of a compromise there is a difference between a consent order which is interlocutory and one which is final. With all due difference I am unable to give my assent to either of these propositions. In my opinion, in considering whether such a settlement has been arrived at as would justify the Court in passing a decree under O. XXIII, r. 3, the matter as to which the Court has to be satisfied is not whether the order was a final order, or a perfected order, but whether it was an agreed order. But a litigant is not entitled *ex debito justiciæ* to an order under O. XXIII, r. 3 or to a decree in a suit brought to enforce a compromise effected by Counsel merely because the Court is satisfied that Counsel in bringing about the settlement possessed authority as Counsel in that behalf. The duty of the Court in such circumstances is clearly, and to my mind conclusively, laid down by the House of Lords in *Neal* v. *Gordon Lenmox* (4). With all due respect to Macardie, J., I do not agree in thinking that this case "is not a precedent of general application" [*Welsh* v. *Roe* (10)]. In my opinion, all cases relating to the authority of Counsel must now be read in the light of the judgment in that case. Lord Halsbury in stating what in his opinion is the duty of the Court in such circumstances took the broad and common sense view which, if I may venture to say so, is invariably to be found in the judicial utterances of that great Judge. His Lordship observed: "My Lords, as I said, I will not go through the cases, because to my mind there is a higher and much more important principle involved. The Court is asked for its assistance, and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done—the Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of Justice is so far bound by the unauthorised act of learned Counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of Justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer, to take it from the jurisdiction of the ordinary Tribunal, shall only be on certain terms, to say that any learned Counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to... But when I come to this case and consider the question of what should be the position of the other party who has acted upon the apparent authority of Counsel, there are cases in which the Court undoubtedly, in the exercise of its discretion (and that is the observation which I intended to make), might well say, 'If it is only a question of money, if it is only a question which costs will rectify, this

(11) (1919) 1 K. B. 474; 88 L. J. K. B. 873; 120 L. T. 492; 35 T. L. R. 220.

(12) (1865) 34 L. J. Ch. 606; 12 L. T. 749; 13 W. R. 1052; 146 R. R. 713.

(13) (1852) 2 Deg. M. & G. 79; 42 E. R. 800; 20 L. T. (o. s.) 194; 95 R. R. 18.

(14) (1902) 1 K. B. 838 at p. 855; 71 L. J. K. B. 536; 50 W. R. 487; 86 L. T. 574; 18 T. L. R. 494.

matter can be put right by the payment of costs.' That is one example. Or the position of the other party might have been totally altered; for instance, I could imagine the case to be so delayed that it made the Statute of Limitation to run so that there was no possibility of trying the action again; and other cases might be put which would raise the question of the other party being put into such a position by the unauthorised act of Counsel that one might well say, 'This is a case in which one of two innocent parties must suffer; then the person by the act of whose Counsel (the Counsel whom he is responsible for employing) the difficulty has been created must suffer; the position of the parties has been totally altered by what has taken place and, therefore, we cannot interfere'" *Neale* v. *Gorden Lennox* (4). Whether or not the Court is satisfied that the suit has been adjusted by a valid agreement or compromise which the Court is bound to enforce must depend upon the circumstances of each case. See *Furnival* v. *Bogle* (15), *Swinfen* v. *Swinfen* (16), *Thomas* v. *Hewaes* (17), *Holt* v. *Jesse* (18), *Harvey* v. *Croydon Sanitary Authority* (19), *Lewsis* v. *Lewis* (20), *Jang Bahadur Singh* v. *Shankar Rao* (21), *Hickman* v. *Berens* (22), *Wilding* v. *Saunderson* (23), *Nundo Lal Bose* v. *Nistarini Dasi* (8), and *Shepherd* v. *Robinson* (11). In this case I am satisfied that Mr. Gupta when he effected the settlement of the suit with Mr. Roy was not labouring under any mistake of fact or any misapprehension as to the extent of his authority as Counsel to compromise the suit on behalf of the defendant Company, and if this settlement had been arrived at or had been assented to, in Court I am of opinion that the Court ought to give the seal of its authority to the arrangement, and to pass an order and decree as prayed. But it is urged on behalf of the defendant Company that the apparent authority of Counsel who is retained to conduct a suit to bind his client by his admissions and acts is restricted to acts and admissions in Court or *coram judice*, and that such acts and admissions out of Court do not bind the client unless in fact they are authorised by the client or by his agent duly authorised in that behalf. I have been unable to discover any direct authority on this important question, but upon principle I am of opinion that this contention which has been raised on behalf of the defendant is sound. The duty of Counsel, as Lord Eshar stated in *Matthews* v. *Munster* (3), is to advise his client out of Court and to act for him in Court. The nature of the duty which an Advocate accepts by undertaking to appear for a client would seem to indicate that he is clothed with authority to bind his client only when he is in fact engaged in the actual management of the suit. (See Pollock and Maitland's History of English Law, Vol. I, page 211 *et seq.*) It is only because he is entrusted with the actual conduct of the suit that his discretion in the management thereof is to remain unfettered. In *contestatione litis* he is no more the agent of his client, or bound by his instructions, than the master of a vessel is the agent of the passengers whom he has undertaken to carry in his ship. Alike in the conduct of the suit and in the navigation of the vessel the person who has undertaken the duty must carry it out in reliance upon his own skill and judgment. In short, Counsel's authority is commensurate with his responsibility. But when he is not appearing in Court the reason for the unfettered discretion which Counsel possesses in Court no longer exists. He then "advises," he does not "act" for his client, and, in my opinion, a compromise effected by Counsel out of Court and not assented to by the client, is only binding upon the client if it is expressly authorised or subsequently ratified by the client, or by his agent authorised in that behalf. Three cases may be referred to in this connection. In *Richardson* v. *Peto* (24), the defendant's Counsel having obtained a rule *nisi* calling upon the plaintiff to

(15) (1827) 4 Russ. 142; 6 L. J. Ch. (o. s.) 91; 38 E. R. 758; 28 R. R. 34.

(16) (1857) 24 Bear. 549; 27 L. J. Ch. 35; 3 Jur. (N. s.) 1109; 6 W. R. 10; 53 E. R. 470.

(17) (1834) 2 C. & M. 519; 4 Tyr 335; 3 L. J. Ex. 158; 149 E R. 866.

(18) (1876) 3 Ch. D. 177; 46 L. J. Ch. 254; 24 W. R. 879.

(19) (1884) 26 Ch. D. 249; 53 L. J. Ch. 707; 50 L. T. 291; 32 W. R. 389.

(20) (1890) 45 Ch. D. 281; 59 L. J. Ch. 712; 63 L. T. 84; 39 W. R. 75.

(21) 13 A. 272; A. W. N (1891) 61; 7 Ind. Dec. (N. s.) 170.

(22) (1895) 2 Ch. 638; 64 L. J. Ch. 786; 12 R. 602; 73 L. T. 323.

(23) (1895) 2 Ch. 534; 66 L. J. Ch. 684; 77 L. T. 57; 45 W. R. 675.

(24) (1840) 1 Man. & G. 896; 9 D. P. C. 73; 133 E. R. 595.

show cause why a judgment should not be entered as in case of a non-suit, the attorney for the plaintiff met the defendant's Counsel in the street, informed him that the plaintiff was unwell and unable to give the necessary instructions for showing cause against the rule; and requested the defendant's Counsel to postpone bringing on the motion to make the rule absolute, which the latter consented to do upon being informed that Counsel would be instructed to oppose the rule. Tindall, C. J., in giving judgment remarked: "I think that this Rule ought to be discharged: the grounds upon which this application is made are such as would place Counsel in a false position, and would be very injurious to the practice of the Bar. The Attorney admitted to prosecute or defend, represents his client throughout the cause, but a Counsel represents his client only when speaking for him in Court. It would confuse the relative position of the two branches of the profession if we were to hold that a communication made by the Counsel was to have the same effect as a communication made to a proceeding from the Attorney." In *Green* v. *Crocket* (12) cogent evidence was adduced to prove that the agreement which had been effected by Counsel out of Court was in fact authorised by the client. The Lord Chancellor (Lord Cranworth), however, while expressing no opinion as to whether an agreement could be enforced by a bill for specific performance, stated "that the arrangement so made could not be treated as an agreement made in the cause or in Court." The decision in this case as reported does not appear to be satisfactory or conclusive, for, having regard to the practice in Chancery *non constat* that the Court would have granted the prayer in the petition even if the arrangement had been arrived at in Court. The judgment of Moloney, J., in the Irish case of *Gethings* v. *Cloney* (25) does not carry the matter any further, for the Court held that the Counsel who settled the case did not purport to do so on their own authority and that no agreement to settle the suit had in fact been concluded between the parties. Applying the rule which I have stated to the facts of this case it is common ground that the Counsel who effected the settlement in the Bar Library did not assent to the arrangement *coram judice*, or in Court and as the defendant Company, which neither expressly authorised norratified the arrangement, refuse to give its consent to the terms thereof. I hold that the compromise is not binding upon the parties, and I dismiss this application, but without costs.

Z. K. *Application dismissed.*

(25) 48 Ir. L. T. 55.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 47 OF 1924.

April 28, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

RAM PRASAD SINGH AND OTHERS—PLAINTIFFS—APPLICANTS

versus

Chaudhri JAGTAMBA PRASAD SINGH AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 1, 5—Application for leave to sue as pauper—Plaintiff possessed of property, whether can be granted leave.

Plaintiffs who were minors applied for leave to sue *in forma pauperis* to set aside an alienation by their father of joint family property. It was found that there was a share of the property which had not been transferred at the time when the suit was filed:

Held, that unless it could be proved that it was impossible for the plaintiffs to obtain funds on the security of the property which belonged to them, it could not be said that they were paupers and they could not, therefore, be granted leave to sue *in forma pauperis*.

Civil revision from an order of the Subordinate Judge, Jaunpur, dated the 6th October, 1923.

Mr. *A. Sanyal*, for the Applicants.

Dr. *S. N. Sen*, for the Opposite Parties.

JUDGMENT.—This is an application for revision of an order holding that the applicants were not entitled to sue as paupers.

They are minor sons suing to set aside an alienation by their father of joint family property. The learned Judge has found that there is a share which had not been transferred at the time when the suit was filed and that, therefore, they are possessed of sufficient means to enable them to pay the Court-fee. This is a finding of fact which we must accept in revision. It is argued for the applicants that this share is

useless to them because they could not raise money on it, as the Privy Council have held in the case of *Gharib-ullah* v. *Khalak Singh* (1), that no guardian can be appointed for a minor member of a joint family. If this argument is correct, then every minor member of a joint family, except in the rare case of his possessing separate property, must be *ipso facto* entitled to sue as pauper. We are not prepared to accept this result or to believe until an attempt has been made, that it is impossible for the minors to obtain funds when it is found that they are possessed of sufficient property. The Privy Council had not before them the case in which there was a conflict of interest between the minor member and the head of the family and the former was engaged in litigation against the latter. In fact the defendants, through their Vakil in this case, had actually offered to purchase a part of the plaintiff's share in case a guardian was duly appointed. We accordingly dismiss the application with costs on the higher scale.

Z. K. *Application dismissed.*

(1) 25 A. 407; 7 C. W. N. 681; 5 Bom. L. R. 478; 8 Sar. P. C. J. 483; 30 I. A. 165 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 78 OF 1924.

October 21, 1924.

Present:—Mr. Justice Srinivasa Aiyangar.

NARIKKOTE KUNNAMANGALATH ITHISSERI KUBERAN NAMBUDRI —DEFENDANT—PETITIONER

versus

POTHUA KALLOOR KOMAN NAIR—DEFENDANT No. 1—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 10—Stay of suit—"Matter in issue", meaning of—Issue common to both suits, whether sufficient.

Under s. 10 of the C. P. C. it is necessary that the matter must be directly and substantially in issue in both the suits. The expression "matter in issue" in the section has reference to the entire subject in controversy between the parties. It is not enough that the main question involved in both the suits should be the same. [p. 421, col. 2.]

The real intention of the Legislature in framing s. 10 of the C. P. C. was merely to prevent a later suit relating to the same subject-matter being tried before an earlier suit relating to the same subject-matter is tried and disposed of. [p. 422, col. 1.]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Taliparamba, in M. P. No. 2179 of 1923, in O. S. No. 82 of 1918.

Mr. *T. S. Viswanatha Iyar*, for the Petitioner.

Mr. *O. T. Govindan Nambiar*, for the Respondent.

JUDGMENT.—This is a civil revision petition by the plaintiff in O. S. No. 82 of 1918, on the file of the District Munsif's Court of Taliparamba. The suit was for redemption of certain lands by the plaintiff, and one of the issues raised was whether the plaintiff who claimed under an adoption had been validly adopted. It appears that in a previous action between the plaintiff and the 1st defendant, the same issue had been raised and is now pending disposal in an appeal before the District Judge of South Malabar, having been remanded after a second appeal by this Court. The defendant in this suit put in an application to the District Munsif's Court under s. 10 of the C. P. C., for staying the trial of this suit pending the disposal of that appeal which is still pending. The District Munsif made an order of stay. I think the order of the District Munsif was wrong. Under s. 10 of the C. P. C., it is necessary that the matter in issue must be directly and substantially in issue in both the suits. The learned Counsel for the respondent argued that the expression "matter in issue" should be construed as meaning merely the main question involved in the suit, and his contention was that as the issue relating to the adoption was the main question in the suit as well as in the present suit, the order of the District Munsif was right. But I do not think that the expression "matter in issue" can be so construed. I believe the real intention of the Legislature in framing s. 10 of the C. P. C. was merely to prevent later suits relating to the same subject-matter being tried before an earlier suit relating to the same subject-matter is tried and disposed of. Otherwise the result will be that if any issue should be common to two suits, the later suit could never possibly be disposed of before the earlier suit. But we know that the law recognizes that the decision even in a later suit may operate as *res judicata* in a suit which has been really instituted previously. There is also direct authority for the position reported as *Sriramulu* v. *Sreeramula* (1), where Mr. Justice Venkatasubba Rao

(1) 70 Ind. Cas. 682; 15 L. W. 646; (1922) A. I. R. (M.) 304; 31 M. L. T. 360.

construing this very section has, after referring to the previous decisions, come to the conclusion that the expression 'matter in issue' in s. 10 has reference to the entire subject in controversy between the parties. The order of the District Munsif is set aside and the petition is allowed. The respondent will pay the petitioner's costs in this Court.

V. N. V. *Petition allowed.*
Z. K.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 97 OF 1922.
February 15, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Mukerji.

HAZARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition, suit for, dismissal of—Separate collections—Property acquired by different members, whether joint or separate—Family consisting of uncle and nephews—Jointness—Presumption.

In the case of a Hindu family consisting of an uncle and nephews the presumption is that the family is joint until the contrary is established. [p 422, col. 2; p. 423, col. 1.]

A member of a joint Hindu family filed a suit for partition of the family properties, but the suit was dismissed on the ground that all the family properties had not been brought into hotch-pot. After the dismissal of the suit, however, the members of the family began to make separate collections although there was no actual division of the family property. In a subsequent suit for partition:

Held, (1) that unless it was established that any particular item of property was acquired with separate funds by any individual member of the family, all the property in the hands of the members of the family was liable to partition and to be divided among the members in equal shares; [p. 423, col. 2.]

(2) that in the case of property acquired by the managing member before the different members began to make separate collections, the presumption was that the property belonged to the joint family and was not the separate property of the manager. [p. 424, col. 1.]

First appeal from a decree of the Subordinate Judge, Shahjahanpur.

Mr. *G W. Dillon*, for the Appellants.

Messrs. *Peary Lal Banerji*, *Uma Shankar Bajpai* and *Durga Prasad*, for the Respondents.

JUDGMENT.—These two connected appeals arise out of a suit for partition.

The parties are relations and they are related in this way. Gobind Sahai had two sons, namely, the defendant No. 1, Hazari Lal and Gur Sahai Mal, father of the plaintiffs Nos. 1 to 3. The other plaintiffs are the sons of plaintiffs Nos. 1 and 2. The defendants other than Hazari Lal, defendant No. 1, are the sons and gandsons of Hazari Lal.

The plaintiffs came into Court with the allegation that the family, consisting of all the parties, was still joint; that the entire property was the joint property of the family, the plaintiffs' share being one half; and that owing to dissension in the family it was not possible for the parties to go on amicably. On these grounds the plaintiffs sought partition of the property.

The defence was that the family had already separated 30 years prior to the institution of the suit; that although certain of the properties were still held jointly between the parties, certain other properties detailed in the written statement were their separate property and some were separate acquisitions of the defendants.

On these pleadings the learned Subordinate Judge framed several issues. One issue related to the status of the family. The other issues were concerned with the claim as to the separate property of the defendants. The suit succeeded except with respect to a small portion of the property, situate in the village of Khiria. This property was the subject-matter of issue No. 5. The learned Subordinate Judge held that except some minor items in Khiria, the rest of the property was joint family property. He made a preliminary decree and directed the Court *amin* to effect an actual partition.

Both the parties have appealed, and Appeal No. 97 of 1922 is the defendants' appeal. Appeal No. 68 is the plaintiffs' appeal.

Although several points were taken in the memoranda of appeal only three questions require determination by this Court. The first question is one of status. The second question is about the property in Khiria, and the third question relates to certain indigo cakes claimed as joint property.

The presumption of Hindu Law is that the family, constituted as the parties are, is joint. As already stated, defendant No. 1, Hazari Lal, is the paternal uncle of the plaintiffs Nos. 1 and 2. The nearness of

blood relationship would indicate that the family is joint, until the contrary is established. The evidence, however, goes to show that there was a disruption in the family a few years before the institution of the suit. It appears that in 1913 a certain suit No. 218 of that year was instituted by Hazari Lal against his three nephews for division of the family property with the allegation that the family had divided in law about 25 years previous to the institution of the suit, but the business and properties were held jointly by way of partnership. The suit was met with the plea that the family was still joint. A further plea was taken that all the joint family properties had not been made the subject-matter of the suit, and that, therefore, a suit for partition was not maintainable. The learned Subordinate Judge, who heard the suit, came to the conclusion that the family was still joint. He, however, declined to make a decree for partition on the ground that all the family properties had not been brought into the hotch-pot. The suit was accordingly dismissed.

It has been argued on behalf of the defendants that the institution of this suit operated as a disruption of the family and the joint character of the family ceased to exist. This is in accordance with the Privy Council case of *Girja Bai* v. *Sadashiv Dhundiraj* (1). The plaint on which this suit was based has not been filed, and it would be material to find out what was the intention of the plaintiff Hazari Lal, in filing that suit, in order to see whether he wanted a disruption of the family. But although the plaint is not here, it is clear from the judgment that Hazari Lal intended that the joint character of the family, if it existed, should disappear. Along with this evidence we have the evidence of witnesses of the parties and the statement of the plaintiff, Ram Lal, himself, to show that shortly after 1913 the parties began to make separate collections. At page 105 of our printed record a previous statement of Ram Lal is printed. In it Ram Lal said that from 1321 *Fasli* he began to make collections separately. Up to 1320 *Fasli* collections were made jointly. Several witnesses examined on behalf of the defendants establish the fact that only a few years before the institution of this suit (in 1919) the parties began to make collections separately. Gauri Shanker, the Incom Tax Clerk, produced his account-books and showed that up to 1914-1915 the income-tax was paid jointly. The parties were separately assessed to income-tax for the first time in the year 1916-1917. The witness, Ram Singh, said that he owed a debt to the family, and the parties agreed that he should pay them each one-half. The last instalment was paid on the 20th of July 1920. There were seven instalments and this would go to show that in 1913 or a year later, the parties agreed to make collections separately. It is needless to multiply instances. The statement of Ram Lal, in our opinion, clinches the matter, and we must take it that shortly after 1913 the parties agreed to make collections separately. This agreement would create a separation in the family.

Thus we disagree with the decision of the Court below and hold that the family was not joint at the date of the suit, but that it had separated either in 1913 or about a year later.

As remarked in the argument by Mr. Bajpai the question of jointness or separation at the date of the suit is of little importance in this particular case. It has been established beyond doubt that there was no actual partition in the family. An attempt was made to prove that after the institution of this suit of 1913 a sort of arbitration took place, people gathered together and divided the property. But the evidence was so meagre that the learned Counsel for the defendant-appellant made no attempt to draw our attention to that evidence. The position, therefore, is that although the family separated in law in 1913, or thereabout, there was no division of the family property. It would follow that unless it was established that any particular item of property was acquired with separate funds by any individual party, all the property in the hands of the parties would be liable to be divided in equal shares.

Now we come to two other issues raised in the appeal. The property in Khiria consists $\frac{3}{4}$ths of admittedly joint property and $\frac{1}{4}$th of property in dispute in appeal. The defendants' case is that 6 out of 24 shares were acquired on the 8th of September 1913 by Hazari Lal. The learned Subordinate Judge thought that the very

(1) 37 Ind. Cas. 321; 43 I. A. 151; 20 C. W. N. 1035; 14 A. L. J. 822; 20 M. L. T. 87; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031 (P. C.).

fact that the property was purchased two days after the institution of the suit of 1913, established it beyond doubt that this property had been acquired out of separate funds. The evidence, however, establishes that up to this time the parties had not begun to make separate collections. The presumption of jointness would, therefore, attach to this property. The fact that Hazari Lal was the head or manager of the family and kept the funds has been satisfactorily established by the plaintiffs' witnesses Lakhan Singh, Zalim Singh and Shama Charan. The very fact that he was the eldest member of the family and elder in point of relationship as well would point to him as the head of the family. The acquisition having been made by him, we are unable to agree with the learned Subordinate Judge that we should regard this property as his acquisition. To this extent, therefore, the plaintiffs' appeal must be allowed.

While on the question of the property in Khiria it is to be pointed out that by an oversight on the part of the office the decree that was prepared gave the entire property in Khiria to the defendants. The decree will have to be corrected in this office and the whole of the property will now be divided.

The indigo cakes are claimed as joint family property. In the plaint it is stated that 10 maunds of indigo were sent to Calcutta for sale and the price is given at Rs. 2,100. The question is whether this indigo was manufactured with joint funds or with separate funds. Hazari Lal, as already stated, was the head of the family, and he managed the family property. In the circumstances unless there is something clear to show that the indigo was manufactured with his separate funds It will be difficult for us to differ from the Court below and award it to the defendants alone. The evidence of Shama Charan, a witness examined on behalf of the plaintiffs, was pointed out as indicating that the produce of the factory was the sole property of the defendants. But the witness does not say anything like that but simply says that there were two factories and the management of one of these factories was in the hands of Sita Ram and the management of the other in the hands of Sri Ram, the latter being Hazari Lal's son and the former being one of the plaintiffs.

The result is that the defendants' appeal fails entirely and is hereby dismissed with costs which will include Counsel's fees on the higher scale. The appeal of the plaintiffs succeeds wholly. As regards the costs of the plaintiffs, it appears that the defendants never disputed the fact that the decree of the Court below awarding 18 shares in Khiria was wrong. The plaintiffs were required to appeal so far as six shares were concerned. The decree in the Court below might have been set right by an application for amendment made to that Court. In the circumstances we allow the plaintiffs only one-half of the costs of Appeal No. 68 of 1922.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL SUIT No. 188 OF 1922.

December 11, 1924.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

KRISHNASWAMI THEVAN AND OTHERS—DEFENDANTS Nos. 7 AND 4 TO 6—APPELLANTS

versus

PULUKARUPPA THEVAN, MINOR, BY HIS MOTHER AND GUARDIAN KRISHNAMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1 AND 24—RESPONDENTS.

Hindu Law—Joint family—Partition—Minor, suit by Birth of son after institution of suit, effect of—Profits, whether can be claimed.

An unequivocal unilateral declaration by a member of a joint Hindu family of his intention to be separated from the other members is sufficient to give him a divided status. [p. 426, col. 2; p. 427, col 1.]

A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. But a minor cannot enter into a valid contract and cannot enforce a partition by his mere volition. In an action for partition by a minor through his guardian or next friend the Court has to see whether there are circumstances which would justify granting relief to the minor and whether it would be in the interest of the minor and to his advantage to separate him from the family. Till the Court determines the question whether a partition should be effected in favour of a minor the joint status of the minor with the other members of the family is not in any way severed. It is only by the decree of the Court that a minor becomes divided from the other members of the family. Therefore, the mere filing of a plaint in a partition suit cannot bring about a divided status so far as a minor plaintiff is concerned. Although, however, a minor plaintiff becomes divided in status from the other members of the family only by reason of the decree of the Court, yet his share in the family property is what it was on the date of the plaint. The Court merely determines on the evidence before it whether on the date of the plaint the minor plaintiff was entitled to partition or not. [p. 427, col. 1.]

Therefore, the share of a minor plaintiff who sues his father for partition is not liable to be diminished owing to the birth of another son to the father conceived after the date of the filing of the plaint but born before the date of the preliminary decree. [p. 426, col. 2.]

Ordinarily in a partition suit the managing member of the family is not liable to account for the income and profits. Where, however, it appears that the whole income from the property was enjoyed by the defendant and that the plaintiff was not supported by him the Court has a discretion to award to the plaintiff a portion of the income from the date of the institution of the suit to the date of delivery of possession of his share of the property to the plaintiff. [p. 429, col. 2.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Ramnad at Madura, in O. S. No. 16 of 1919, (O. S. No. 17 of 1919, Sub-Court of Ramnad).

Mr. *K. S. Champakesa Iyengar*, for the Appellants.

Mr. *K. Rajah Iyer*, for the Respondents.

JUDGMENT.

Spencer, J.—This is a suit brought by a minor represented by his mother as next friend for partition of family property. He impugned several alienations made by his father, the 1st defendant, as not binding on his interest and the Subordinate Judge passed a preliminary decree for partition. The 7th defendant and the defendants Nos. 4, 5, and 6 who are the legal representatives of the 3rd defendant appeal. The 7th defendant is an alienee of the first item and the others are alienees of items Nos. 4, 7 and 28. Their Vakil, without directly attacking the findings of the Subordinate Judge that the alienations of these items are not supported by consideration and are not binding on the plaintiff, has argued that as the 1st defendant admitted having received consideration, these alienations are binding at least on his share, and that they may, in the course of partition, be allotted to his share, and that if this is done the possession of these appellants will not be disturbed. The items in dispute measure altogether 7 acres and 40 cents and the items found to belong to the family as per A Schedule measure 27 acres 83 cents. The plaintiff, 1st respondent, has no objection to the items which have been alienated in favour of these appellants being apportioned to the share of the 1st defendant at the final partition if this can be done without detriment to the plaintiff's interest. There will be a direction to that effect added to the preliminary decree of the lower Court.

As regards costs the lower Court directed that the costs of the suit in that Court should be recovered from the defendants Nos. 1 and 7 as the 7th defendant wholly failed and as the 1st defendant had been enjoying the income of the lands. It will be equitable that the 7th defendant should bear the costs of the suit in the lower Court in proportion to the value of the item in which he is interested, and the Vakil's fee should be calculated accordingly. The balance will be recoverable from the 1st defendant. With these modifications the appeal is dismissed with costs.

The memorandum of objections filed by the 1st respondent coming on for hearing on the 27th and 28th days of November 1921 respectively the Court delivered the following

JUDGMENT.

Spencer, J.—This suit was brought by a minor plaintiff represented by his mother as next friend for partition of the properties belonging to the undivided Hindu family consisting of himself and his father the 1st defendant. It involves a new and interesting point of Hindu Law. After the institution of the suit on 31st January 1919, another son was born in May 1920, to the 1st defendant by a second wife. Conception must have taken place about August 1919, certainly after the filing of the plaint. This after-born son has been brought on the record as the 24th defendant.

On the principle that if a suit for partition is instituted by a co-parcener who is *sui juris* the mere filing of the plaint effects a severance of the joint status of the family, but that in the case of a minor it is the Court that decides whether there is to be a division or not, the lower Court has found the 24th defendant to have come into existence before there was any change of status and has awarded the minor plaintiff a one-third share instead of one-half. The Subordinate Judge quotes *Chelimi Chetty* v. *Subbanna* (1) and *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple* (2) as his authorities for so deciding. The learned Judges (Abdur Rahim and Oldfield, JJ.), who decided the former case, were, if I may say so, perfectly right in saying that it should not depend on the choice or option of any person calling himself the next friend of a

(1) 42 Ind. Cas. 860; 41 M. 412; (1917) M. W. N. 792; 22 M. L. T. 432; 31 M. L. J. 213.

(2) 58 Ind. Cas. 667; 42 A. 461; 2 U. P. L. R. (A.) 137; 18 A. L. J. 503.

minor to say whether the family to which the minor belongs shall in future be joint or separate and that the law has left it to the Court that hears the minor's partition suit to decide whether it is in the interest of the minor that he should become divided. But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement [*vide Rai Charan Mandal* v. *Biswanath Mandal* (3)]. Therefore, in my judgment, the only sound principle will be to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. It is true that there can be no division of status unless the Court sees fit to decree it, but there is no reason why the Court should not make its decree take effect from the date of the institution of the suit.

If a suit abates owing to the death of the only other co-parcener, as in *Lalta Prasad* v. *Sri Mahadeoji Birajaman Temple* (2), or if the plaintiff comes of age during the pendency of the suit and elects to abandon or repudiate it under O. XXXII, rr. 12 and 13 of the C. P. C., no change of status takes place because the suit does not proceed to the stage of decree, not because the filing a partition suit by a minor has not by itself the effect of causing a division of status. It does have that effect when it ends in a partition decree.

In *Krishna Lal Jha* v. *Nandeshwar Jha* (4), it was held that even a minor might make through his next friend an unequivocal expression of his intention to become separate and that, if he did so, the subsequent birth of another member into the family would not cause any diminution in his share of the family property. In that case the birth took place after the passing of the preliminary decree, but in the view taken by the learned Judges, who were not referred to the decision in *Chelimi Chetty* v. *Subbanna* (1), it was not that date but the date of the institution of the suit that was the date when severance took place, if at all. That is the law as regards major co-parceners. *Vide Soundararajam* v. *Arunachalam Chetty* (5), and *Ramalinga Annavi* v. *Narayana Annavi* (6).

As soon as severance takes place the plaintiff's share is not liable to decrease by birth thereafter of other co-parceners. *Vide Chinnu Pillai* v. *Kalimuthu Chetty* (7). As regards the date from which divided status begins, I fail to see why any distinction should be made between adults and minors so far as their shares are subject to alteration in consequence of events that occur between the commencement and the end of a partition suit. As my learned brother agrees with me upon this point, the memorandum of objections is allowed and plaintiff's right to a one-half share will be declared in the preliminary decree. He will consequently be entitled to an account from 1st defendant of profits from the date of suit, and the lower Court's decree will be modified accordingly with costs of the memorandum of objections.

Devadoss, J.—The main question raised by the 1st respondent in the memorandum of objections is, whether the share of a minor plaintiff who sues his father for partition is liable to be diminished owing to the birth of another son conceived after the date of the filing of the plaint but born before the date of the preliminary decree.

The plaintiff, who is a minor, is the son of the 1st defendant. The suit was filed on 31st January 1919. The 24th defendant was born to the 1st defendant in June 1920. Issues were settled in the case on 8th October 1919, and after the birth of the 24th defendant an application was made to bring him on record. That application was filed on 26th September 1920, and an additional issue was framed on 21st July 1921. The Subordinate Judge gave a decree to the plaintiff for one-third of the family properties. The contention of Mr. Rajah Iyer is that the 24th defendant having been born after the suit was filed the plaintiff's share is not liable to be diminished to one-third.

It is well-settled that an unequivocal unilateral declaration of a member of a

(3) 26 Ind. Cas. 410; 20 C. L. J. 107.
(4) 44 Ind. Cas. 146; 4 P. L. J. 38.

(5) 33 Ind. Cas. 858; 39 M. 159; 29 M. L. J. 816; 2 L. W. 1266; 18 M. L. T. 568; (1916) 1 M. W. N. 31.
(6) 68 Ind. Cas. 451; 45 M. 489; 30 M. L. T. 255; (1922) M. W. N. 399; 26 C. W. N, 929; (1922) A. I. R. (P. C.) 201; 43 M. L. J. 428; 16 L. W. 639; 24 Bom. L. R. 1209; 20 A. L. J. 839; 37 C. L. J. 15; 49 I. A. 168 (P. C.).
(7) 9 Ind. Cas. 596; 35 M. 47 at pp. 55, 59; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246.

joint family of his intention to be separated from the other members is sufficient to give him a divided status. *Girji Bai* v. *Sadashiv Dhundiraj* (8) and *Suraj Narain* v. *Iqbal Narain* (9). It was decided by a Full Bench of this Court in *Soundararajam* v. *Arunachalam Chetty* (5) that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. On the strength of this decision Mr. Rajah Iyer contends that on the filing of a plaint by a minor through his next friend he becomes divided from the other members of the family. If the plaintiff were a major, no doubt on the filing of a plaint or on the sending of a proper notice he would become divided from the other members of the family. But the law is quite clear that a minor cannot enter into a valid contract and cannot enforce a partition by his mere volition. In an action for partition by a minor through his guardian or next friend the Court has to see whether there are circumstances which would justify granting relief to the minor and whether it would be in the interests of the minor and to his advantage to separate him from the family. Till the Court determines the question whether a partition should be effected in favour of a minor, the joint status of the minor with the other members of the family is not in any way severed. It is only by the decree of the Court that a minor becomes divided from the other members of the family. No doubt in the case of a suit by an adult member or in a partition at the instance of an adult member, a minor may become separated from the other members but where the minor himself comes into Court with a prayer for partition from the other members of the family it is the Court that determines whether he should be divided or not and, therefore, it is not the act of the next friend or the guardian that determines the issue whether there should be division or not, but it is the judgment of the Court which determines the issue, and therefore, the mere filing of a plaint cannot bring about a divided status so far as a minor plaintiff is concerned. This question was decided by a Bench of this Court in *Chelimi Chetty* v. *Subbanna* (1). The facts in that case were that a minor brought a suit for a partition of his share. Pending the suit, the minor plaintiff died and the mother applied to be brought on record as the legal representative of the minor plaintiff and asked for permission to continue the suit. The Subordinate Judge held that no cause of action survived to the mother and rejected her application. On appeal the District Judge set aside the order of the Subordinate Court holding that the mother was entitled to continue the suit as the legal representative of the plaintiff. Abdur Rahim and Oldfield, JJ., held that the cause of action did not survive to the mother. Abdur Rahim, J., observes at page 445*: "In the case of an adult he has not got to give any reasons why he asks for partition but has simply to say that he wants partition, and the Court is bound to give him a decree. In the case of a minor the law gives the Court the power to say whether there should be a division or not, and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor."

Mr. Rajah Iyer wanted to contend that this decision is wrong and that on the filing of the plaint by a minor he becomes divided from the other members of the family. Such a contention is opposed to the principle that it is the Court that determines whether there should be a partition of the family property at the instance of the minor plaintiff and not any relation, guardian or next friend. Whatever may be the circumstances which justify a guardian in bringing a suit on behalf of a minor, there is no warrant for saying that it is his view that should prevail. The matter is entirely for the decision of the Court and, therefore, it is opposed to principle as well as to policy to hold that a minor or anybody on his behalf has the power to give him a divided status without the decree of a competent Court.

Mr. Rajah Iyer relied for his contention upon a decision in *Krishna Lal Jha* v. *Nandeshwar Jha* (4). In that case the learned Judges remark at page 48†: "We

(8) 37 Ind. Cas. 321; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031; 43 I. A. 151 (P. C.).

(9) 18 Ind. Cas. 30; 40 I. A. 40; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129 (P. C.).

*Page of 41 M.—[*Ed.*]

†Page of 4 Pat. L. J.—[*Ed.*]

are unable to accede to the proposition that under Hindu Law a minor cannot express either himself or through his guardian an intention to do that which is clearly not against his own interest." With due respect to the learned Judges, I am unable to accept the argument. When the law is clear that there cannot be a partition at the instance of a minor except under a decree of Court it is not proper to hold that the guardian or the next friend could do what the Court alone is competent to do. The decision in *Chelimi Chetty* v. *Subbanna* (1), though of August 1917, was evidently not brought to the notice of the learned Judges of the Patna High Court. There is no reason to doubt the soundness of the decision in *Chelimi Chetty* v. *Subbanna* (1).

An argument was advanced by Mr. Rajah Iyer that in a partition action by a minor, the Court acts upon the representation of the guardian or next friend and in a way approves of the action of the guardian; in other words, the Court approves of the conduct of the guardian and grants his prayer and, therefore, it sanctions what the minor through his guardian or next friend wished to be done; and he relied upon *Kancherla Kanakayya* v. *Mulpuru Kottayya* (10) as supporting his contention. In that case the next friend of a minor transferred a decree obtained on behalf of a minor without the leave of the Court. The High Court held that the leave to transfer the decree might be given at any time. This case does not support Mr. Rajah Iyer's contention. In a partition action, the Court does not merely sanction what the guardian or next friend has done; it hears and determines on the evidence whether the minor plaintiff should be given his share of the family property by effecting a partition or not. It does not merely sanction what the minor wants but it comes to a conclusion on the evidence as to whether the prayer of the minor plaintiff should be granted or not.

But the question whether the plaintiff's share is liable to be diminished by the birth of the 24th defendant is not concluded by the decision in *Chelimi Chetty* v. *Subbanna* (1). Though the minor plaintiff becomes divided in status from the 1st defendant only by reason of the decree of the Court, yet his share in the family property is what it was on the date of the plaint. The Court determines on the evidence before it whether on the date of the plaint the minor plaintiff was entitled to partition or not. In the case of an adult plaintiff, his share is not liable to be diminished by the birth of a member who was not conceived at the time of the filing of the plaint. If a member of a joint Hindu family alienates his share, the alienee is entitled to the share of his alienor as on the date of the alienation and not as on the date on which he obtains a decree for partition. It is difficult to see why in the case of a minor plaintiff a different principle should prevail. In the case of an adult plaintiff suing for partition the Court has not to determine whether he is entitled to partition or not. It is his undoubted right to claim a partition. Nobody has a right to deny him his share if he is entitled to one. In the case of a minor plaintiff, he is entitled no doubt to a share. All that the Court is asked to determine is whether in the circumstances of the family it is advantageous to the minor plaintiff to be separated from the other members of the family or not. Though it is the Court that determines that question its determination does not affect the share of the minor plaintiff which was his on the date when he filed his plaint. If the 24th defendant had been conceived before the date of the filing of the plaint, no doubt the plaintiff would be only entitled to one-third share, but the 24th defendant was born only in June 1920. So he could not have been *ventre sa* mere on 31st January, 1919, and no such case is put forward on his behalf. So he must have been conceived long after the plaint was filed. On the date when the plaintiff filed his suit, he was entitled to a half share and the mere fact that the Court took two years to decide the suit is not a ground for diminishing his share which was a moiety on the date of the suit. Supposing in a partition suit at the instance of a minor, several unnecessary contentions are raised, and the case takes a number of years before it is ready for trial, and before it is decided several members are added to the family, is it reasonable to hold that the plaintiff for no fault of his should be deprived of the share which he was entitled to on the date he filed his plaint either owing to the obstructive conduct on the part of the defendants or to the unavoidable delay in the Courts? I think it is but reasonable to hold that the plaintiff's share is not dimi-

(10) 63 Ind. Cas. 285; 41 M. L. J. 75; 13 L. W. 637; (1921) M. W. N. 437.

nished owing to the birth of the 24th defendant before the preliminary decree was passed. The plaintiff is, therefore, entitled to a half-share of the joint family property and not to one-third as found by the Subordinate Judge.

The next question is whether the 1st defendant is liable to account for the income. In a partition suit the managing member of the family is not liable to account for the income and profits; but in this case the plaintiff was not supported by the 1st defendant, and all the income was enjoyed by the 1st defendant. The plaintiff had to be maintained by his maternal relations and it is but fair that he should get his share of the income from the date of the plaint. The Court has a discretion in this matter and I think this is a fit case in which the discretion should be exercised in favour of the plaintiff by giving him a moiety of the income from the date of plaint to the date of his being put in possession of his share of the property.

Respondents Nos. 2 and 3 were not represented in this Court, but I must say in fairness to Mr. Rajah Iyer that he presented his case very fairly before the Court.

The memorandum of objections is allowed with costs.

V. N. V.
Z. K. *Memorandum of objections allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 45 OF 1924.

April 22, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Musammat GULAB DEI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FIRM VAISH MOTOR COMPANY, ETAWAH, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Compromise entered into on behalf of minor—Leave of Court, absence of, effect of—Guardian refusing to be bound by compromise before leave granted—Compromise, whether binding on minor—Decree passed on compromise—Leave of Court, whether can be presumed.

A compromise entered into on behalf of a minor without the leave of the Court is a nullity. [p. 430, col. 1.]

The mere fact that a decree has been passed in terms of a compromise does not necessarily justify an inference that the Court granted leave on behalf of a minor party or that it was satisfied that the compromise was for the benefit of the minor. [p. 429, col. 2; p. 430, col. 1.]

Where the guardian of a minor enters into a compromise without the leave of the Court but changes his mind before the leave of the Court is granted, the compromise cannot be forced on the minor. [p. 430, col. 1.]

First appeal from an order of the District Judge, Agra, dated the 15th November 1923.

Mr. *Gopi Nath Kunzru*, for the Appellants.

Mr. *J. M. Banerji*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand in a suit brought by *Musammat* Gulab Dei on behalf of herself and as guardian of her minor son against a Motor Company for accounts. The case was apparently being looked after by her father as her *pairokar*, and on the 2nd of August 1923 when she was not herself present in the Court the case was compromised on her behalf and on behalf of her minor son on instructions given by her father Shankar Lal. The Court recorded this compromise and passed a decree in terms of it. *Musammat* Gulab Dei for herself and on behalf of her minor son appealed to the District Judge from this order recording the compromise and urged that she had never given any authority to the compromise being made, that the compromise was not for the benefit of the minor, and that no leave of the Court having been obtained it was a nullity. The learned Judge came to the conclusion that it was not clear whether Shankar Lal had authority to enter into the compromise, or that the compromise was for the benefit of the minor. He has accordingly remanded the case to the Court of first instance, but has given directions as to how the Court is to proceed in case it came to certain conclusions after further enquiry.

It seems to us that so far as the minor is concerned the compromise cannot be forced on him. The minor's guardian herself did not enter into the compromise but someone on her behalf did enter into it. It is, however, not disputed that no leave of Court has up till now been granted and that there is no finding that the compromise was for the benefit of the minor. The mere fact that the decree has been passed in terms of the compromise does not necessarily justify an inference that Court granted leave, or that it

was satisfied that the compromise was for the benefit of the minor. Any compromise without the leave of the Court is a nullity. As before any leave has been granted, the guardian herself does not want the compromise, it is impossible to force the compromise on the minor. In the case of *Ranga Rao* v. *Rajagopala Rajn* (1), it was clearly held that even if a guardian of a minor enters into a compromise without the leave of the Court, but changes her mind before the leave of the Court is granted, the compromise cannot be forced on the minor. This follows clearly from the wording of O. XXXII, r. 7, under which no next friend or guardian is permitted without the leave of the Court to enter into any agreement or compromise on behalf of a minor. If, therefore, before any such leave is granted she changes her mind, it cannot be forced on the minor.

The case, therefore, so far as the minor is concerned must be disposed of on the merits unless the guardian chooses to compromise it afresh after having obtained the leave of the Court.

As regards *Musammat* Gulab Dei herself, the question remains whether Shankar Lal or her Vakil had authority to compromise the case on behalf. The case has been rightly remanded in order that this matter may be enquired into. Of course, if it is found that neither Shankar Lal nor the Vakil had any authority to compromise on behalf of *Musammat* Gulab Dei, then the case so far as she is concerned will also be tried on the merits.

We allow the appeal in part, and modifying the order of the learned District Judge direct that the case be remanded to the Court of first instance for the enquiry as to whether Shankar Lal or the Vakil had authority to compromise the case on behalf of *Musammat* Gulab Dei. The compromise so far as the minor is concerned will, however, be totally ineffective.

We direct that the minor appellant will have his costs from the respondent. The other parties will bear their own costs.

Z. K. *Appeal allowed.*

(1) 22 M. 378; 8 Ind. Dec. (N. S.) 272.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 639 OF 1923.

November 25, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

ZUBEDA BEGAM SAHEBA—PETITIONER

versus

KOMMANNA KANNIAH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment—Agency Courts, properties in the jurisdiction of—Agency Rules, rr. 16 (4), 22—Power to attach at instance of Court outside Agency Tracts.

A Court acting under the C. P. C. has no jurisdiction in a suit pending before it to attach before judgment properties situate in the Agency Tracts over which it has no jurisdiction. [p. 431, col. 1.]

Setrucherula Ramabhadraraju Bahadur v. *Maharja of Jeypore*, 51 Ind. Cas. 185; 42 M. 813; 17 A. L. J. 694; 37 M. L. J. 11; (1919) M. W. N. 502; 26 M. L. T. 127; 21 Bom. L. R. 914; 30 C. L. J. 209; 23 C. W. N. 1033; 10 L. W. 362; 46 I. A. 151 (P. C.) and *Kruthiventi Perrazu* v. *Seetharamachandraraju*, 69 Ind. Cas. 559; 16 L. W. 669; (1922) M. W. N. 728; (1923) A. I. R. (M.) 114, relied on.

Under the Agency Rules for the administration of the Agency Tracts, there is no power in the Agency Court to attach properties before judgment at the instance of a British Court situate outside the Agency Tracts. [p. 431, col. 2.]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Vizagapatam, in I. A. No. 752 of 1922, in O. S. No. 19 of 1922.

Mr. *S. Subramania Sastri*, for the Petitioner.

Mr. *Y. Suryanarayana*, for the Respondents.

JUDGMENT.—This is an application to revise an order passed by the Subordinate Judge of Vizagapatam refusing to set aside an attachment before judgment of property, namely, a house alleged to belong to the petitioner who is the wife of the 3rd respondent. The attachment order was passed in the following circumstances: Respondents Nos. 1 and 2 filed O. S. No. 19 of 1922, against respondents Nos. 3 and 4 for the recovery of Rs. 50,000 and obtained an order for attachment before judgment of the said property alleging it to belong to the 3rd respondent. The petitioner's case was that the house in question belonged to her and not to the 3rd respondent. The property is situate in what are known as the Agency Tracts. The Subordinate Judge of Vizagapatam in whose Court the application was made rejected the

petition on the ground that the claim was not satisfactorily proved.

The only question raised in this revision petition is one of jurisdiction. It has been argued before us that the Subordinate Judge of Vizagapatam has no jurisdiction in a suit pending before him to attach before judgment properties which admittedly are in the Agency Tracts over which his Court has no jurisdictions, and in support of this argument strong reliance has been placed on. a decision by the Privy Council in *Setrucherula Ramabhadraraju Bahadur* v. *Maharaja of Jeypore* (1). In that case a suit was brought under the C. P. C. in the Court of the Subordinate Judge of Vizagapatam to enforce a mortgage of property, some of which were situate in the Agency Tracts subject to the special jurisdiction of the Agency Courts, and a decree on the mortgage and for the sale of the mortgaged property was made by the Subordinate Judge and affirmed by the High Court. On appeal to the Privy Council it was held that "so far as the decree was for the sale of the mortgaged property in the scheduled District, the Courts had no jurisdiction to make it," and the decree was, therefore, "varied by deleting the order for sale so far as applicable to the lands situate within the Agency Districts." In our opinion, the reasoning adopted by their Lordships of the Privy Council in this case applies to the present case also. Their Lordships state: "The order for sale is made under sections of the C. P. C. which the Code itself says are not to apply to the scheduled District." In the case before us, the property is situate in the Agency Tracts and the order for attachment before judgment was made under the C. P. C. which does not apply to such tracts; on the authority of the decision on *Setrucherula Ramabhadraraju Bahadur* v. *Maharaja of Jeypore* (1), it was held in *Kruthiventi Perrazu* v. *Sectharamachandraraju* (2) that an Agency Court was right in refusing to execute a decree sent to it for execution regarding the lands in the Agency Tracts. The learned Vakil for the respondents has not been able to advance any satisfactory reason why the principle enunciated in *Setrucherula Ramabhadraraju Bahadur* v. *Maharaja of Jeypore* (1) should not be applied in the present case also. The argument that the order for attachment before judgment in this case was passed in a suit for money, while the order for sale in the Privy Council case was passed in a suit against property does not really affect the application of the principle "that the order was made under sections of the C. P. C. which the Code itself says are not to apply to the scheduled Districts."

It has also been argued by the learned Vakil for the appellant that there is no provision in the Agency Rules to attach before judgment properties in the Agency Tracts in a suit pending in a Court outside the Agency. In this connection our attention has been drawn to rr. 22 and 16, cl. (4) of the Agency Rules. In our opinion, the rules do not confer the power on an Agency District Munsif of attaching properties before judgment at the instance of a British Court situate outside the Agency Tracts. Nor do we think that such power was conferred upon him by r. 2, cl. (4) relied upon by the respondents.

Applying the principle of the Privy Council decision in *Setrucherula Ramabhadraraju Bahadur* v. *Maharaja of Jeypore* (1), we hold that the order of attachment before judgment passed by the learned Subordinate Judge is without jurisdiction and we set it aside accordingly. The petitioner will have her costs in this Court only.

V. N. V. *Petition allowed.*

(1) 51 Ind. Cas. 185; 42 M. 813; 17 A. L. J. 694; 37 M. L. J. 11; (1919) M. W. N. 502; 23 M. L. T. 127; 21 Bom. L. R. 914; 30 C. L. J. 209; 23 C. W. N. 1033; 10 L. W. 362; 46 I. A. 151 (P. C.).

(2) 69 Ind. Cas. 559; 16 L. W. 669; (1922) M. W. N. 728; (1923) A. I. R. (M.) 114.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 235 OF 1923.

April 21, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

SITAL RAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM KHELAWAN PANDEY—PLAINTIFF AND NAND KUMAR RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Occupancy and fixed rate tenancies, mortgage of—Mortgagee in possession of occupancy holdings—Suit to recover possession of fixed rate holdings and

in alternative for proportionate amount of mortgage money, whether maintainable.

Defendants executed a mortgage of occupancy and fixed rate holdings in favour of the plaintiff. Plaintiff brought a suit in which he stated that he was in possession of the occupancy holdings but that he had been dispossessed from the fixed rate holdings and prayed for recovery of possession of the latter and in the alternative for recovery of a proportionate amount of the mortgage-money:

Held, (1) that the mortgage of the occupancy holdings was illegal;

(2) that inasmuch as the plaintiff was in possession of the occupancy holdings which were not transferable and wanted to recover possession of the remaining lands, his suit could not be decreed, as to do so would be to enforce the entire mortgage a part of which was illegal;

(3) that the plaintiff was not entitled to a decree for a proportionate amount of the mortgage-money inasmuch as the result of such decree would be to split up the mortgage-money which was one single consideration for the transfer, it being impossible for the Court to say how much of the entire consideration was intended to be for the occupancy lands and how much for the fixed rate tenancies.

First appeal from an order of the District Judge, Ghazipur, dated the 28th September 1923.

Mr. *A. P. Pandey*, for the Appellants.
Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants arising out of a suit brought by a mortgagee for recovery of possession of certain lands and in the alternative for recovery of a proportionate amount due.

It appears that the defendants made a mortgage of occupancy and fixed-rate holdings in the year 1911 for a sum of Rs. 999-15-0 in favour of the plaintiff. The plaintiff's case is that he has been in possession of the occupancy lands all along and is in possession of them even now, but that as regards the fixed-rate tenancies he was put in possession but has since been dispossessed. The defence was that the mortgage was viod and the plaintiff had no right to seek the assistance of the Court.

The Court of first instance dismissed the suit on the ground that the mortgage was one transaction and the whole of the mortgage was illegal. It also came to the conclusion that inasmuch as the plaintiff wanted to retain possession over the occupancy lands he did not come to Court with clean hands and was not entitled to any relief. The suit was accordingly dismssed. On appeal the learned District Judge has taken a contrary view. Relying on the case of *Rajendra Prasad v. Ram Jatan Rai* (1), he is of opinion that it was open to the mortgagee to claim relief against the fixed-rate tenancies which were transferable. He has accordingly allowed the appeal and remanded the case for disposal of the other issues.

In our opinion it is unnecessary in this case to decide the question whether when a mortgage is made of occupancy holdings along with certain other properties which are legally transferable for a single consideration the whole transaction is or is not void. It is, therefore, unnecessary to consider the ruling reported as *Rajendra Prasad v. Ram Jatan Rai* (1). It is quite sufficient for the purposes of this case to say that the plaintiff is not entitled to seek any relief in Court at all. He admittedly retains possession of the occupancy lands which are not transferable and he wants to recover possession of the remaining lands. If his suit were to be decreed the result substantially would be to enforce the entire mortgage contract part of which is admittedly illegal. It seems to us that such a relief ought never to be granted. In the case of *Rajendra Prasad v. Ram Jatan Rai* (1), the mortgagee had actually given up all claim to the occupancy lands which were not transferable. In the present case the mortgagee actually retains possession of the occupancy lands and has not given them up. He cannot, therefore, be entitled to a decree for possession.

The learned Advocate for the respondent has urged that in any case he is entitled to a proportionate money decree. If such a claim were allowed the result would be to split up the mortgage-money which was one single consideration for the transfer. It is impossible for a Court to say how much of the entire consideration was intended to be for the occupancy lands and how much for the fixed-rate tenancies when the mortgage-deed makes no such apportionment. We cannot, therefore, even give the plaintiff a decree for a proportionate amount of the mortgage-money.

We accordingly allow this appeal and setting aside the order of the lower Appellate Court restore the decree of the Court of first instance with costs in all Courts including in this Court-fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 39 Ind. Cas. 785; 15 A. L. J. 544; 39 A. 539.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 363 OF 1925.

May 1, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KISHUN AHIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SARAN AHIR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Pre-emption Act (XI of 1922), s. 5—Wajib-ul-arz relating to several villages—Record of custom—Rubkar attached to wajib-ul-arz stating that no custom prevailed in a particular village, value of—Custom, existence of, proof of.

A *wajib-ul-arz* relating to a *taluqa* comprising a number of villages stated that there was a custom of pre-emption in the *taluqa* but a *rubkar* was attached to the *wajib-ul-arz* declaring that the entry relating to the custom of pre-emption in the *wajib-ul-arz* was to be deemed to be incorrect so far as it related to a particular *mauza* and it was stated in the *rubkar* that in that particular *mauza* there was no custom of pre-emption and that there would be no such custom in future:

Held, (1) that in order to determine whether the *wajib-ul-arz* recorded a custom of pre-emption in respect of the particular *mauza* within the meaning of s. 5 of the Agra Pre-emption Act, the *wajib-ul-arz* could not be read detached from the *rubkar* which professed to correct it and that when read together the effect of the two documents was that there was no *wajib-ul-arz* recording a custom of pre-emption in respect of the particular *mauza*;

(2) that the two documents indicated that the parties concerned intended to have nothing whatever to do with the right of pre-emption whether by custom or by contract in respect of the particular *mauza* referred to in the *rubkar*.

Second appeal from a decree of the District Judge, Azamgarh, reversing that of the Munsif, Havali.

Mr. *Haribans Sahai*, for the Appellants.

JUDGMENT.—We think the decision of the lower Court in this case is correct. It is a case to which the Pre-emption Act XI of 1922 applies. It appears that in the 1874 Settlement the village in which the property is situated formed part of a *taluqa* comprising a number of villages. It is true that a *wajib-ul-arz* was prepared at that Settlement in which it was stated that there was a custom of pre-emption, but there was also produced before the Court below a certified copy of a *rubkar* dated the 30th September 1874, declaring that the entry relating to custom in this *wajib-ul-arz* was to be deemed to be incorrect as far as this *mauza* Jalalpur was concerned. It was stated clearly in this *rubkar* that there was in that village no custom of pre-emption and that there would be no such custom in future.

We are of opinion that the Judge of the Court below construed s. 5 of the Pre-emption Act correctly. The *wajib-ul-arz* cannot be read detached from the *rubkar* which professes to correct it. The two documents must be construed together and we are quite clear, this being done, there is no *wajib ul-arz* of 1874 recording a custom of pre-emption.

It is further argued that even if this view be taken, there is nothing to exclude the idea that the parties who signed the *wajib-ul-arz* were entering into a contract for pre-emption. Here again we think the language of the *rubkar* is quite clear. It indicates to us that the parties concerned intended to have nothing whatever to do with the right of pre-emption whether by custom or by contract.

No other point arises for discussion.

We dismiss the appeal under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1939 OF 1922.

April 2, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.

GOPI MOHAN MAZUMDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAWAB BAHADUR OF MURSHIDABAD—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 50—Landlord and tenant—Suit for enhancement—Tenure created since Permanent Settlement—Fixity of rent—Presumption, absence of—Contract, whether can be proved.

Where in answer to a suit for enhancement of rent the defendants plead that the *jama* is *mourusi mokarrari* and that, therefore, there can be no enhancement, a finding that the *jama* was created after the Permanent Settlement and that consequently no presumption arises under s. 50 of the Bengal Tenancy Act is not enough to dispose of the defence. Notwithstanding such a finding it is open to the defendants to establish on the evidence that there was a contract that the rent of the tenure should not be enhanced.

Appeal against a decree of the Special Judge, Murshidabad, dated the 11th of April 1922, affirming that of the Assistant Settlement Officer, Rajshahi, dated the 20th of September 1920.

Mr. *Bipin Chandra Mullick* and Babu *Rabindra Nath Banerji*, for the Appellants.

Messrs. *Hemendra Chandra Sen*, *Amarendra Nath Bose*, Babus *Gopendra Nath Das* and *Suresh Chandra Mukerji*, for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the defendants against a decision of the District Judge of Murshidabad, affirming a decision of the Assistant Settlement Officer of Rajshahi. The plaintiff, the landlord, claimed enhancement of rent. Defendants pleaded that the *jama* was *mourasi mokarrari* and that, therefore, there could be no enhancement. Both the Courts below have found that the *jama* was created after the Permanent Settlement. The lower Appellate Court seems to have thought that once this was established, the fact that no presumption, therefore, arose under s. 50 of the Tenancy Act disposed of the case. In our opinion, this is not so. It is true that even if the tenure had been held for a long period at the same rate of rent, no presumption as to its permanency could arise, if, as has been found, the tenure was created after the Permanent Settlement. But even if so, it is open to the defendants who are sued for enhancement of rent to establish on the evidence that there was a contract that the rent of the tenure should not be enhanced. Unfortunately, the lower Appellate Court has not found whether or not any such contract existed; and the matter will accordingly go back to the Judge in the Court below in order that he may arrive at a finding on the evidence, both documentary and oral, in the suit as to whether there was any arrangement or contract between the parties that the rent of this holding should not be enhanced. The same point arose in the case of *Nityananda Pal* v. *Nanda Kumar Chowdhury* (1). The decree of the lower Appellate Court is accordingly reversed and the matter must go back in order that the case may be considered from the point of view indicated in this judgment. Costs of this appeal and of the remand will abide the decision by the lower Appellate Court who will finally dispose of the case.

Cuming, J.—I agree.

Z. K. *Appeal allowed; Case remanded.*

(1) 10 Ind. Cas. 163; 13 C. L. J. 415.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 706 OF 1923.

January 30, 1925.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

ABDUL WAHID—PLAINTIFF—APPELLANT

versus

HATIM ALI—DEFENDANT—RESPONDENT.

*Custom—Pre-emption—*Wajib-ul-arz, *entry in, construction of—Partition, effect of—*Shurkayan deh, *meaning of—Resumed* muafi *land, sale of—Pre-emption, whether can be claimed.*

An entry in a *wajib-ul-arz* recording a custom of pre-emption gives rise to the presumption that the custom exists in the village. [p. 435, col. 1.]

The paragraph in a *wajib-ul-arz* recording a custom of pre-emption stated generally that the custom prevailed in the village and the list contained in the paragraph comprised shares both in *khalsa* and resumed *muafi* and there was nothing to indicate that the entry was confined to sale of shares in *khalsa* land alone. Subsequent to the date of the *wajib-ul-arz* the village was partitioned into distinct *mahals*. One of the *mahals* consisted entirely of proprietors who were originally proprietors of resumed *muafis*. One of these proprietors sold certain land and plaintiff, who was a proprietor in the same *mahal* as the vendor, brought a suit for pre-emption. The *wajib-ul-arz* gave the right of pre-emption to *shurkayan deh*:

Held, (1) that the custom of pre-emption must be deemed to exist in the *mahals* into which the village had been divided after the partition; [p. 435, col. 2.]

(2) that the custom was applicable to resumed *muafi* lands and was not confined to *khalsa* lands alone; [*ibid.*]

(3) that the words *shurkayan deh* must after the partition be interpreted as meaning *shurkayan mahal* and that although the custom of pre-emption continued after the partition it must now be confined only to those co-sharers who had a joint interest in the same *mahal* with the vendor; [*ibid.*]

(4) that the plaintiff being a co-sharer in the same *mahal* with the vendor had a preferential right of pre-emption as against the vendee who was a co-sharer in another *mahal* and, therefore, a stranger to the vendor. [*ibid.*]

Second appeal from a decree of the District Judge, Bulandshahr.

Messrs. *Mushtag Ahmad* and *Iqbal Ahmad*, for the Appellant.

Dr. *Kailas Nath Katju*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption with respect to the sale of a share situated in *mahal munzabta* of Abdul Wahid the plaintiff, in which the plaintiff and the vendor had proprietary interests, and in which the defendant-vendee has not proprietary interest. There were many pleas taken by the defendant. Among others were the pleas that there was no custom of pre-emption in this village; that the custom did not apply to resumed *muafi* lands which had been sold and lastly

that the defendant being a proprietor in the village out of which this *mahal* had been carved, he was on an equal footing with the plaintiff. The Court of first instance decreed the claim; but on appeal the lower Appellate Court dismissed the suit *in toto*.

To prove the existence of this alleged custom the plaintiff produced a *wajib-ul-arz* of the year 1873 which contains a clause relating to the right of pre emption. On behalf of the defendant three judgments, namely, of 1879, 1895 and 1899 were produced where a claim of pre-emption was asserted, but not allowed. The plaintiff produced a judgment of the year 1910 which we understand was affirmed by the High Court in second appeal and where a claim for pre-emption on the basis of custom was upheld. We may note that the judgments in the earlier cases proceeded on a view of law which does not now prevail. The learned Judges did not proceed on a presumption in favour of the plaintiff but rather thought that the *wajib-ul-arz* not having been signed by the parties was not conclusive. In the second case the learned Judge held that the custom did not apply to *muafi dawami*. It is possible that the whole *wajib-ul-arz* was not before him because in the *wajib-ul-arz* in Ch. III, para. 1, there is a special mention that transfers of *muafi dawami* take effect subject to the right of pre-emption.

The last judgment is in favour of the plaintiff.

In our opinion there is nothing to rebut the ordinary presumption arising from the *wajib-ul-arz* that a custom of pre-emption exists in this village. We, therefore, agree with the Courts below that it must be held that a custom exists.

The next question is whether such a custom applies to *muafi munzabta*. In para. 5 of the *wajib-ul-arz* after giving a long list of the transfer that were in existence at the time of its preparation, there is a recital that no other property is under a mortgage and that in future every co-sharer will have a right to sell his share, but he shall first sell to his own brothers and if they refuse then to *shurkayan deh* (co-sharers in the village), and if they also do not take then he may transfer it to any one he pleases.

Paragaph 14, which has the heading of the custom of pre-emption states that pre-emption prevails. It is noteworthy that in this paragraph the list comprises both shares in *khalsa* and resumed *muafi* and there is nothing in it to indicate that the entry was confined to sales of shares in *khalsa* land alone. Furthermore, since the preparation of the *wajib-ul-arz* the village has been partitioned into two distinct *mahals*. The plaintiff's *mahal* now consists of only one class of proprietors who originally were proprietors of resumed *muafis* and now are co-sharers in this new *mahal*. The plaintiff and the vendor are both co-sharers and they are on the same footing, whereas the defendant-vendee is not a co-sharer in this *mahal*. The custom must be deemed to exist in this new *mahal*.

It is next contended before us that the defendant being a proprietor in the village is on the same footing as the plaintiff. This contention cannot prevail. Prior to the partition he certainly was a co-sharer with the vendor but since the partition he has gone off to an entirely different *mahal* and has no community of interest left with the vendor.

The words *shurkayan deh* must now be interpreted as meaning *shurkayan mahal*. The custom continues but it is now confined only to those co-sharers who have a joint interest in this *mahal*.

We are accordingly of opinion that the view taken by the learned Judge is not correct. We allow this appeal and setting aside the decree of the lower Appellate Court restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale. We extend the time for payment to six months from this date. In case of default of payment the suit shall stand dismissed with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 6 OF 1925.

February 19, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Rankin.

ANDERSON KIRKWOOD TENNENT—PLAINTIFF—APPELLANT

versus

WALTER MITCHEL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 16—

Evidence Act (I of 1872), s. 92, proviso (3)—Pleadings, striking out of—Duty of Court—Suit to recover amount of cheque—Oral agreement that cheque would not be presented in a certain event, whether admissible.

The jurisdiction to strike out pleadings which is given to the Court by O. VI, r. 16 of the C. P. C., is one which ought to be exercised with great care and caution. A written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations which the defendant has put upon the record are such as cannot afford a defence to the action with the result that if they are allowed to stay upon the record the trial of the suit must be unnecessarily delayed. [p. 437, col. 1.]

The Court should not, as a rule, decide a point as to the relevancy of matters on an application to strike out a pleading. [*ibid*]

Oral evidence is admissible to prove a contemporaneous verbal arrangement, upon the faith of which an instrument was handed over that it would not be effective or operative until a certain condition has been fulfilled. [p. 437, col. 2]

In answar to a suit to recover the amount of certain cheques, it was pleaded by the defendant that when the cheques were handed over to the plaintiff it was orally agreed between the parties that in the event of a certain dispute being settled in a certain manner the cheques would not be presented for payment. On an application by the plaintiff to strike out this plea, the Court held that evidence of the oral agreement which the defendant alleged would not be admissible under s. 92 of the Evidence Act and that consequently the plea must be struck out:

Held, that as the pleadings stood the allegation of the defendant was susceptible of the meaning that when the defendant handed over the cheques to the plaintiff, it was agreed between them that the cheques should not be presented for payment until a dispute which had arisen between the parties should be settled in the manner which was stated in the written statement and that in this view of the case evidence of the oral agreement might be admissible under proviso (3) to s. 92 of the Evidence Act and that, therefore, the order striking out the plea could not be upheld. [p. 436, col. 2.]

Appeal against the judgment of Mr. Justice Buckland, dated the 6th January 1925.

Messrs. *Langford James* and *F. Surita*, for the Appellant.

Mr. *L. P. E. Pugh*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the defendant against the judgment of my learned brother Mr. Justice Buckland which was delivered on the 6th of January 1925, by which the learned Judge directed the defendant's written statement to be struck out as embarrassing. Inasmuch as this appeal is in the nature of an interlocutory appeal, the hearing of it was expedited.

The application was made by the plaintiff under O. VI, r. 16 of the First Schedule of the C. P. C. That rule is as follows: "The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the suit;" and it is upon the ground that the written statement would embarrass and delay the fair trial of the suit, that the order has been made.

The suit was brought by the plaintiff to recover the sum of Rs. 11,000 and it was alleged that that sum was advanced to the defendant on the 4th of April 1923 and that in return for that advance the defendant gave the plaintiff four cheques, which were post-dated and bore the dates respectively the 1st of October, the 1st of November, the 1st of December 1923, and the 1st of January 1924.

The plaint further alleged that the defendant promised to re pay the sum of Rs. 11,000 on the aforesaid dates.

The plaint then alleged that the cheques were duly presented; but payment was refused on the ground endorsed upon the cheques. The endorsement was "payment stopped by the drawer."

The defendant in his written statement set up the defence that the plaintiff was a Turf Commission Agent; that the defendant had given him instructions to back a horse called "Better Hope," and that the plaintiff had failed to carry out his instructions, whereby the defendant had lost a sum of about Rs. 20,000 inasmuch as the horse, which the defendant desired to back, had won the race. It was then alleged that the plaintiff denied that he had received these instructions; that a dispute arose and the matter was reported by the defendant to the Stewards of the Royal Calcutta Turf Club; that the plaintiff was intending to leave Calcutta; and, it was then arranged that the settlement of that dispute should be postponed until his return which, it was anticipated, would be about September 1923.

The defendant then alleged as follows:—"The defendant on the said date (*i.e.*, the 4th of April 1923) made over the four post-dated cheques referred to in the plaint to piaintiff and it was orally agreed by and between the plaintiff and the defendant that on the dispute being settled as aforesaid, the said cheques would not be presented for payment."

The learned Judge decided that evidence of the oral agreement, which the defendant alleged would not be admissible under s. 92 of the Indian Evidence Act; consequently he came to the conclusion that the written

statement in that respect was embarrassing and would delay the fair trial of the suit: acting upon that opinion the learned Judge ordered that the written statement should be taken off the file.

With great respect to the learned Judge, I am of opinion that the written statement ought not to have been struck out on that ground.

It is clearly established that the Court should not, as a rule, decide an important point as to the relevancy of matters on an application to strike out.

The jurisdiction which is given to the Court by O. VI, r. 16, is one which, in my judgment, ought to be exercised with great care and caution: and it follows that a written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations, which the defendant has put upon the record, are such as cannot afford a defence to the action, with the result that if they are allowed to stay upon the record, the trial of the suit must be unnecessarily delayed.

In this case, there is a matter which, in my judgment, is decisive of this appeal. It was referred to by the learned Counsel for the plaintiff in the course of his argument. The question whether the alleged oral agreement, upon which the defendant relies, is admissible in evidence, will depend to some extent upon the way in which the defendant's case is presented at the trial. The allegation in the written statement as to the oral agreement is open to the criticism that the meaning thereof is not clear, and I could well-understand the learned Judge making an order that the pleading should be amended and made more explicit. That, however, was not done. As the pleadings stand the allegation is susceptible of the meaning that when the defendant handed the four cheques to the plaintiff, it was agreed between them that the cheques should not be presented for payment until the dispute which had arisen between the parties should be settled in the manner which was stated in the written stetement.

Under these circumstances I am not prepared at this stage of the proceedings to hold that evidence of such an agreement would be inadmissible having regard to the provisions of s. 92, proviso (3) of the Indian Evidence Act.

It has been held that evidence is admissible which shows a contemporaneous verbal arrangement, upon the faith of which an instrument was handed over, that it would not be effective or operative until a certain condition has been fulfilled.

In my judgment, therefore, the learned Judge ought not to have exercised the jurisdiction which was vested in him by O. VI, r. 16, by striking out the written statement.

With regard to the other part of the written statement, namely, that which alleges that "there is a sum of Rs. 9,000 due and owing to the defendant by the plaintiff being the difference between the said sums of Rs. 20,000 and Rs. 11,000 all or any portion of which sum the plaintiff has failed to pay to the defendant," and that part of para. 7 which prays for a decree in favour of the defendant against the plaintiff, I agree with the learned Judge that those allegations should be struck out of the written statement for the reasons which the learned Judge has stated.

I do not mean to say that the previous paragraphs which set out the alleged facts upon which the defendant relied and which led up to the allegation of the oral agreement should be struck out: I confine my decision solely to paras. 6 and 7 of the written statement which, in my opinion, should be struck out. This is without prejudice to any right which the defendant may have to institute a suit in respect of these allegations.

For these reasons, in my judgment, this appeal must be allowed, and the learned Judge's order so far as it directs that the written statement should be taken off the file must be set aside. The written statement will stand, except that paras. 6 and 7 so far as they relate to the defendant's claim for Rs. 9,000 must be struck out. Each party will pay his own costs of the application before Mr. Justice Buckland.

The plaintiff must pay the defendant's costs of this appeal.

Having regard to the fact that it might be somewhat embarrassing to my learned brother Mr. Justice Buckland to try this case in view of the opinion which he has already expressed, we think it desirable that this case should be tried by another Judge. I, therefore, direct that this case should be placed in Mr. Justice Page's list, with liberty to the parties to apply for a speedy trial.

Rankin, J.—I agree.

The learned Judge has not merely objected to the lack of clarity in certain words

in the middle of para. 4 of the written statement, and accordingly gone on to tell the defendant that he ought to have pleaded better, and given him upon certain terms a few days in which to make the matter clearer; but he has struck out the written statement altogether, having come to a finding that the defence disclosed in para. 4 is one which must be inadmissible in evidence in view of s. 92 of the Evidence Act. Before that could be done, it must be very clear that the defence put forward is inadmissible in evidence. Far from thinking that that is very clear, I am disposed to think that it may very well be that the oral agreement as expressed in para. 4 is within proviso (3) to s. 92. For this reason it seems to me that the order of the learned Judge with regard to this matter cannot be upheld.

I agree also with regard to the alleged counter-claim for Rs. 9,000 which is set up in paras. 6 and 7 of the written statement, that those ought to be struck out without any opportunity to amend, having regard to the fact that this counter-claim cannot be tried in this suit.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 105 OF 1924.
March 13, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir Theodore Caro Piggott, KT.

KANJI MALL—PLAINTIFF—APPELLANT

versus

DURGA PRASAD AND OTHERS—DEFENDANTS RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against some defendants—Appeal—Decree, whether can be passed against defendants who were absolved by Trial Court.

Where a plaintiff obtains a decree against some of the defendants in the suit and no decree is passed against the other defendants, but on an appeal by the judgment-debtor defendants the Appellate Court comes to the conclusion that the decree should have been against the defendants who have been absolved from liability by the Trial Court, and not against the defendants-appellants, it can apply the provisions of O. XLI, r. 33 of the C. P. C., to give appropriate relief to the plaintiff. [p. 439, col. 1.]

Neelamani Patnaik Mussadi v. *Sukaduva Behara*, 60 Ind. Cas. 255; 43 M. 803; 12 L. W. 269, relied on.

Letters Patent Appeal from a judgment of Mr. Justice Mukerji, dated the 19th March 1924.

Messrs. *P. L. Banerji* and *S. N. Gupta*, for the Appellant.

JUDGMENT.—This was a suit for profits, and accounts had to be adjusted as between three distinct parties, namely, the plaintiff, Kanji Mal, the third defendant Durga Prasad and the other two defendants Jugal Kishore and Ram Chandra in respect of whom a joint account was required to be taken. The case underwent various vicissitudes; but in the end a learned Judge of this Court on the basis of express findings of fact returned upon issues remitted for the purpose, arrived at the conclusion that Kanji Mal, the plaintiff, was on a fair settlement of accounts, entitled to recover Rs. 242-7-6 in all from the other co-sharers. He also found that Durga Prasad was in debt to the other co-sharers by reason of realizations which he had made in excess of his rateable share, to the amount of Rs. 202-14-11. On these facts the learned Judge rightly held that there ought to be a decree in favour of Kanji Mal against Durga Prasad alone for a sum of Rs. 202-14-11. It was found that there had been a settlement as between Kanji Mal and the other two defendants so that it was not necessary to go further into the question of their respective rights or liabilities. The learned Judge, however, held that, because no decree had been passed against Durga Prasad and the plaintiff had never appealed against the decree which dismissed his claim as against Durga Prasad, no decree could be given in favour of Kanji Mal on the second appeal which had been filed by Jugal Kishore and Ram Chandra. The matter has been brought before us in an appeal under the Letters Patent in which all the defendants to the suit as brought are impleaded. The plaintiff Kanji Mal relies on the provisions of O. XLI, r. 33 of the C. P. C., and contends that there ought to have been a decree in his favour against Durga Prasad for Rs. 202-14-11. Reliance is also placed on the case of *Neelamani Patnaik Mussadi* v. *Sukaduva Behara* (1), as authority for the proposition that the provisions of O. XLI, r. 33, of the C. P. C., can be applied so as to give appropriate relief to a plaintiff who appeared before the Ap

(1) 60 Ind. Cas. 255; 43 M. 803; 12 L. W. 269

pellate Court as a respondent under circumstances closely analogous to those now before us. In our opinion, this contention is well-founded. We modify the decree of the learned Judge of this Court and instead of dismissing the plaintiff's claim altogether we grant him a decree for Rs. 202-14-11 against the defendant Durga Prasad alone.

The costs as between these two parties, which will include fees on the higher scale in respect of both hearings in this Court, will be adjusted on the basis of payment and receipt in proportion to failure and success calculated on the total amount originally claimed.

Z. K. *Decree modified.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 114 OF 1923

AND

(CIVIL MISCELLANEOUS PETITION No. 3989 OF 1923).

December 18, 1923.

Present:—Sir Walter Salis Schwabe, KT., Chief Justice, and Mr. Justice Ramesam.

P. SUNDARAM MUDALIAR—PLAINTIFF—APPELLANT

versus

C. MUTHUSWAMI PILLAI—DEFENDANT—RESPONDENT.

Madras High Court Original Side Rules, O. XX, r. 11 (1)—Practice—Original Side—Under-chapter suit—Decree by Deputy Registrar—Stay of execution, unconditional, whether can be granted.

Where under the Madras Original Side Rules, a decree is passed by the Deputy Registrar in an under-chapter suit, it is not right for a Judge to stay execution of the decree unconditionally, or by imposing simply a condition as to giving security for a small amount for the defendant's appearance. [p. 439, col. 2.]

The fact that the defendant's property is tied up may be a ground for a conditional but is not a ground for an unconditional stay. [*ibid.*]

Appeal from an order of Mr. Justice Devadoss, dated the 14th December 1923, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, on the Judge's summons taken out by the respondent (defendant) for the extension of time for payment of the amount of the decree to be passed in C. S. No. 738 of 1923.

Petition praying that in the circumstance, stated in the accompanying affidavit filed therewith, the High Court will be pleased to direct the respondent herein to furnish security for the amount due under the decree in C. S. No. 738 of 1923, on the file of the High Court, Original Civil Jurisdiction, pending disposal of O. S. No. 114 of 1923, preferred therefrom to the High Court, Appellate Jurisdiction.

Mr. *V. C. Seshachariar*, for the Appellant.

Messrs. *G. Krishnaswami Iyer* and *A. Ramaswami Iyengar*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—In my judgment, the order made in this case was wrong, apart altogether from the question, whether there was any power, under the circumstances of the case, to make an order under O. XX, r. 11, (1) in that the decree was passed under the Rules by the Deputy Registrar on December the 11th and this order was made by Devadoss, J., several days later. For I do not think it right for the Judge, upon the making of a decree, to stay the execution of it unconditionally, without very much better cause being shown by the defendant than that his property is tied up and that he cannot lay his hands upon it for the moment. That may be a ground for staying execution conditionally, on the judgment-creditor being in some way secured. In my view, it is not correct, under these circumstances, to stay execution unconditionally, or by imposing simply a condition as to giving security for a small amount for a defendant's appearance, in six months' time as was done in this case. But it is suggested that, in the interests of everybody concerned, it will be possible now to make a satisfactory order, as to the terms, on which this decree may be stayed, and it is suggested that the respondent-defendant will be able to give to the plaintiff in a short time security to his satisfaction. Therefore, I propose to adjourn the hearing of the appeal until the 7th February and if, meanwhile, the defendant gives security, either on property or in the ordinary way, to the satisfaction of the Deputy Registrar, Original Side, the stay will stand. If by that time, he fails to give the security, the stay must be removed and, in any event, the taxed costs of this appeal must be paid by the respondent and the costs of the motion in this appeal will be payable by the defendant. The defendant says that, on an application to the Tanjore Court, where a Receiver has

been appointed of his property in a matter which came before us the other day, he will probably obtain authority to pay to the present plaintiff the amount of his debts. As far as we are concerned, we think that it will be very desirable that such an application shall be made, but we know nothing as to its practicability.

Ramesam, J.—I agree.

V. N. V.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 130 OF 1924.

May 5, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

DURGA RAM—OPPOSITE PARTY—APPELLANT

versus

HAR KISHEN DASS—APPLICANT—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 6—Act of insolvency—Purchasing goods from one creditor and paying off others—Ceasing to prosecute business with vigour, whether act of insolvency.

The facts that a retail seller of goods has been purchasing goods from one creditor and has been selling them in retail and using the sale-proceeds to pay off other creditors and that he has not been keeping up his accounts for some time past and has ceased to carry on his business with vigour do not constitute an act of insolvency within the meaning of s. 6 of the Provincial Insolvency Act.

First appeal from an order of the District Judge, Ghazipur, dated the 16th of May 1924.

Mr. *S. N. Verma*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—This is an appeal from an order declaring the appellant, Durga Ram, an insolvent on the application of the respondent Har Kishan Das to whom he is indebted. It is difficult to know exactly on what grounds the learned Judge has granted the petition. The acts of insolvency alleged in the creditor's petition were, first, that the insolvent was removing his property in order to avoid paying his creditors, and, secondly, that he did not sit at his shop and was about to go to Calcutta. The learned Judge finds neither of these allegations to be proved. As regards the absence, he says that all that is proved is that the appellant was absent from his village for about two or three hours on one occasion when the *munim* of the shop went to collect the debt. This is not sufficient to constitute an act of insolvency within the meaning of cl. (*d*) (*ii*) of s. 6. The grounds on which the learned Judge seems to have proceeded are that the defendant who is a cloth dealer has been purchasing cloth from the applicant, selling it retail and using the sale-proceeds to pay up creditors other than the applicant. He further finds that the defendant has not been keeping up his accounts for about a month past and has ceased to carry on his business with vigour during these days. Neither of these two acts constitutes an act of insolvency within the Provincial Insolvency Act. Nor does the fact that he is unable to pay his debts in itself suffice. We allow the appeal and set aside the order of adjudication. The appellant will get his costs.

Z. K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

January 23, 1925.

Present:—Lord Shaw, Lord Blanesburgh, Sir John Edge, and Mr. Ameer Ali.

MOTILAL ITCHPALAL GANDHI—APPELLANT

versus

HAJI MOOSA HAJI MUHAMMAD—RESPONDENT.

Vendor and purchaser—Sale of immoveable property—Conclusion of negotiations—Five days' notice to complete contract, whether unreasonable—Contract Act (IX of 1872), s. 55.

A contract for the sale of immoveable property contained a clause making the settlement and the payment of the price subject to the condition that time was of the essence of the contract. The investigation into title, however, took nearly six months and at the end of that period when the purchaser had been satisfied as to the vendor's title and a draft conveyance had been prepared and approved by the vendor and had been sent to the agents for the purchaser, the vendor gave notice to the purchaser to complete the sale without delay. To this the purchaser replied that he was ready to complete the sale and had the purchase-money lying idle with him. Thereupon the vendor wrote to the purchaser again giving him five days' notice within which to have the sale-deed engrossed and to pay the purchase-money:

Held, (1) that the purchaser having replied to the first letter of the vendor to the effect that the purchase-money was ready, was estopped from contend

ing that five days' notice was too short a period for him to provide the purchase money; [p. 142, col. 2.]

(2) that in any case having regard to the circumstances of the case the notice given by the vendor to the purchaser was not unreasonable and that the purchaser was bound to complete the sale within the period of the notice. [*ibid.*]

Messrs. *George Lowndes* and *E. B. Raikes*, for the Appellant.

JUDGMENT.

Lord Shaw.—The Board is at a considerable disadvantage in this case on account of the absence of the respondent. The case, however, has been explained with complete candor and fullness by Sir George Lowndes, on behalf of the appellant.

In the contract for the sale of this immoveable property, made in the month of February 1919, there was a clause making the settlement and the payment of the price subject to the condition that time was of the essence of the contract. The negotiations, however, proceeded, and the parties entered into communication with regard to the furnishing of a title, requisitions were made and answered, and arrangements with the Municipality, usual in Bombay, had to be come to, so that the *batakki* announcements should be made in the district.

It is quite clear to their Lordships that the time allowed for completion was far exceeded and the condition as to time being of the essence of this contract was, by the conduct of the parties, obliterated therefrom.

The circumstances which are argued to be alone relevant to the issue, are said to begin late in the month of August 1919. But their Lordships desire it to be understood that they make no pronouncement with regard to whether a notice as to completion would be reasonable or abrupt in the case of a contract made at that period. The contract had been made months before. What had happened was that before the period in August 1919, alluded to, a clean title had been furnished, a draft conveyance had been prepared, it had been approved by the vendor and had been sent to the agents for the purchaser; and that nothing *de facto* remained to be done of this transaction—every kind of complication being removed—except the mere clerical item of engrossing the draft, and the financial result, namely, the payment of the price. Those two matters alone remained: the price to be paid and the draft conveyance engrossed for signature.

In those circumstances, on the 23rd August 1919, the vendors' agents wrote saying that the matter must be completed without delay. They intimated by their letter of that date that nearly six months had elapsed since the agreement was executed, and the sale must accordingly now be completed. The letter may be fully quoted. It is as follows, *viz*:—

"Bombay, 23rd August 1919.

"Messrs. Rustamji and Ginwala.

"*Re* Sale of Property at Ardeshir Dady Street.

"DEAR SIRS,

"We extremely regret to note that we have not yet received the engrossment of the conveyance for our comparison. Requisitions on title were answered long ago. Your client had inspection of Trust Deed, and they have been satisfied on all the points. Our client has waited sufficiently long for completion.

"Our client says that your clients have no money and that they have purchased the property from our client only with a view to profiteering. They are out for some purchaser but they have not been able to secure any. It is nearly six months that the agreement was executed and the sale must now be completed without any delay. You should not lose sight of the fact that the agreement provides that the time for completion is the essence of the contract.

"We are, therefore, instructed to request you to send us the engrossment for comparison. The draft conveyance has already been sent to you duly approved. We are expecting the engrossment within four days from the receipt hereof by you.

"Yours truly,

"(Sd.) MOTICHAND AND DEVIDAS."

This letter of the 23rd August was not unnatural in the circumstances which their Lordships have stated, namely, that everything except the clerical part of engrossing the draft and the financial part of payment had been already finished.

In answer to the letter of the 23rd August this letter, dated 25th August 1919, was, however, received by the defendant's agents from the agents for the plaintiff, the purchaser. They say:

"Bombay 25th August 1919.

"Messrs. Motichand and Devidas.

"*Re* Sale of Property at Dady Street.

"DEAR SIRS,

"With reference to your letter dated the

23rd instant, we beg to state that the delay was on your client's part in not replying to the requisitions in time and not furnishing the Municipal bill for a very long time.

"We received the *battaki* only recently and have since then taken the engrossment in hand which we shall let you have as soon as it is ready. Your client's suggestion that our client has no money or that he is trying to secure a purchaser is an imaginary one. Our client's moneys are lying idle with him since two months past and he is more eager to complete this matter than your client.

"Yours truly,
"(Sd.) RUSTAMJI AND GINWALA."

This letter accordingly cleared away any doubt or hesitation on the part of the vendor and his advisers as to the reasonableness of making an immediate demand for the completion of the sale and the payment of the price. They thereupon wrote the letter of the 27th August giving the five days' notice which was received on the 28th August, so that four days remained during which these two simple things had to be done, namely, engross the deed and pay the money.

The question before their Lordships is not any serious or complicated question as to what would be a demand of equity in the completion of a transaction of sale recently made, with reference to which many practical things had to be done by way of clearing the title, and reasonable time for needful business arrangements had to be taken into account. In the circumstances of this case it is simply the ordinary common place question; was it reasonable, with the assurance given by a purchaser that he had the money in the Bank and the title in his hand to say, "Well, the contract having been made months ago, do this little matter within four days or the contract is off"?

The Board having considered the matter, is of opinion that there was no abruptness whatsoever in the conduct of the defendant's agents or in their letter of the 27th August, 1919, and, there being no abruptness in it, the unreasonableness falls to the ground, because the unreasonableness of the demand consists, not in its method; but would have consisted in this, that it would have put the purchaser, whose finances might have been allowed to drop owing to the dragging on of the negotitations, into a position of much embarrassment on such a short notice being given.

Their Lordships are further of opinion that it is not open to this purchaser to set up such a case because the purchaser had given, prior to that notice, the very assurance that no abruptness could be felt by the two statements that he had made, namely, that his money was ready and his title was engrossed. In these circumstances the case for the purchaser falls to the ground. It is explained to the Board that the letter of the 25th August had mis-stated the facts and that it was not in accordance with truth that (*inter alia*) he was ready with the puschase-money. It is clear that he is estopped from maintaining that the facts are otherwise than his letter of the 25th August, 1919, represented them to be.

But their Lordships are further of opinion that, whether he was estopped or not, the circumstances of a long-drawn-out transaction in which all remaining to be done was the engrossment of the deed of sale and the payment of the price, demonstrate that as between purchaser and vendor of immoveable property in a time of financial strain it was not a reasonable position for a purchaser to occupy to be unable to complete within four days.

For these reasons their Lordships have to take the course which will presently be announced, but before doing so they have to note that prior to these proceedings the vendor, who was in possession of a certain deposit of Rs. 500 had made offer to refund that if the transaction went off. Through his Counsel, an intimation has been made to the Board that he does not resile from that position. Their Lordships do not think it necessary to put this into the decree, but it will be recorded in their judgment and the vendor will act accordingly.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the decree of the Trial Judge should be restored with costs in both Courts. The respondent will pay the costs of the appeal.

Z. K. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 16 OF 1922.

November 26, 1924.

Present:—Sir Victor Murray Coutts-Trotter, KT., Chief Justice, and Mr. Justice Srinivasa Iyengar.

P. K. BHIMASENA RAO—DEFENDANT—APPELLANT

versus

I. C. VENUGOPAL MUDALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 10, 22 (4)—Letters Patent (Mad.), cl. 15—Limitation Act (IX of 1908), s. 5—Appeal—Security for costs, failure to furnish—Dismissal of appeal—Cross-objections, whether can be heard—Appeal from Original Side—Cross-objections, nature of—Limitation—Delay—Extension of time—Sufficient cause.

Where an appeal is dismissed on account of the failure of the appellant to furnish security for costs as directed by the Court, a memorandum of cross-objections, filed by the respondents pending the appeal can still be dealt with as a substantive appeal and disposed of after notice to the parties. [p. 443, col. 2.]

Order XLI of the C. P. C. has no application to appeals from the Original Side of the High Court. Such appeals are provided for by cl. 15 of the Letters Patent of the Madras High Court. A memorandum of cross-objections by a respondent in such an appeal must, therefore, be treated as a substantive appeal and must be filed within 20 days from the date of the judgment. [*ibid.*]

Where, however, a respondent is misled by the rules and practice of the Court, and files a memorandum of cross-objections beyond the time for filing the appeal, the delay in the presentation may be excused under s. 5 of the Limitation Act. [p. 444, col. 1.]

Appeal against the judgment and decree of Mr. Justice Phillips, dated the 1st December 1921, and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court.

Messrs. *T. Narasimha Iyengar* and *T. A. Vijayaraghavachari*, for the Appellant.

Messrs. *V. K. Venugopal Naidu* and *V. Krishnan*, for the Respondents.

JUDGMENT.—I shall only say a few words with regard to the preliminary objection that was taken to the hearing of the appeal by the learned Vakil for the respondent.

The 3rd defendant originally filed an appeal and by an order of this Court he was directed to furnish security for the costs of the plaintiff-respondent. He failed to do so and in consequence the appeal went off for default. The objection taken by the learned Vakil for the respondent is that in form the present appeal preferred by the 1st defendant was a memorandum of cross-objections such as is contemplated under r. 22 of O. XLI of the C. P. C. His argument was that when the appeal went off for default and there was no hearing of the appeal, the memorandum of cross-objections could not be heard; but assuming that O. XLI of the C. P. C. applies to this case, the Legislature itself has provided for it in cl. (4) of r. 22 of O. XLI. Before the new Procedure Code there was an expression of judicial opinion to the effect that such cross-objections could not be heard if there was no hearing of the appeal itself. It is to provide against such contingencies that that clause provides that where, in any case in which any respondent has under this rule filed a memorandum of objections, and the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. Notice of the memorandum of objections has been served and, therefore, there is no valid objection to its being heard. But, in my opinion, O. XLI has no application whatever to appeals from the Original Side. The appeal is provided under cl. 15 of the Letters Patent and it is not an appeal from one Subordinate Court to another, the Appellate Court, but from one Judge of the same Court to two or more Judges of the same Court. Now in such a case the provision is only for an appeal from a judgment of one Judge. There is no doubt in the rules framed by this Court for Original Side appeals in r. 351, there is a reference to memorandum of objections, if any. The law of limitation provides 20 days for appeals from a judgment of one Judge on the Original Side and any provision for the filing of memorandum of objections by the rules of this Court will have the necessary effect of extending the period prescribed by the Law of Limitation for Original Side appeals; but, in this case, apart from any question of limitation there is absolutely no difficulty in treating what is called the memorandum of objections as a substantive appeal, because an appeal merely means a petition to the proper Tribunal for the purpose of reversing or modifying a judgment of the Court or Judge from which or whom the appeal is preferred. This is that in form, and apart from any nomenclature, there is absolutely no difficulty in dealing with the substance of this appeal and dealing with it as a substantive appeal. However, I think the

appellant in this case should under the rules of this Court treating it as a substantive appeal be required to pay another sum of Rs. 75 as and for additional Court-fee. There, is, however, the question of limitation, and, though this appeal was not filed within 20 days of the judgment appealed against, still there is no doubt whatever that the appellant in this case was misled by the rules of this Court and by the practice of this Court so long, and, therefore, if there is any case in which the provisions of s. 5 of the Limitation Act can be invoked, this is such a case. The delay in the presentation of the appeal will, therefore, be excused, and the appeal is thus rendered competent. For the reasons set forth in his judgment by my Lord the Chief Justice I agree that the appeal should be allowed as stated by him.

Appeal allowed.

V. N. V.
Z. K.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 21 OF 1924.

April 22, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

FAQIR MOHAMMAD—APPELLANT

versus

Babu BRIJ NARAIN MAHROTRA —RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 41, 45 —Order directing guardian to hand over property to minor—Property not admitted to belong to minor—Order, legality of—Disobedience—Offence—Irregularity, effect of.

A Court cannot in proceedings under the Guardians and Wards Act compel a former guardian to hand over to the minor possession of property which the guardian does not admit to belong to the minor and over which he never obtained possession as guardian of the minor. [p. 445, col. 1.]

So long as an order passed by a competent Court with jurisdiction under the Guardians and Wards Act stands, any disobedience of it by the guardian would be an offence under s. 45 of the Act. The mere fact that there was some irregularity in passing the order would not be a good defence. [p. 444, col. 2.]

First appeal from an order of the District Judge, Cawnpur, dated the 9th August 1923.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Saila Nath Mukerji*, for the Respondent.

JUDGMENT.

Sulaiman, J.—This is an appeal arising out of a guardianship matter. The appellant Faqir Muhammad was appointed guardian on his own application of a minor Muhammad Islam. Along with the application for guardianship he filed a list of the property said to belong to the minor and that list did not contain a house in Cawnpur which has been the subject-matter of much dispute. Subsequently he was removed from the guardianship and the respondent was appointed guardian of the minor. On the 28th of September 1922 the respondent put in an application to the District Judge praying that the former guardian had deliberately omitted from the list the house aforesaid of the rent of which he had given no account whatsoever. We have had the record examined and it is curious that without any formal enquiry having been made as to the title to this house and in spite of the fact that there is a third party *Musammat* Janno who rightly or wrongly is asserting her title to it, an order was passed on the 8th of February 1923, that the former guardian should hand over possession of the said house to the new guardian and that he should pay over the rent which he collected in respect of it. This order apparently was passed on the supposition that inasmuch as the former guardian was actually in possession of the house he was bound to account to the minor.

When an *amin* was deputed to go and hand over possession of the house to the new guardian he was resisted by *Musammat* Janno, who had got the house locked from inside. Formal delivery of possession, therefore, could not be effected. The appellant has also not made good any rent which he had collected from the tenants though professedly not on behalf of the minor. The learned Judge accordingly has fined the appellant for his disobedience of the previous order. The date of the order given in the judgment under appeal is wrong, the correct date being the 8th of February 1923.

It is true that so long as an order passed by a competent Court with jurisdiction stands any disobedience of it would be an offence under s. 45 of the Guardians and Wards Act. The mere fact that there was some irregularity in passing it would not be a good defence. But as we find in this case that the previous order directing the appellant to deliver possession of the house to the new guardian and pay over the

rents realized by him had been passed without any enquiry into the matter we can revise it. It is not suggested by the learned Vakil for the respondent that Faqir Muhammad entered into possession of the house originally on behalf of the minor nor is it anywhere suggested that at any time during the period of his guardianship he admitted that he was holding possession over it on behalf of the minor. The attitude of Faqir Muhammad all along had been that the house did not belong to the minor. It, therefore, seems to me that Faqir Muhammad should not have been compelled to hand over possession of the house to the new guardian or to pay over its rent when he was not put in possession of the house on behalf of the minor. If the house really belongs to the minor it will be open to the new guardian to take legal steps to recover its possession. The learned District Judge cannot in the proceedings under the Guardians and Wards Act compel the former guardian to hand over possession of the house which he does not admit to belong to the minor and over which he never obtained possession as guardian of the minor. The order previously passed had, therefore, been passed with a material irregularity in the exercise of jurisdiction inasmuch as there had been no proper enquiry made at all. As that order was not appealable it is open to the High Court to set it aside on the revisional side. I am, therefore, of opinion that it must be held that the previous order was passed with material irregularity and is not binding on the appellant Faqir Muhammad and that, therefore, his conviction for disobedience of it was not a proper one. It seems to me that the question of the title to the house should be litigated in a regular suit brought by the new guardian, if so advised, against Faqir Muhammad or *Musammat* Janno or whoever else may be in possession. I would, therefore, allow this appeal and setting aside the order of the District Judge dated the 9th of August 1923 and conviction of the appellant direct that the fine, if paid, should be refunded.

Daniels, J.—I concur in allowing the appeal. I am not prepared in these proceedings to revise an order which is not directly before us and against which no revision has been filed. I am not satisfied that in this appeal we are precluded from taking notice of the fact that the order for disobeying which the appellant has been fined was passed without there being any evidence whatever on the record to show that the appellant was in possession of this house on the minor's behalf. On this ground I concur in allowing the appeal.

By the Court.—The order of the Court is that this appeal is allowed and the order of the District Judge dated the 9th of August 1923 and also the conviction of the appellant are set aside, and it is ordered that the fine, if paid, be refunded.

Z. K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 27, 1925.

Present:—Viscount Haldane, Lord Dunedin and Lord Darling.

UDOYCHAND PANNALAL—PETITIONER

versus

P. E. GUZDAR AND CO.—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Cross-claims for damages—Award, suit to set aside—Valuation of suit below ten thousand rupees—Appeal to Privy Council—Cross-claim for damages, whether property involved in suit—Leave, whether can be granted.

Petitioner entered into a contract for sale of goods with the respondents and the contract contained a clause that all disputes arising out of the sale should be settled by arbitration. A dispute arose and was referred to arbitration and an *ex parte* award was made but was set aside by the Court. Against the order setting aside the award respondents preferred an appeal. In the meantime petitioner filed a suit claiming the damages which he had claimed in the arbitration but the suit was stayed on the application of the respondents. Petitioner appealed against the order of stay. Respondents' appeal against the order setting aside the award and petitioner's appeal against the stay order were both eventually dismissed. The parties again betook themselves to arbitration and as the arbitrators were unable to agree *ex parte* awards were made one in favour of the petitioner for Rs. 81,000 and the other in favour of the respondents for Rs. 3,900. The High Court on the application of the respondents set aside the award in favour of the petitioner. The petitioner then filed a suit to set aside the award in favour of the respondents which was decreed but was dismissed on appeal. Against this order of dismissal petitioner applied for leave to appeal to the Privy Council which was refused. Petitioner then made an application to the Privy Council for special leave to appeal:

Held, (1) that the case did not fall under sub-s. (c)

of s. 109 of the C. P. C. inasmuch as the High Court had refused to certify it under that sub-section; [p. 446, col. 2.]

(2) that the case did not fall under sub-s. (*a*) of s. 109 of the C. P. C., inasmuch as the subject-matter of the suit was only Rs. 3,900; [*ibid.*]

(3) that the case did not fall within the purview of sub-s. (*b*) of s. 109 of the C. P. C., inasmuch as the petitioner's right to recover damages against the respondent was not consequential on the result of the present suit and was too remote to be entitled to the description of being property indirectly involved in the issue of the suit within the meaning of sub-s. (*b*) of s. 109 and that consequently petitioner was not entitled to come up in appeal to the Privy Council. [p. 447, col. 1.]

Appeal against the judgment and decree of the Calcutta High Court, dated the 28th July 1922.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Petitioner.

Sir *G. Lowndes, K. C.*, and Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

Lord Dunedin.—The question raised by this petition is as to the meaning of s. 110 of the C. P. C. The circumstances which have given rise to it are peculiar and complicated. They arise out of a contract for sale of goods made by the respondents with the petitioner. In the contract of sale there was a provision that all disputes arising out of the sale should be settled by arbitration. A dispute did arise and cross-claims were made. The parties commenced arbitration proceedings, but disagreed as to appointment of arbitrators. An arbitrator appointed by the respondents made an *ex parte* award in their favour, but this was set aside by the Court. New arbitrators chosen in a manner ordered by the Court were then appointed. Another *ex parte* award was made and this also was set aside. Against this order setting it aside the respondents appealed. The petitioner then filed a suit claiming the damages he had sought in the arbitration. This was met by an application to stay the suit pending the disposal of the above-mentioned appeal, or otherwise until the matter was settled by arbitration. The High Court granted the stay. The petitioner appealed against that order. The Court of Appeal then took up this appeal and the appeal before mentioned and it dismissed both appeals, the date of the dismissal of the last mentioned being the 28th July, 1922. The parties then again betook themselves to arbitration. Again the arbitrators were unable to agree and *ex parte* awards were made, one in favour of the petitioner for Rs. 81,000 odd, the other in favour of the respondents for Rs. 3,900 odd.

On the 5th December, the High Court, on the application of the respondents, set aside the award in favour of the petitioner. The petitioner then raised a suit to set aside the award in favour of the respondents, and it is in this suit that the petition comes before the Board. The High Court in its original jurisdiction set it aside, but on appeal the Appeal Court reversed and dismissed the suit. The petitioner applied for leave to appeal, but this was refused upon the ground that the sum involved was neither directly nor indirectly of the value of Rs. 10,000.

The only question, therefore, is whether the case falls within the words of s. 110; that section is as follows:—

"110. In each of the cases mentioned in cls. (*a*) and (*b*) of s. 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount of value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must envolve some substantial question of law."

Now, it is clear that the present case does not fall under the first paragraph because the actual subject of the suit is only Rs 3,000 odd. Nor does it fall under sub-s. (*c*) of s. 109, which is as follows:—

"(*c*) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council,"

because it has not been certified. It is, therefore, if at all, under the second paragraph of s. 110. The learned Judges of the High Court have held that it does not so fall upon the ground that here what is affected directly or indirectly is not property. The appellant argued that it must be property because the right which the petition has to make good was the claim of right which, in the nomenclature of English Law, is called a *chose in action*, and because the transference of such rights is

dealt with in the Transfer of Property Act.

Their Lordships are not inclined to attempt any precise definition of the word "property." The C. P. C. has not done so, and any definition might not be found in the future precisely to fit the circumstances which the kaleidoscope of actual experience may produce. But they think that the present is not a case where the issue of this suit can be said directly or indirectly to involve other property. Let the situation be considered. If this appeal were allowed and were successful, what would be the position? The petitioner would indeed get rid of his present liability to pay Rs. 3,000 but that is the subject-matter of the suit and is not of the value of Rs. 10,000. What then? The first thing that he would have to do would be to get rid of the judgment of the 28th July 1922, staying his suit. Against that judgment he did not appeal, and he feels that so much that he has appended to the present petition a further prayer to be allowed to appeal against that order. He would have to be successful in that appeal and then also he would have to succeed on the merits of his suit, and not till then would he be in possession of anything tangible in the way of money.

Their Lordships think that this is not really consequential on the present decree and too remote to be entitled to the description of being property indirectly involved in the issue of this suit. It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because such cases, if worthy of being tried by a higher Tribunal, can always be dealt with under sub-s. (c) of s. 109.

Their Lordships will humbly advice His Majesty to refuse the prayer of the petitioner with costs.

Z. K. *Prayer refused.*

Solicitors for the Petitioner:—Messrs. *Downer, Johnson & Co.*

Solicitors for the Respondents:—Messrs. *Watkins* and *Hunter.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1137 OF 1923.

March 13, 1925.

Present:—Mr. Justice Stuart.

RAM SARUP AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GAYA PRASAD—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 164, 165—Suit for profits against legal representative of deceased lambardar—*Profits, calculation of, basis of.*

Where a suit for profits is brought not against the *lambardar* himself but is brought after his death against his successor-in-title, the latter is not liable to account for profits which his predecessor had failed to collect or which he permitted to remain uncollected owing to negligence or misconduct. In such a case profits can be awarded only on the basis of actual collections. [p. 448, col. 1.]

Bharat Singh v. *Tej Singh*, 43 Ind. Cas. 636; 40 A. 246; 16 A. L. J. 193 (F. B.), distinguished.

Dip Singh v. *Ram Charan*, 29 A. 15; 3 A. L. J. 608; A. W. N. (1906) 252, followed.

Second appeal against a decree of the District Judge, Farrukhabad, dated the 12th April 1923.

Dr. *K. N. Katju*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was brought under s. 165 of the Tenancy Act by certain *zemindars* for profits. During the period in which the profits have become due Ram Dayal was *lambardar*. Ram Dayal had, however, died before the suit was brought and it was sought to obtain the profits from his sons as his representatives. The Trial Court awarded profits on a basis of demands. The lower Appellate Court has awarded profits on a basis of collections.

In second appeal it is asserted that the profits should have been given on a basis of demands and in support of that proposition reliance is placed upon the authority of the Full Bench decision in *Bharat Singh* v. *Tej Singh* (1). That decision does not, however, support the appellant's contention. In the suit out of which the appeal decided in *Bharat Singh* v. *Tej Singh* (1) arose the suit was one brought under s. 164 against the *lambardar* and the Full Bench decided that where a suit had been brought against a *lambardar* and he had died during its pendency the provisions of sub-s. (2), s. 164 had application and that a decree should be given for sums which had not been collected owing to the negligence or misconduct of the *lambardar* as against the assets left

(1) 43 Ind. Cas. 636; 40 A. 246; 16 A L J. 193 (F. B.

by him in the hands of his heirs. But this decision in no way overruled the previous decision of a Bench of this Court in *Dip Singh* v. *Ram Charan* (2) in which it was held that the successor-in-title of a deceased *lambardar* in a suit which was not brought against the *lambardar* but brought after his death was not liable to account for profits which his predecessor had failed to collect or which he permitted to remain uncollected owing to negligence or misconduct. That was also a suit under s. 165. But there it is to be noted that the actual *lambardar* sued was not the *lambardar* who was guilty of the misconduct and negligence. In that case one *lambardar* had been negligent, had then died and the suit had been brought against another *lambardar* who had been guilty of no misconduct.

I read the Full Bench ruling to have application only to suits under s. 164. This is a suit under s. 165. The descendants of the deceased *lambardar* are in no worse position than any other co-sharer. The special provision by which a *lambardar* or his heirs, legal representatives, executors, administrators and assigns are liable for sums remaining uncollected owing to negligence and misconduct does not apply to the defendants here as co-sharers in spite of the fact that they are also the heirs of the *lambardar*.

The learned District Judge arrived at a correct decision on the point. I dismiss this appeal with costs on the higher scale.

Z. K. *Appeal dismissed.*

(2) 29 A. 15; 3 A. L. J. 608; A. W. N. (1906) 252.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 88 OF 1924.

April 30, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Lala TULSHI RAM—PLAINTIFF—APPELLANT

versus

DAYA RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3—Date fixed for taking oath—Oath not taken—Procedure—Court, whether can proceed to decide suit on materials on record.

The parties to a suit agreed to have the suit decided in accordance with an oath to be taken by one of them. The Court fixed a date for the oath to be taken. On the date fixed, the oath was not taken and the Court purporting to act under the provisions of r. 3 of O. XVII of the C. P. C. proceeded to decide the case on the materials on the record giving the parties no opportunity of producing any further evidence:

Held, that r. 3 of O. XVII of the C. P. C. had no application to the case and that the proper course for the Court was to direct the suit to proceed and to be decided on the merits after allowing the parties an opportunity to produce all the evidence that they wished to produce.

First appeal from an order of the District Judge, Meerut, dated the 25th March 1924.

Dr. *N. C. Vaish*, for the Appellant.

Mr. *K. C. Mital*, for the Respondent.

JUDGMENT.—This is an appeal against an order of remand under the following circumstances. In the course of the plaintiff's evidence the plaintiff agreed that if the defendant would take an oath holding one of his sons in his lap with his hand placed on the son's head he would accept it. The defendant agreed to do this, and a date was fixed for the required oath to be taken and for no other purpose. We may point out that the oath in question was one which it was not permissible to the Court to allow to be administered in view of s. 8 of the Oaths Act of 1873 as it was an oath affecting a third person. The Court, therefore, acted wrongly in fixing a date for the oath to be taken. On the date so fixed the defendant asserted that he was unable to produce his son as the plaintiff had persuaded his wife not to allow her son to come. This allegation so far as it concerned the plaintiff may have been, and very likely was false. However that may be, it was impossible for the oath to be taken on that date. The learned Munsif applied the provisions of O. XVII, r. 3, C. P. C. and without giving the parties an opportunity of producing any further evidence proceeded to decide the case on the materials on the rscord. The learned Judge holds and we agree with him, that this is not the correct course to take, and that O. XVII, r. 3, has no application to these circumstances. The proper course was to direct the suit to proceed and to be decided on the merits after allowing the parties an opportunity to produce all the evidence they wished to produce. We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 38, 67 AND 68 OF 1921.

June 20, 1921.

Present:—Mr. Kennedy, J. C, and Mr. Aston, A. J. C.

PITUMAL—APPELLANT—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 162, 360—Statement before Police—Oral evidence, whether admissible—Evidence Act (I of 1872), ss. 80, 92—Omission to read deposition to witness, effect of.

It is not necessary under s. 162 of the Cr. P. C. that statements made to the Police in the course of an investigation should be reduced to writing. Section 91 of the Evidence Act has, therefore, no application and it is open to the prosecution to prove by the oral statements of the Police Officer what the contents of the statements made to the Police by the witnesses were. [p. 450, col. 1.]

No amount of pressure of work and inconvenience and other considerations of that kind in the slightest degree can justify any Court for the deliberate breach of the provisions of the law. Section 360 is direct and positive and instructions laid down by the law to the administrators of the law should be rigorously complied with both in the interests of the accused, Court and witnesses. [p. 450, cols. 1 & 2.]

If a statement is properly recorded under s. 360 then under s. 80 of the Evidence Act a strong presumption arises that the deponent stated in his evidence what appears in the deposition. If, however, s. 360 is not complied with, that presumption does not arise, and it is necessary for the person who alleges that the memorandum, which purports to be a deposition, but has been irregularly recorded, is accurate, to prove that it is accurate, if its accuracy is challenged. [p. 450, col. 2; p. 451, col. 1.]

The omission to read out a deposition to a witness as required by s. 360 of the Cr. P. C. does not necessarily render it inadmissible in evidence, at any rate against a person charged with abetment of perjury and it can also be proved by extraneous evidence notwithstanding s. 91 of the Indian Evidence Act. [p. 452, col. 2.]

Applications to revise the judgment of Mr. Madgavkar, Additional Judicial Commissioner.

Mr. *S. G. Velinkar*, for the Applicant.

Mr. *Motiram Idanmal*, for the Crown.

JUDGMENT.

Kennedy, J. C.—In this case one Bachumal alleged that he entrusted one Bohar with 200 empty gunny bags to carry to the Salt Works at Marypur and also gave him Rs. 2 in his shop at Karachi. It appears that Bachumal found that Bohar had not made the use of those gunny bags and the rupees which he has expected and consequently Bohar was prosecuted. An investigation was made by the Police and in the course of that investigation three coolies, Gangu, Aloo and Mehar employed by Bachumal made certain statements to the Police in the investigation under s. 162, Cr. P. C., which tended to show that the gunny bags and rupees had been entrusted as alleged. Prosecution was, therefore, launched against Bohar. But at the trial Gangu, Aloo and Mehar are said to have made statements contradicting their statements made to the Police which revised statements tended to show that the gunny bags and rupees were not so entrusted to Bohar. Eventually Gangu, Aloo and Mehar were prosecuted for making false statements in a judicial proceeding and one Pitumal was prosecuted for abetting such false statements. All parties were convicted. Pitumal, Gangu, Aloo and Mehar appealed to this Court in its Sessions Court Jurisdiction and their appeals were dismissed. Pitumal alone now comes here in revision.

According to the principles always applied to revisional applications we shall not consider the facts. There is evidence which if believed (as it has been by two Courts), establishes that the statements made by Gangu, Aloo and Mehar were false and that Pitumal incited them to make them. I confine myself, therefore, to the legal points which have been urged in favour of Pitumal.

Such legal points are three.

In the first place, it appears that the false statements which form the ground of the present charge are not the statements of Gangu, Aloo and Mehar that they did not see the delivery of bags and money to Bohar, but are statements that they did not state to the Police that they had seen such delivery. It is urged that even assuming Pitumal was guilty of suborning of perjury in respect of the delivery, it is not likely he could have suggested these particular false statements to Gangu, Aloo and Mehar and that he would have confined himself to urging them to state that they had not seen the delivery of gunny bags and rupees to Bohar. But it seems to me that the false statements for the making of which Gangu Aloo and Mehar have been convicted are so closely connected with the false statements which Pitumal may have been considered likely to have suggested to them to make, that he must be held responsible for the statements so made by Gangu, Aloo and Mehar just as if *A* incites *B* to

kill *C* with a club and *B* meets *C* and stuns him with a club and then strangles him, it is impossible to hold that *A* is not guilty of abetment of murder by *B* of *C*.

Another point taken is that there is no actual evidence as to what statements made to the Police were. It appears that as usual the statements of Gangu, Aloo and Mehar made to the Police were reduced to writing under s. 162, Cr. P. C. These tipens are lost and are, therefore, not in evidence. But as a matter of fact it is not necessary under s. 162 that statements made in such an investigation should be reduced to writing. Section 91 of the Evidence Act, therefore, has no application and it is quite open to the prosecution to prove (as it has done in the present case by the oral statements of the Police Officer what the contents of the statements made to the Police by the witnesses were).

The third point is really the crucial point in the case and that is whether there is any evidence as to what the statements of Gangu, Aloo and Mehar in the trial of Bohar to the Magistrate were. We are still rather in the dark as to what the language of the Court of the City Magistrate is whether English or Sindhi, and consequently it is somewhat difficult to ascertain which of the statements, namely, the statement taken by the Magistrate in English or the statement taken by the *Sheristedar* in Sindhi is the deposition. But nothing turns upon this because it is not disputed that the two statements recorded are identical, that is to say, that the Sindhi record and the English memorandm contains the same statements. What is important, however, is this that the statements so contained whether in the English memorandum or the Sindhi memorandum (whichever is to be considered as the depositions of Gangu, Aloo and Mehar) were not read over to the deponents in the presence of the Court and the accused as they should have been under s. 360, Cr.P.C. It is necessary to express here with much emphasis that no amount of pressure of work and incovenience and other considerations of that kind in the slightest degree can justify any Court for the deliberate breach of the provisions of the law. Section 360 is direct and positive and instructions laid down by the law to the administrators of the law should be rigorously complied with both in the interests of the accused, Court and witnesses. Then what is the effect of the neglect of the provisions of s. 360?

It is urged on behalf of the applicant by his Counsel that in this case the effect is this:

The law having laid down certain formalities for completion of the deposition, and those formalities not being fulfilled there is no deposition. Under s. 91 of the Evidence Act no extraneous evidence can be given as to what the witness said other than his deposition and consequently there being no deposition, it is impossible for the Court to ascertain what the accused person said in Court when he was the deponent. Therefore, it is impossible to establish against the applicant the charge of perjury. But this seems to me to push the matter beyond what is reasonable and what the law lays down. It seems to me if this view is correct the only logical consequence would be that when a deposition had not been read out it would be impossible for any conviction to be had or to be upheld in appeal.

It is only on the depositions that the Trying Court when writing its judgment and still more the Appellate Court can decide the case, and if the depositions are not admissible in evidence owing to non-compliance with s. 340 then the record is blank and the prosecution must fall. Now none of the Courts which have dealt with this question have pushed the matters to that extreme. At the most it has been said that such a deposition cannot be admitted in evidence against the maker when he is being prosecuted for perjury. This is so far the question of s. 91 goes. But this seems to me purely an arbitrary view and I cannot see how Courts can pick out certain provisions of s. 360 and say that failure to comply with such provisions render the deposition inadmissible against certain persons, whereas the failure to comply with certain provisions does not render such depositions inadmissible against certain other persons. It seems to me the true way of looking to this question is this. If a statement is properly recorded under s. 360 then under s. 80 of the Evidence Act a strong presumption arises that the deponent stated in his evidence what appears in the deposition. If, however, s. 360 is not complied with, that presumption does not arise, and it is neces-

sary for the person who alleges that the memorandum, which purports to be a deposition, but has been irregularly recorded, is accurate, to prove that it is accurate, if its accuracy is challenged. In the present case the fact that these three people did make what appears to have been made in the so-called deposition is clearly established by extraneous evidence. I think, therefore, there can be no doubt that the deposition (as you may call it) was to all intents and purposes a true record of the case and actually represented what was said in the Magistrate's Court. But in the case of the deponent himself no doubt a further consideration arises. If s. 360 is complied with the deponent has always up to the moment when he is dismissed from the Court a *locus pœnitentiæ*. There have been cases in the experience of all of us when a witness has been telling a tissue of falsehood upto the time when his deposition is read out to him and he has then been touched by penitence or comes to the conclusion that he has taken too much risk and has resiled from his deposition and has said in Court that his deposition is false. In the case, therefore, where a deponent is being tried for making a false deposition and where the provisions of s. 360 have not been strictly complied with, it would I apprehend always be open for the deponent to say that it was unjust that he should be prosecuted for a perjured statement because if he had been given full opportunity he would have stated the truth in Court. Whether such plea would avail when the deponent shows by his whole statement, and it also appears from the surrounding circumstances of the case that he intended to adhere to his false statement is another matter which is not before us. But I cannot see that the fact there is a loop-hole for the deponent would in any way assist the abettor. The deponent may be so touched at the conclusion of the statement by remorse or terror that he states to the Court that the statement that he has given at the instigation of the abettor is false and thus correct the statement so recorded. But the abettor has no means of correcting the record or advising the witness to change his statements. The abettor has no access to the witness while the witness is deposing. The remorse and the penitance of the witness arises spontaneously in his own mind. The abettor as such is *functus officio* when he induces the witness to make a false statement, he is not entitled to the benefit of the penitance of his accomplice. So far, therefore, as the present charge goes even if Gangu, Aloo and Mehar having made these statements had had their depositions properly read over to them under s. 360 and then had changed their story and admitted that they had made these statements to the Police, I cannot myself see that that would in any way benefit Pitumal who, (it has been found by two Courts) incited Gangoo, Aloo and Mehar to get up in Court and swear that they had not said certain things which they had as a matter of fact said to the Police.

It seems to me, therefore, that the views of the learned Additional Judicial Commissioner sitting as Sessions Judge are correct and I would, therefore, dismiss these revision applications.

Aston, A. J. C.—The petitioner Pitumal has been convicted of the offence of abetment of perjury. The principal ground on which he applies for revision is that the conviction was bad because the statements of the alleged perjurers Gangoo, Aloo and Mehar were not recorded in accordance with the provisions of law. Gangoo, Aloo and Mehar gave their evidence in the Sindhi language, the *Sheristedar* recorded their evidence in Sindhi and the learned Magistrate recorded an English translation repeating it sentence by sentence in English in the presence of the Pleaders who appeared for the prosecution and the defence before he wrote it down. The record was not translated nor read to the witnesses as required by s. 360 of the Cr. P. C., 1898. A large number of cases have been cited in support of the proposition that where a prosecution for perjury is based on a deposition which has not been taken in accordance with law within the meaning of s. 80, the deposition is altogether inadmissible in evidence against the alleged purjurer. In *Kamatchinathan Chetty* v. *Emperor* (1) the deposition of a witness was read over to him by a Court Clerk in a place where neither the Judge nor Vakils were present. It was held that his conviction for perjury could not be sustained and that the deposition should not have been admitted in evidence.

(1) 28 M. 308; 2 Cr. L. J. 756.

In *In re Nalluri Chenchiah* (2) where a deposition was not read over and interpreted to a witness it was held dissenting from the principle laid down in *Meango* v. *Baviah* (3) that the omission to read over and interpret the deposition was not a mere irregularity but rendered the record inadmissible in proof of the deposition under s 91 of the Evidence Act as the guarantee provided by law for its accuracy had been substantially ignored and because it was dangerous and against public policy to make a witness liable on such a wholly unsafe record. In *Emperor* v. *Mayadeb Gossami* (4) a deposition was made in Assamese. The Judge recorded it in English, he did not sign it nor was it read over to the witness or translated. It was held that the deposition was not admissible against the witness in a charge of perjury. In *Emperor* v. *Jogendra Nath Ghose* (5) the Court held that s. 360 of the Cr. P. C. required the evidence of a witness to be read over to him in the hearing of the accused or his Pleader, so as to enable the latter to correct any mistakes in it and that the reading of the witness himself was not a compliance with the section and rendered the record inadmissible in a subsequent trial against him under s. 193 of the Penal Code. In *Ramesh Chandra Das* v. *Emperor* (6) the Court no doubt held that the perusal by a witness of his deposition was a substantial compliance with O. XVIII, r. 5 and that such deposition was admissable in evidence on a subsequent trial of the deponent but this was a deposition under the C. P. C. and the Court expressly distinguished rulings under s. 360 of the Cr. P. C. In the case of *Imam Din* v. *Niamat Ullah* (7) where the evidence was not read out to a witness, it was held that his conviction for perjury could not be sustained. So too in *Kartar Singh* v *Emperor* (8) where it was pointed out that the omission deprived the deponent of the *locus pœnetentiæ*." For the prosecution reliance is chiefly placed on the judgments of Richardson, J., and Beachcroft, J., in *Elahi Baksha Kazi* v. *Emperor* (9) on the judgment of Richardson, J., in *Ramesh Chandra Das* v. *Emperor* (6) and of Sir Lawrence Jenkins, C. J., in *Jyotish Chandra Mukerjee* v. *Emperor* (10). It was pointed out that in *Adyan Singh* v. *Queen-Empress* (11) the Appellate Court held that a Sessions Judge was wrong in rejecting depositions tendered by the defence to contradict certain witnesses on the ground that the requirements of s. 360 of the Cr. P. C, had not been complied with. Reliance was also placed on *In re Bogra* (12) where Mr. Justice Miller expressed the opinion that the presence of the Judge and Vakils at the reading of a deposition is not required for the protection of the witnesses but to make sure that the deposition is correctly recorded and that the accused or the Crown or the defendant or the plaintiff is not prejudiced. And that when a deposition has been read over to a witness and he has admitted it to be correct no good reason exists why his admission so far as he is concerned should not be regarded as proof of its correctness.

The question of law is *res integra* so far as this Court is concerned. For the reasons mentioned by Mr. Justice Beachcroft in *Elahi Baksha Kazi* v. *Emperor* (9), I am of opinion that the omission to read over a deposition to a witness does not necessarily render the deposition inadmissible in evidence. The omission removes the presumption arising under s. 80 of the Indian Evidence Act since the document has not been framed in accordance with law. It also seems to me to impair the value of the deposition from an evidentiary point of view, since a safe guard laid down by the Legislature has been neglected. And in certain circumstances the omission might be fatal. The circumstances in the present case, however, are in my opinion distinguishable. Pitumal, the petitioner, was not the person who committed the alleged perjury but he is charged with abetment of the offence assuming the existence of a

(2) 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296; 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 356; 20 Cr. L. J. 379.

(3) 45 Ind. Cas. 507; (1918) M. W. N. 239; 7 L. W. 435; 19 Cr. L. J. 603; 24 M. L. T. 242.

(4) 6 C. 762; 8 C. L. R. 292; 3 Ind. Dec. (N. S.) 494.

(5) 24 Ind. Cas. 571; 42 C. 240; 18 C. W. N. 1242; 15 Cr. L. J. 483.

(6) 50 Ind. Cas. 660; 46 C. 895; 23 C. W. N. 661; 29 C. L. J. 513; 20 Cr. L. J. 324.

(7) 58 Ind. Cas. 830; 1 L. 361; 21 Cr. L. J. 830; 10 P. W. R. 1920 Cr.

(8) 39 Ind. Cas. 847; 12 P. R. 1917 Cr.; 15 P. W. R. 1917 Cr.; 18 Cr. L. J. 607.

(9) 45 Ind. Cas. 258; 45 C. 825; 27 C. L. J. 377; 22 C. W. N. 646; 19 Cr. L. J. 498.

(10) 4 Ind. Cas. 416; 36 C. 955; 14 C. W. N. 82; 10 Cr. L. J. 581.

(11) 13 C. 121; 6 Ind. Dec. (N. S.) 579.

(12) 7 Ind. Cas. 414; 34 M. 141; 8 M. L. T. 117; (1910) M. W. N. 435; 20 M. L. J. 943; 11 Cr. L. J. 482.

locus pœnitentiæ for witnesses, it cannot be suggested that there was any *locus pœnitentiæ*. So far as the abettor was concerned, his offence was complete as soon as the abetment took place. The evidence shows that the actual deponents subsequently admitted that the records were correct. A double version exists for purpose of comparison in the Sindhi and English languages of what the witnesses said. The English version was read out sentence by sentence by the Magistrate and Pleaders for the prosecution, and defence were present in that and they were in a position to inform the Magistrate if any error arose. The two versions are available for comparison even now and from first to last there has not been a suggestion that any mistake was made in the record of the deposition. I think there can be no reasonable doubt in the circumstances that the witnesses stated in evidence what they are alleged to have stated in the depositions and that they intentionally made the statements attributed to them.

With regard to the question of abetment there appears to me to have been sufficient evidence to justify a finding that the petitioner committed the offence and there appears to me no ground for us in revision to interefere with that finding. Similarly although there is no direct evidence that the petitioner tutored the witnesses to make the statements the subject of the charge there appears to me to have been sufficient evidence to justify an inference that the statements were made in consequence of abetment by the petitioner.

With reference to the objection that oral evidence was admitted to prove statements made by the witnesses to the Police the procedure adopted appears to me to be correct. The examination of a witness by a Police Officer under s. 162, Cr. P. C. does not appear to me to come within the class of documents referred to in s. 91 of the Indian Evidence Act. Section 162 merely enacts that the statement if taken down in writing shall not be signed and the correct procedure for proving statements made to the Police seems to me to put the Police Officer in the witness-box to depose to the statements giving him an opportunity of refreshing his memory if necessary.

For the reasons mentioned I agree with the learned Judicial Commissioner that the conviction and sentences should be confirmed.

K. S. D. *Conviction confirmed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1007 OF 1924.

March 13, 1925.

Present:—Justice Sir Henry Scott-Smith, Kt., and Mr. Justice Zafar Ali.

EMPEROR—APPELLANT

versus

RAM KARAN—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 417—Evidence Act (I of 1872), s. 114, Illus. (b)—Penal Code (Act XLV of 1860), s. 302—Acquittal, appeal against—Interference, when justified—Approver, statement of—Corroboration—Accused seen talking to deceased.

An order of acquittal arrived at upon evidence should not as a rule be set aside unless the Appellate Court holds it to be manifestly wrong or perverse or unless it can be said that the Court which tried the case has manifestly erred. An order of acquittal should not be set aside merely because the Appellate Court is of opinion that if it had been trying the case itself it would have arrived at a different conclusion. [p. 455, col. 2.]

Two little girls were collecting fodder near their village and the accused was seen talking to them shortly before sunset. Two days afterwards the bodies of the girls were discovered lying in a field with injuries on their persons which indicated that their death was due to violence. An approver gave evidence that the girls had been put to death by the accused and himself for the sake of their ornaments:

Held, that the evidence that the accused was seen talking to the girls on the evening on which they disappeared did not amount to a material corroboration of the approver's statement. [p. 454, col. 2.]

Appeal from the order of the Sessions Judge, Hissar, dated the 26th June 1924.

Kanwar *Dalip Singh*, Government Advocate, for the Appellant.

Mr. *Edmunds*, for the Respondent.

JUDGMENT.—This is an appeal by the Local Government under s. 417, Cr. P. C., from the order of the Sessions Judge of Hissar acquitting Ram Karan of the murder of two little girls aged 8 and 10 years respectively under s. 302, Indian Penal Code, and also of robbery under s. 394, Indian Penal Code. Sunehra was also tried along with Ram Karan and was acquitted but no appeal has been filed against him. The two children *Musammat* Ladian and *Musammat* Kini were murdered near the village of Kheri Lochap on the evening of 10th March 1924. They were out in the field collecting fodder on the evening in question and when they did not return after sunset enquiries were made and a search party went out to look for them but no trace could be found. It was suspected at the time that the girls had been taken away from the fields to *Mauza* Bans in the Karnal District on account of

a marriage dispute and so no further action was taken except that some men were sent to that place to make enquiries. On the morning of the 12th March one *Musammat* Rukmani (P. W. No. 7) while collecting fodder in her husband's field in *Mauza* Kheri Lochap found the bodies of the two girls in the field. She gave information in the village, a party went out to the spot where the bodies were and one of them came back and informed Sheoli (P. W. No. 2) uncle of *Musammat* Ladian. He proceeded forthwith to the Police Station Narnond which is distant 5½ *kos* and made the First Information Report. In this he stated that *Musammat* Kini had a pair of silver *karis*, and a pair of *chhail karas* on her feet and *Musammat* Ladian had a pair of *chhail karas* when they had gone out to collect fodder and that these ornaments were missing from the bodies when they were found. In this report no suspicion was directed against any person in particular. The principal witness in the case is Kamal-ud-Din (P. W. No. 3) a youth aged 17 years who has been examined as an approver and whose evidence is that he, Sunehra and Ram Karan used to gamble together and that they murdered the two girls for the sake of their ornaments in order to sell them and thus get money for gambling. The story of Kamal-ud-Din is fully detailed in the judgment of the learned Sessions Judge and it is unnecessary for us to repeat it. The main point which has to be seen is whether the evidence of this accomplice has been corroborated in material particulars against Ram Karan. There was no corroboration at all against Sunehra and on that account no doubt the Local Government did not think it fit to file an appeal against the order acquitting him. The main evidence besides that of the approver against Ram Karan is that of Thakaria (P. W. No. 9) who states that he saw Ram Karan standing near the girls on the evening of the day of their disappearance at a place not very far distant from the field in which their dead bodies were found two mornings later. In addition to this there is the evidence to the effect that three of the missing ornaments were found buried in the house of Ram Karan's father Data Ram where Ram Karan also lives. Further we have the evidence of Lal Chand *alias* Letha (P. W. No. 14) a boy of 12 who produced the other three missing ornaments which he stated had been given to him to hide by Ram Karan. Besides the above upon which alone the learned Government Advocate relies in support of the appeal there is the evidence of Chandoo, Dhari and Shingu which requires to be noticed briefly Chandoo stated that he was returning from Milakpur to Kheri shortly before sunset along the *rajbaha*. As he was coming along he saw three men about 30 paces from the path who were quarreling among themselves. He called out asking who they were. There was no reply. He called out again and Kamal-ud-Din then replied that they were Sunehra and Ram Karan and himself. It was dark at the time and the witness did not indentify these persons by their features but by their voices. This man's evidence has been entirely disbelieved by the learned Sessions Judge. He contradicts the approver in material particulars and does not fix the date and the Government Advocate does not rely upon him. Dhari (P. W. No. 11) is another Wajtakkar witness whose evidence also differs materially from that of Kamal-ud-Din It has not been believed by the learned Sessions Judge and it is not relied upon in arguments before us and we need not refer to it any further. Shinghu (P. W. No. 13) is a *Mahajan* of Ram Karan's own village Kheri and deposes to Ram Karan bringing the missing ornaments to him on the evening of the day of the girls' disappearance and offering to sell them to him for Rs. 50. He states how he refused to give Rs. 50 and how eventually Ram Karan pawned the same to him for Rs. 17 and how he redeemed them the following morning and took them back. This man keeps account books in which there is no entry of this transaction. We agree with the learned Sessions Judge that it is extremely improbable that Ram Karan would have gone openly to a *Mahajan* in his own village immediately after joining the murder and have pawned some of the ornaments to him as he stated. Thakaria's evidence has been accepted by the learned Sessions Judge inspite of the fact that on the evening of the girl's disappearance he made no mention to Sheoli or to any one in the village that he had seen Ram Karan standing near the two girls shortly before sunset. Now taking Thakari's evidence at its face value we do not consider that it can be said to corroborate the approver

in material particulars. It is quite possible that Ram Karan did meet the girls on the evening in question and even spoke to them but it does not at all follow from that that he is one of the murderers. The girls were collecting fodder near the village and there is no reason to suspect Ram Karan a boy of the same village merely because he was seen standing near them some little time before they disappeared. Thakaria not having mentioned the fact to any one in the village apparently himself attached no importance to it. The finding of ornaments buried in Data Ram's house is no doubt some corroboration of the approver's statement. Considering, however, that the house belonged to Data Ram there is no presumption that Ram Karan placed the ornaments where they were found or even that he knew that they were there. In fact as the house belongs to his father it cannot be said that Ram Karan was in possession of these ornaments.

We have finally the evidence of Lal Chand *alias* Lehta. He is a boy of 12 years of age and states that Ram Karan gave him the three ornaments subsequently produced by him saying that he had won them in gambling. He states that later on Ram Karan told him to take them out from his house and to hide them somewhere outside and accordingly he buried them in a filed from which he subsequently produced them when told to do so. The learned Sessions Judge has disbelieved the evidence of this boy on the ground that it is not at all likely that Ram Karan would have made over to a child of that age to keep for him the property which he had taken from the girls after joining in their murder. We are not sure that the learned Sessions Judge has given very good reasons for rejecting this child's evidence. At the same time we are unable to say that his view in regard to it is manifestly wrong or perverse. It was he who recorded the witness's evidence and he was in the best position to judge whether it was trustworthy or not. Even, however, if we are to suppose that the evidence of Lehta is true it does not necessarily follow that Ram Karan joined in the murder. He used to gamble with Kamal-ud-Din and others and it is quite possible as he stated to Lal Chand that he had received the ornaments in payment of a gambling debt.

It has been held and we consider it to be a sound principle that an order of acquittal arrived at upon evidence should not as a rule be set aside unless the Appellate Court holds it to be manifestly wrong or perverse or unless it can be said that the Court which tried the case has manifestly erred. We are unable to say this in the present case. It is possible that if we had been trying the case ourselves we might have arrived at a different conclusion but we are quite unable to say after fully considering all the evidence on the record that the decision appealed from is manifestly erroneous or perverse. We, therefore, dismiss the appeal and direct that Ram Karan be forthwith set at liberty.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 663 OF 1924.

March 16, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

In re KATIRI *alias* ARUNCHALLEM—ACCUSED—APPELLANT.

Penal Code (Act XLV of 1860), ss. 100, 302, 304—Right of private defence, exceeding of—Intention to cause death—Murder—Culpable homicide.

If a person in defending himself exceeds the right of private defence and intends to cause the death of his assailant he is not necessarily guilty of murder. A person in order to defend himself may kill his adversary provided he has a reasonable apprehension that otherwise he himself would be killed. But where there is no reasonable apprehension of his being killed but only reasonable apprehension of grievous hurt, and in defending himself he exceeds his right of private defence and kills the other, he is not guilty of murder but only guilty of an offence less than murder. His act may amount to an offence under s. 304 of the Penal Code. [p. 456, col. 2.]

Where the only evidence against an accused person is his own confessional statement, the Court must accept the whole of the statement. [p. 456, col. 1.]

Appeal against an order of the Sessions Judge of North Arcot at Vellore, in Case No. 39 of the Calendar for 1924.

Mr. *A. S. Sivakaminathan*, for the Appellant

The Public Prosecutor, for the Crown.

JUDGMENT.—The appellant has been convicted of the murder of a young boy and sentenced to transportation for life by the Sessions Judge of North Arcot.

The prosecution case is that the appellant and the deceased were very friendly and they used to take their bed together in the house of the appellant. The parents of the deceased objected to the deceased keeping company with the appellant, but notwithstanding their advice the deceased went and took his bed in the house of the appellant on the night in question. About mid night the appellant was found with a wound in his neck and the body of the deceased was in the house with head almost severed from the body. Information was given to the village Munsif and he and several other persons went to the house of the appellant and the village Magistrate took statements from various persons including the appellant. The appellant stated to the village Magistrate that he and the deceased took their bed together that there were some hot words between them, that the deceased went to his house and brought a knife and stabbed him on the neck and that he, therefore, killed him and came away. This is the main evidence in the case.

The P. Ws. who were present at the time when the statement was made to the village Magistrate depose that they heard the appellant make that statement. The learned Sessions Judge has accepted the evidence of these witnesses and believed the statement of the village Magistrate that such a confessional statement was made and has convicted the appellant of murder under s. 302, Indian Penal Code. But seeing that the only evidence against the appellant is his confessional statement, we are bound to accept the whole of the confessional statement. No doubt, the appellant pleaded in the lower Court that he did not make such a statement, but it is abundently clear that he did make such a statement. The question is, if the whole of the confessional statement is believed what is the offence that the appellant is guilty of. He says that the deceased first stabbed him on the neck and that he, therefore, cut him and came away. He seems to plead self-defence. But the injury on the neck of the appellant is nothing serious and according to his own statement he did exceed the right of self-defence and killed the deceased and almost severed his head from the body. We think the offence is one falling under s. 304, Indian Penal Code. We alter the conviction to one under s. 304, Indian Penal Code, and sentence the appellant to 10 years' rigorous imprisonment.

The learned Sessions Judge's view of the law in para. 21 is wrong. He seems to think that if a person in defending himself exceeds the right of private defence and intends to cause the death of his assailant he must be held to be guilty of murder. That is not so. A person in order to defend himself may kill his adversary provided he has a reasonable apprehension that otherwise he himself would be killed. But if he exceeds the right of self-defence where there is no reasonable apprehension of his being killed but only had reasonable apprehension of grievous hurt and in defending himself exceeds his right of private defence and kills the other, he is not guilty of murder but he is only guilty of an offence less than murder. His act may amount to an offence under s. 304, Indian Penal Code.

V. N. V. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 385 OF 1924.

March 25, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Zafar Ali.

MOHAR SINGH *alias* MEHR SINGH —ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 397, applicability of—Dacoity with use of deadly weapon.

Section 397 of the Penal Code applies only to the persons who actually cause grievous hurt or are themselves armed with deadly weapons. [p. 457, col. 2.]

Queen-Empress v. *Mahabir Tiwari*, 21 A. 263; A. W. N. (1899) 76; 9 Ind. Dec. (N. S.) 876, *Queen-Empress* v. *Senta*, A. W. N. (1899) 186; 28 A. 404 note, *Emperor* v. *Nageshwar*, 28 A. 404; A. W. N. (1906) 61; 3 Cr. L. J. 322, *Chatar Singh* v. *Emperor*, 15 P. R. 1901 Cr. and *Crown* v. *Mohna*, 16 P. R. 1901 Cr., referred to.

Appeal from the order of the Sessions Judge, Gurdaspur, dated the 24th March, 1924.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—A dacoity was committed on the night between the 16th and 17th December, 1923, in the house of Lahori Mal at Barnala in the Gurdaspur District and a large number of ornaments

of gold and silver were stolen. Grievous hurt was caused to two of the villagers by the dacoits and simple hurt to others. There are said to have been 13 dacoits of whom 10 were jointly tried by the Sessions Judge of Gurdaspur. He convicted nine of them and acquitted one by name Mela. Gujar one of the dacoits turned King's evidence whilst Billi and Ali Muhammad, were said to be absconding at the time of the trial. Subsequently Ali Muhammad was apprehended and tried separately and convicted and there is a separate appeal by him before us which is disposed of by a separate judgment. The nine persons who have been convicted have filed separate appeals through the Jail Authorities. The judgment of the learned Sessions Judge is an extremely clear one. It gives in detail the statement of Gujar approver and describes the way in which a clue to the perpetrators of the dacoity was obtained. The evidence against the appellants is in the first place that of the approver. This has been corroborated as against each and every one of the appellants by either the finding of stolen property in their possession or by the fact that they gave information which led to the recovery of the stolen property from other persons to whom they had entrusted it. As regards Mehr Singh appellant it must, however, be remarked that he is said to have sold some stolen property to Inayat Ullah (P. W. No. 54) which is not produced. This consisted of a pair of gold *budkis* which Inayat Ullah melted down; the gold resulting from this operation has been produced. Mehr Singh was identified by Lahori Mal as one of the dacoits at an identification parade which was duly held in the presence of a Magistrate. We see no reason to doubt that this parade was properly held.

As regards the ornaments produced by or at the instance of the various appellants the evidence is that both of Police Officers and of respectable gentlemen whose testimony we see no reason to reject. Mehnga and Tehla appellants are brothers residents of the village Bhaini Bangar. Tehla not only stated that no ornaments were found from his possession but that he had no *kotha* in the village of Bhaini Bangar and that he lived elsewhere. The witnesses for the prosecution, however, stated that Tehla's *kotha* was shut up and searched in accordance with law. One of these witnesses was Mohamed Ali (P. W. No. 35) *Lambardar* of the village. No questions were put to the witness in cross-examination with a view of showing that it was not Tehla's house which was shut up, but some one else's. Moreover D. Ws. Nos. 1 and 3 clearly stated that Tehla had a *kotha* in the village, though he had only returned thither five or six days before the dacoity. The appellants have all denied the finding of stolen property in their possession or the production of stolen property by them or by other persons at their instance; but the evidence in proof of these facts is entirely reliable and overwhelming. In our opinion the evidence of the approver has been sufficiently corroborated as against each of the appellants and we maintain their convictions.

The learned Sessions Judge was of opinion that as some of the dacoits were armed with deadly weapons and as grievous hurt was caused by some of them the least sentence that could be passed on any one of them, whether he actually caused grievous hurt or not, or whether he was armed with a deadly weapon or not, was seven years having regard to s. 397, Indian Penal Code. The Allahabad High Court in the case reported as *Queen-Empress* v. *Mahabir Tewari* (1) held that the words "such offender" in the section include any person taking part in the dacoity. But subsequently in the same year in the case reported as *Queen-Empress* v. *Senta* (2) the same High Court laid down that the section applies only to those persons taking part in the dacoity who themselves use deadly weapons or cause grievous hurt. This view was followed in the case reported as *Emperor* v. *Nageshwar* (3) and it has also been followed by the Madras High Court. The Punjab Chief Court in the cases reported as *Chatar Singh* v. *Emperor* (4) and *Crown* v. *Mohan* (5) followed the earlier Allahabad ruling In our opinion the section only applies to the person who actually caused grievous hurt or was himself armed with a deadly weapon. We, therefore, consider that it was open to the Court to award lesser sentences than seven years' rigorous imprisonment.

(1) 21 A. 263; A. W. N. (1899) 76; 9 Ind. Dec. (N. S.) 876.
(2) A. W. N. (1899) 186; 28 A. 404 *note*.
(3) 28 A. 404; A. W. N. (1906) 61; 3 Cr. L. J. 322.
(4) 15 P. R. 1901 Cr.
(5) 16 P. R. 1901 Cr.

The sentences awarded, however, are by no means excessive except perhaps in the case of Kaka who is according to the record a youth of only 20 years. Having regard to his age we think a lesser sentence will suffice and we accept his appeal and reduce his sentence to three years' rigorous imprisonment including two months' solitary confinement.

The appeals of the other appellants are dismissed.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 588 OF 1924.
February 19, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

In re IBRAHIM AND OTHERS—APPELLANTS.

Jury trial—Retracted confession—Ambiguous charge—Prejudice—Approver—Corroboration—Confession—Incriminating statement.

The failure of a Judge to unambiguously warn the Jury against taking the retracted confession of an accused into consideration as against his co-accused amounts to misdirection, and is likely to cause miscarriage of justice, and necessitates a re-trial of the co-accused.

It cannot be laid down as a matter of law that the evidence of witnesses who support the statement of an approver is not corroborative evidence merely because their evidence was known to the Police before the approver was examined by them. It can, however, be urged in such a case that the approver's evidence should not be believed because he might have been tutored by the Police to make a statement fitting in with the evidence of the other witnesses. [p. 459, col. 2.]

Obiter.—Where a co-accused in a dacoity case merely states that after the dacoity he was offered a certain sum of money which he took, the statement is not a confession of his having committed the dacoity and should not be taken into consideration as against the other accused. [*ibid.*]

Mr. *Camell* and Babu *Radhikaranjan Guha*, for Appellants.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The seven appellants have been convicted of committing dacoity. The first three have been sentenced to seven years' rigorous imprisonment each, the fourth to three years' rigorous imprisonment, the last three to five years' rigorous imprisonment each.

The case for the prosecution is that a dacoity was committed in a river in the night following the 8th of March. It was committed on a boat in which a sum of about Rs. 11,000 was being taken from a place called Galachipa to Nalchiti and Jhalakati.

The principal evidence against the appellants is that of an approver. This evidence has been corroborated by evidence as to the accused being seen together at different times and places before and after the dacoity and also as to other circumstances. But as the learned Sessions Judge has correctly pointed out in his heads of charge there is no evidence besides that of the approver to show that the appellants actually took part in the dacoity. So far as the evidence of the approver and the corroborative evidence given by witnesses is concerned, we hold that there has been no misdirection. But we must accept the contention urged on behalf of the majority of the appellants that there has been serious misdirection in the charge where he deals with the evidential value of the so-called confession made by the accused Kalu and also of certain extra judicial confessions made by the accused Sundarali as against the accused other than the makers of the confessions.

It will be convenient to first deal with the appeal of the 4th appellant Kalu. The case for the prosecution is that this accused did not actually take part in the dacoity. He was with the others before the dacoity and went with one of the dacoits, who is now absconding, to borrow a boat, but during the dacoity he was left in a larger boat at a place some five or six miles from the place of the dacoity and told to wait for the other dacoits. In the case of this accused the Jury gave a special verdict in these terms:—

When asked with regard to Kalu the reply of the Jury was "Guilty. He is their servant and at first he did not know a dacoity would be committed. He was not present when the dacoity was committed. His case may be considered."

Though the Jury apparently held that Kalu was to some extent aiding the commission of the dacoity having regard to the definition of dacoity in s. 391, Indian Penal Code, we hold that on this finding he should not have been convicted. He was not one of those who were conjointly committing or attempting to commit robbery, and though he may have been aiding such commission or attempt he was not present and, therefore, his action did

not come within this definition. This Kalu was examined by the Magistrate as a confessing prisoner and it is contended that this statement made by him was not a confession so that it can be taken into consideration as against the other accused under the provisions of s. 30.

We think there is considerable force in this contention. Kalu in this statement describes the movements of himself and other accused tried for the dacoity. The only really incriminating statement that he makes is that after the dacoity he was offered Rs. 100 which he took. This statement is certainly not a confession that he committed the dacoity, and we think that it should not have been put to the Jury as a matter to be taken into consideration as against the other accused. But it is not necessary to consider to what extent an incriminating statement is to be regarded as confession within the meaning of s. 30 of the Evidence Act, for whether we hold that this statement was not a confession or whether we hold that it was a retracted confession, it has no evidential value as against Kalu's co-accused. The learned Sessions Judge treated it as a retracted confession, and although in one part of his charge he correctly told the Jury that the retracted confession of a co-accused is practically of no value against anybody but himself, he prevented this direction being properly appreciated by the Jury by referring to this confession of Kalu and also to the extra-judicial confession of the appellant Sundarali, asking evidence to be taken into consideration in considering the case of each of the other accused. When the Jury were referred to the mentioning of individual accused in the confession of Kalu and the extra-judicial confession of Sundarali, they were not likely to properly appreciate the direction that they were to regard these statements as of no value as against the other accused. We must hold that this was likely to prejudice the Jury and lead them to give some weight to these statements when they should have disregarded them altogether; and we hold that this caused a mis-carriage of the justice and necessitates a re-trial of all these accused in respect of whom there has been such misdirection. This applies to all the appellants except Kalu and Sundarali.

Sundarali was not named in Kalu's statement or confession. So, as regards him there has been no misdirection on this point. It is urged that there has been misdirection on other points. It is said that the evidence of witnesses who corroborate the approver as to association before and after the dacoity is no real corroboration, because the approver was examined by the Police after the Police had obtained this information as to these movements from these witnesses. It certainly cannot be said that as a point of law the evidence of witnesses who support the statement of the approver is not corroborative evidence because this evidence was known to the Police before the approver was examined by them. It may be urged and probably was urged at the trial that the approver's evidence should not be believed because he might have been tutored by the Police to make a statement which fitted in with the evidence of witnesses who had been previously examined. But at the most it was a matter of non-direction on the part of the Judge not to draw the attention of the Jury to this point. We do not consider it a serious matter of misdirection since the attention of the Jury was fully drawn to the necessity of considering how far the evidence of the approver can be believed.

Another point on which misdirection is alleged is that the attention of the Jury was not drawn to the statement in the First Information that the informant Benode Behary Pal's *gomashta* in charge of the money suspected his own boatmen. We think that having regard to the reasons there given for the suspicion nothing can be based on it to support the case for the defence. It rather renders the story as to the fact of the dacoity more probable.

It is urged that the evidence as to the extra-judicial confession made by Sundarali was not properly put to the Jury. The learned Sessions Judge when referring to this confession spoke of it as the alleged confession of Sundarali and in placing the evidence before them he pointed out to the Jury that it was for them to decide whether this confession had been made. We cannot say there was misdirection because attention was not drawn to the statement of the witness Najamali *talukdar* that he did not inform the Police or *panchayet* of the confession. The objection to the statement of Darbarulla that he understood that Khabiruddin *gomastha*, Sundarali and Jaban Mirdha had committed dacoity would be open to serious objection as re-

gards Khabiruddin and Jaban Mirdha since it was not clear from the definition that this understanding in respect of them was based on the statement made by Sundarali. But in the case of these two appellants we have already held that there must be a re-trial. His statement as to Sundarali's confession is somewhat vague, but the attention of the Jury appears to have been sufficiently drawn to this point. So far as Sundarali is concerned we can see no ground for holding that there was misdirection on any other ground for setting aside the verdict of the Jury.

We accordingly allow the appeal of the appellant Kalu. We set aside his conviction and sentence and direct that he be released.

The appeal of the appellant Sundarali is dismissed.

We allow the appeals of the appellants Ibrahim, Jaban Mirdha, Sherajuddi, Kadamali and Khabiruddin *gomastha*. We set aside their conviction and sentences and direct that they be re-tried according to law.

N. H. *Appeal partly allowed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1416 OF 1924.
January 17 1925.

Present:—Mr. Justice Le Rossignol.

SHAH MUHAMMAD HIMSELF AND AS GUARDIAN OF SAID SHAH, AHMAD SHAH AND NAWAB SHAH, MINORS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 87, 88—Absconder—Attachment of property—Ancestral property, rights in—Attachment, operation of—Property acquired by father, whether ancestral.

In the case of ancestral lands in the Punjab all that can be attached in proceedings under ss. 87 and 88 of the Cr. P. C. is the interest of the absconder, and on his death the lands must be released in favour of his heirs.

Sadhu Singh v. *Secretary of State for India*, 18 P. R. 1908; 156 P. L. R. 1908; 19 P. W. R. 1908 and *Niamat Ali* v. *Secretary of State for India*, 30 Ind. Cas. 71; 52 P. R. 1915; 253 P. W. R. 1915, followed.

Where waste land is granted to a person who subsequently acquires proprietary rights therein, the land becomes ancestral in the hands of his son.

Petition, under s. 439, Cr. P. C., for revision of the order of the Sessions Judge, Multan, dated the 6th August 1924.

Lala *Tirath Ram*, for the Petitioners.

JUDGMENT.—The question in this case is whether the property of an absconder against whom proceedings under ss. 87 and 88 of the Cr. P. C. have been taken should be freed from attachment on the death of the absconder. It has been found and I see no reason to disagree with the finding, that Wilayat Shah, who was wanted in connection with a complaint under s. 363, Indian Penal Code, did abscond, and his property was properly attached. On the 16th of January 1924, the absconder appeared and applied for the release of his property, but he has since died.

The present petition is by the heirs of Walayat Shah protesting against the continued attachment of the land on the ground that it is ancestral. A report had been called for from the District Magitrate and he has reported that the land is not ancestral. But his view seems to me erroneous for he adds that the land was originally waste land granted to the father of Walayat Shah who in 1902 acquired proprietary rights in it. On the death of his father Walayat Shah succeeded to his estate by inheritance. Consequently the land must be regarded as ancestral in the hands of Walayat Shah. With regard to ancestral lands in the Punjab it has been decided in *Sadhu Singh* v. *Secretary of State for India* (1) and *Niamat Ali* v. *Secretary of State for India* (2) that all that can be attached in proceeding under ss. 87 and 88 of the Cr. P. C. is the interest of the absconder and that on his death the land must be released in favour of his heirs. Those decisions cannot be overlooked and must be followed. I, therefore, direct that the lands of the absconder be released in favour of his heirs from the date of his death.

Z. K. *Petition accepted.*

(1) 18 P. R. 1908; 156 P. L. R. 1908; 19 P. W. R. 1908.

(2) 30 Ind. Cas. 71; 52 P. R. 1915; 256 P. W. R. 1915.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 28 OF 1925.
March 17, 1925.
Present:—Mr. Daniels, J. C.
RAM PARGAT AND ANOTHER—PRISONERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security proceedings—Local enquiry, whether desirable—Finding based on evidence—Information obtained in local enquiry, use of—Irregularity.

Though local inquiry is most appropriate where it is a question whether proceedings under s. 110 of the Cr. P. C. should be instituted, such an enquiry is out of place when the accused are brought before the Court. Once the accused are before the Court the case must be decided on the evidence alone.

In a proceeding under s. 110 of the Cr. P. C. the Magistrate dealt with the evidence at great length and on that evidence came to the conclusion that it was established that the accused were habitual thieves. In his order the Magistrate stated that camping at the spot he had received information which confirmed the conclusion at which he had arrived on the evidence:

Held, that the course adopted by the Magistrate in making an enquiry at the spot was irregular but that the irregularity was not sufficient, in the circumstances of this case, to induce the Court to set aside the whole proceedings and direct a re-trial.

Application for revision of an order of the Sessions Judge, Gonda, dated the 10th January 1925, in Appeal No. 228 of 1924, confirming that of the Magistrate, First Class, Gonda, dated the 3rd December 1924.

Mr. *Ali Zaheer*, for the Applicants.

The Government Pleader, for the Crown.

ORDER.—This is an application in revision against an order binding over the applicants under s. 110, Cr. P. C. which has been upheld by the learned Sessions Judge in appeal. There is a large amount of evidence in the case which has been fully considered by both the Courts below, and the only point which requires serious consideration in the revision is whether the trial has been prejudiced by certain local enquiries made by the Magistrate. I agree with the learned Sessions Judge that though local enquiry is most appropriate where it is a question whether proceedings under s. 110 shall be instituted, it is entirely out of place when the accused are brought before the Court. Once the accused are before the Court the case must be decided on the evidence alone. It seems to be, however, that in this case the Magistrate merely used his enquiries to confirm the result at which he had arrived on a consideration of the evidence. He has dealt with the evidence at great length and on that evidence come to the conclusion that it establishes that the accused are habitual thieves, and then he says that camping at the spot he has received information which confirms this impression. On the whole, therefore, though the course taken by the Magistrate was irregular I do not think that it is a sufficient ground for setting aside the whole proceedings and directing a re-trial. I accordingly dismiss the present application.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 72 OF 1925.
April 2, 1925.
Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Zafar Ali.
EMPEROR—APPELLANT
versus
DINA *alias* BODHI—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust, what constitutes—Intention to deprive owner of property.

In order to constitute the offence of criminal breach of trust it is not necessary that the accused should have disposed of the property to a third person. His first possession of the property being lawful, the offence consists in a mental act or intent to deprive the owner of his property, without any outward or visible trespass. [p. 462, col. 2.]

Accused was engaged by the complainant as a tonga driver to drive the latter's tonga on hire within the limits of a Municipality. Under the terms of the agreement the accused had to bring the tonga back each evening and was to pay over his earnings to the complainant while he was to receive a certain fixed salary per month. On the very first day of his employment the accused did not return with the tonga in the evening and on the following day was pursued and arrested at a distance of 36 miles from the town while driving the tonga away from the town:

Held, that the conduct of the accused showed that he intended to keep the tonga for himself or to dispose of it to some third person and that this intent or mental act of his was the gist of the offence of criminal breach of trust and the accused was consequently guilty of an offence under s. 408 of the Penal Code. [p. 462, col. 2; p. 463, col. 1.]

Appeal from an order of the Sessions Judge, Ludhiana, dated the 29th October 1924, reversing that of the Magistrate First Class, Ludhiana, dated the 29th August 1924.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Appellant.

Mr. *Bal Kishen Mehra*, for the Respondent.

JUDGMENT.—This is an appeal by the Local Government under s. 417, Cr. P. C., from the order of the Sessions Judge of

Ludhiana acquitting the respondent Dina who had been convicted by a Magistrate of an offence under s. 408, Indian Penal Code, and had been sentenced to 1½ years' rigorous imprisonment.

The facts which have not been disputed before us are as follows:—

The accused was on the 22nd of July, 1924, engaged as a tonga driver by Saif-ul-Rahman to drive his tonga on hire within the limits of Ludhiana Municipality. The tonga had been licensed in the name of the mother of Saif-ul-Rahman on the 18th of July and the accused himself had been licensed to drive a tonga. According to the complainant the accused had to bring back the tonga each evening and pay over his earnings while he was to receive a salary of Rs. 15 a month. He did not return on the evening of the 22nd of July and on the following day was pursued and arrested near Dhuri which is some nine miles beyond Malerkotla and some 36 or 37 miles from Ludhiana. At the time of his arrest he was driving the tonga rapidly in the direction away from Ludhiana. His arrest with the tonga is clearly proved by the evidence of Harbans Lal and Hans Raj (P. Ws. Nos. 3 and 4), by Mohammad Sadiq (P. W. No. 5) in whose tonga the prosecution witnesses Nos. 3 and 4 pursued the appellant and by Mahman, Police Constable (P. W. No. 6). The accused in his defence at first stated that the tonga had never been made over to him by the complainant but then said that a Hindu of Ludhiana had asked him to take the tonga to his shop in Malerkotla. He produced no evidence in defence. The Magistrate held that the conduct of the accused in taking the tonga away to a distance from Ludhiana contrary to the terms on which he was engaged clearly showed that he had converted it to his own use and intended to dispose of it dishonestly. The learned Sessions Judge who heard the appeal says in his judgment: "If he was going with the tonga to some place it might be a simple preparation to dispose of it, but it does not amount to the committing of the criminal breach of trust as he has not converted the thing to his own use." In other words, the learned Sessions Judge was of opinion that there had been no criminal breach of trust because the accused had not disposed of the tonga to a third person.

It is contended by the learned Counsel for the Crown that in order to constitute the offence of criminal breach of trust it was not necessary that the accused should have disposed of the tonga to a third person. *Kesho Ram* v. *Empress* (1) was referred to in which it was held that for conviction under s. 408, Indian Penal Code, it is not necessary for the prosecution to show that an accused person has actually expended some portion of the money which was entrusted to him. His first possession being lawful, the offence consisted in a mental act or intent to deprive the master of his property without any outward or visible trespass. This mental act of fraudulent appropriation was rightly inferred from the conduct of the accused in that case. At page 136* of the report the learned Judges quoted with approval the remarks of Coleride, J. in the case of *Rex* v. *Williams* (2) who in summing up said: "The circumstances of the prisoner having quitted her place and gone off to Ireland is evidence from which you may infer that she intended to appropriate the money, and if you think that she did so intend, she is guilty of embezzlement." Again in *Reg.* v. *Lynch* (3). Moore, J. said: "You have further the fact that, after getting the money, the prisoner absconded, and did not come back till he was in custody. You may infer that he intended to appropriate this money, and if so, he is guilty of embezzlement." At p. 138* the Judges said: "The same view, namely, that the mental act or intent to deprive the master of his property is the gist of the offence, is adopted by Mr. Bishop in his valuable work on Criminal Law, when treating of embezzlement. When a particular thing of a nature to be embezzled has come into the hands of the servant, he is in reason to be held guilty of embezzling the thing in all circumstances which show a malicious intent to deprive the master of it."

We fully agree with the various remarks quoted by us above. We have not the least doubt that in the present case the accused intended to deprive his master of the tonga and this intent or mental act of his is the gist of the offence of criminal breach of trust. He has not attempted to explain why he had taken the tonga to a distance of 36 miles from Ludhiana. His conduct

(1) 36 P. R. 1889 Cr.
(2) (1835) 7 C. & P. 338.
(3) (1854) 6 Cox. C. C. 445

*Pages P. R. of 1889 Cr. -[*Ed.*]

shows that he intended to keep the tonga for himself or to dispose of it to some third person. We do not see how any other inference than this can be drawn. We, therefore, accept the appeal and setting aside the order of the learned Sessions Judge restore that of the Magistrate convicting Dina and sentencing him 1½ years' rigorous imprisonment including 1½ months' solitary confinement.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 142 OF 1925.

April 8, 1925.

Present:—Mr. Dalal, J. C.

SAADAT KHAN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 366, 366A—Abduction of girl under 18 years of age—Force or deceit, absence of—Procuration—Offence.

Accused took a girl of less than 18 years of age from place to place with the intention of compelling her to marry against her will or in order that she may be forced or seduced to illicit intercourse. There was no evidence that the girl was compelled to accompany the accused by force or by deceitful means:

Held, that the accused could not be convicted of an offence under s. 366 of the Penal Code but that he was guilty of an offence under s. 366A of the Code.

Appeal against an order of the Assistant Sessions Judge, Gonda, dated the 20th February 1925.

The Government Pleader, for the Crown.

JUDGMENT.—Saadat has appealed from his conviction under s. 366 of the Indian Penal Code. It is stated that he abducted *Musammat* Kalsooma in order to compel her to marry against her will or in order that she may be forced or seduced to illicit intercourse. The difficulty is that the learned Assistant Sessions Judge, who tried the case, has not specifically stated what the abduction consisted in; was the girl compelled by force or by deceitful means induced to come from any place. There is abundant evidence to prove that the appellant took her from place to place with the intention stated in the charge but all through the judgment I fail to discover any definite finding that the appellant used force or deceitful means to gain his end. When the girl met the village *chaukidar* while she was in the company of the appellant she made no complaint to the *chaukidar*. It is not understood from the lower Court's judgment at what particular moment the force or deceitful means were used and when the taking away of the girl, which was innocent at first with the permission of her mother-in-law, should turn to abduction.

I am, however, of opinion that the girl is under 18 years of age. The medical evidence is to that effect and there is nothing on the record to the contrary. The appellant was clearly guilty of procuration of *Musammat* Kalsooma. I alter the conviction to one under s. 366 A and maintain the sentence passed by the lower Court.

The appeal is, therefore, dismissed except as to the alteration of the section of the Indian Penal Code.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 578 OF 1924.

February 12, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

RAHAMALI HOWLADAR AND ANOTHER——APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 221, 289—Charge to Jury—Unreliability of evidence—Direction to Jury—Error of law.

A statement in the heads of charge that such and such sections of the Penal Code were "read and explained" to the Jury is bad if it is not shown in what manner the sections concerned were explained. [p. 464, col. 2.]

Where there is evidence against an accused it is for the Jury and not for the Judge to say that that evidence is such that no reliance should be placed on it. [p. 464, col. 1.]

A Judge commits an error of law if he directs the Jury to return a verdict of non-guilty because he holds that there is "no evidence worth the name" against an accused.

"No evidence worth the name" is under the law a very different thing from "no evidence." [p. 464, col. 1.]

Babu *Suresh Chandra Talukdar*, for the Appellants.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The two appellants were tried by the Additional Sessions Judge of Bakarganj with the aid of a Jury on several charges. The majority of the Jury found the first appellant guilty of an offence punishable under s. 364/34, Indian Penal Code and also of an offence punishable under s. 147, Indian Penal Code. For the first offence he was sentenced to seven years' rigorous imprisonment and for the second offence to two years' rigorous imprisonment, the sentences to run concurrently. The second appellant was convicted only of an offence punishable under s. 147,

Indian Penal Code and for that he has been sentenced to two years' rigorous imprisonment.

On behalf of the appellants three points have been pressed. The first relates to the acquittal of one Seher Ali who was put on his trial with the appellants. After the conclusion of the case for the prosecution the learned Additional Sessions Judge directed the Jury to return a verdict of not guilty of any offence in the case of this accused. It is clear that in so doing he intended to act under cl. (2) of s. 289, Cr. P. C. From his charge to the Jury it appears that he gave this direction because he held that there was no evidence worth the name against Seher Ali. In so doing we hold that he committed an error of law. No evidence worth the name is under the law very different from no evidence. Though the learned Sessions Judge held that on account of the contradiction of the witness who implicated Seher Ali that evidence could not be believed, he was not justified in saying, that there was no evidence against him. There was evidence and it was for the Jury and not for the Judge to say that this evidence was such that no reliance could be placed upon it. But in our opinion this error of law was of no great importance. Had the learned Judge continued the trial against this accused and charged the Jury as he did it is probable that Seher Ali would have been acquitted. Had he been convicted by the Jury we have no doubt the learned Judge would have made a reference to this Court under s. 307, Cr. P. C. which would have ended in the acquittal of this accused. We certainly cannot accept the contention that this action of the learned Judge in any way prejudiced the other accused in their trial. The fact that one of the three accused was acquitted in this way cannot have affected the Jury and made them more ready to convict the appellants before us.

The second point urged is that there was non-direction amounting to misdirection because the learned Judge omitted to prominently put before the Jury the fact that neither in the information first given to the Police by Mafezuddi *chowkidar* of which an entry was made in the station diary, nor in the formal First Information that was subsequently lodged by Sahed Ali *howaldar* do the names of either of the appellants appear. In many cases the omission of the names of the accused in their trial in the First Information given to the authorities is a very important point in their favour. But in the present case it appears to us that the point was of no substantial importance. From the statement recorded in the diary it appears that Mafezuddi at the time he made that statement had no information as to who were the assailants. Sahed Ali's statement in the First Information was that he recognised two of the assailants, and that was the story which he also told in his evidence. We have been through the evidence of both Mafezuddi and Sahed Ali and there is nothing to indicate, nor does any suggestion appear to have been made in their cross-examination, that at the time they made these statements to the Police they had information of the names of any accused whose names do not appear in these entries. That being so we are unable to hold that the omission of the learned Judge to draw special attention to this point amounted to misdirection.

The last point urged is that the heads of charge do not show that the law was properly explained to the Jury. It is stated in the charge that ss. 299, 300, 302, 141, 146, 147, 148, 362, 364 and 34 are read and explained. This Court has frequently condemned a statement of this kind in the heads of charge if it is not shown in what manner the sections referred to were explained. But in the present case the heads of charge do show the manner in which the essential points were put to the Jury. The details of the points which the prosecution must prove to establish the charge under ss. 302 and 149 are explained in one portion and later on there is set out an explanation of the charge under s. 164/34. In the present case there was no real difficulty in applying the law to the facts. If the facts alleged by the prosecution were proved it was clear that the charges were established. We hold, therefore, that there is no misdirection on this point. The case is one in which the appellants have been convicted on the evidence of a single witness corroborated by his statements made at different times. Whether that evidence was sufficient for a conviction or not was essentially a question for the Jury.

The sentences passed are not in our opinion too severe.

The appeal is dismissed.

N. H. *Appeal dismissed.*

PATNA HIGH COURT.

APPEALS FROM ORGINAL DECREES NOS. 127, 128, 137 AND 139 TO 145 OF 1921.

May 7, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

MADAN MOHAN LAL—DEFENDANT—APPELLANT

versus

ABDUL RAZAQUE KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), ss. 10, 11, 12, 13, 14, 33—Bengal Land Registration Act (VII of 1876), s. 70—Separate account, whether can be opened at a time when residuary share is in arrears—Sale for arrears of revenue, when can take place—Extent of share to be sold—Irregularity.

The three kinds of objections specified in s. 12 of the Bengal Land Reveune Sales Act are the only objections that can be taken to the only statements that an application for the opening of a separate account is to contain. If no such objection is made the Collector is bound to open a separate account whether the share from which the separate account is to be opened is in arrears or not at the time. [p. 467, col. 2.]

There is no special procedure appointed by the Bengal Land Revenue Sales Act for dealing with the case where at the time of the opening of a separate account the residuary share is in arrears, possibly because it was not contemplated that there should be arrears, or because the security of the revenue is not affected by the opening of a separate account. There is no authority in the Act for apportioning the arrears in such a case, whether after taking an account or merely according to the ratio between the Government revenue assessed on the separate account and that remaining to be assessed on the residuary share. [p. 467, col. 2; p. 468, col. 1.]

In the case of arrears of revenue all that the Collector has to do is to look at the separate accounts as they stand and if he finds that any separate account is not in arrear he is not entitled to sell that share; he can only sell the share from which according to the separate account an arrear of revenue is due. [p. 468, col. 2.]

The Collector is not permitted to sell a share merely because that share is in arrears; he can only sell if the estate is in general arrears. It must be shown, therefore, that the estate as a whole is in arrears and liable to sale; and the date on which this liability to sale arises is the date which will fix the extent of the residuary share of the estate to be put up for sale if it is that share which is in arrears. [p. 468, col. 2; p. 469, col 1.]

The Bengal Land Revenue Sales Act contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest date of payment; and where an estate is put up for sale on a particular date it must be presumed that it did not become liable to sale before that date. [p. 469, col. 1.]

Where a residuary share becomes liable to sale on account of arrears of land revenue after the date of the opening of certain separate accounts out of that share, the extent of the share which can be sold is that which existed on the date when the liability to sale arose and not that which existed at the date on which the arrears began to accrue. [p. 469, col. 2; p. 470, col. 1.]

Where the Collector has jurisdiction to sell an estate for arrears of revenue, the remedy for any irregularity in the exercise of the jurisdiction is provided by s. 33 of the Bengal Revenue Sales Act, but an irregularity in the exercise of the jurisdiction cannot take the sale outside the Act. [p. 470, col. 1.]

Appeal from a decision of the Subordinate Judge, Gaya, dated the 7th May 1921.

Messrs. *P. C. Manuk, Kailashpati, Sarjoo Prasad* and *Raghunandan Prasad*, for the Appellant.

Messrs. *Sultan Ahmad, Hasan Jan, Syed Ali Khan*, Rai *T. N. Sahai* and Mr. *Sultan-ud-Din Hussain*, for the Respondents.

JUDGMENT.

ROSS, J.—This is an appeal by defendant No. 3 against a decree passed by the Subordinate Judge of Gaya in favour of the plaintiffs.

The facts are these. *Mahal* Pankardih Malehari, Tauzi No. 1687 consists of 213 villages owned by a large number of proprietors many of whom have had separate accounts opened from time to time. In 1918 the residuary share comprised shares in 96 villages. This share had been in arrears since before 1908 but separate accounts continued to be opened until 1917. In 1916 the arrears were Rs. 4,019-6-7 and, in that year the Collector apportioned Rs. 780-12-0 out of these arrears to the separate accounts that had been opened during the period in which the residuary share had been in arrears. On the 8th of June 1917 and on the 17th of January 1918 the residuary share was sold for arrears of Government revenue. Both the sales were set aside. Eventually on the 23rd of September 1918 when the arrears were Rs. 4,961-11-7, the share was sold and purchased by defendant No. 1, a servant and *benamidar* of defendant No. 3, for Rs. 9,500. Three appeals were preferred to the Commissioner of Revenue against the sale by certain of the plaintiffs in the present suits. These appeals were dismissed. A sale certificate was granted and delivery of possession was given in 1918. Thereafter ten suits, out of which these ten appeals have arisen, were instituted by some of the proprietors of the residuary share covering some 40 villages out of the 96.

The plaintiffs in their plaints impugned the revenue sale on various grounds. Some of these grounds they have failed to establish and there is no cross-appeal. I am, therefore, concerned only with the grounds on which they have succeeded in getting the sale set aside. These grounds

are two; one of which covers all the cases while the other affects three cases only.

The first ground is that separate accounts were opened illegally by the Collector, while the residuary share was in arrears, without realization of the arrears, but after deduction of what is described in the plaint as an imaginary portion of the arrears: and the Collector was not legally authorized to sell by auction only those *ijmali* shares which were found existing subsequent to the default in place of those which existed at the time of the default. At the trial the answer of the defendant was that the proprietors who got separate accounts opened paid their portion of the arrears due, but even if they did not do so, the sale cannot be challenged on this ground. The plaintiff's case was that the Collector had no power to apportion the arrears between the separate accounts and the residuary share; that even if he had this power the arrears had not been apportioned correctly, that the residuary share had been sold for an arrear greater than was due from it; and that what ought to have been sold was the residuary share as it stood when the share fell into arrears, and not the residuary share as it stood at the time of the sale. In Suit No. 33 of 1919 (First Appeal No. 139 of 1921), Suit No. 282 of 1219 (First Appeal No. 140 of 1921) and Suit No. 54 of 1919 (First Appeal No. 144 of 1921) the plaintiffs' case was that the residuary share which was sold included shares belonging to these plaintiffs which were protected by separate accounts.

The learned Subordinate Judge in dealing with the main ground on which the suits were brought examined the accounts of the estate from the June *kist* of 1913 when the Government revenue of the residuary share was Rs. 2,273-8-0 and the arrears were Rs. 2,086-13-11. He continued the examination down to the time of the sale when the Government revenue had been reduced to Rs. 852-13-0 and the arrears had increased to Rs. 4,961-10-7. As a result of his examination he found that whereas Rs. 1,383-13-0 ought to have been apportioned out of the arrears to the separate accounts, the Collector had apportioned only Rs. 780-12-0. The arrears for which the residuary share was sold, therefore, exceeded the true arrears by Rs. 603-1-0. He held, therefore, that the sale was without jurisdiction. He further held, however, that the procedure by way of apportionment of arrears between the separate accounts and the residuary share was unwarranted by law, and, that if a separate account was to be opened while the residuary account was in arrears, this could only be properly done if an account of the payments made by the co-proprietors had first been taken; and that the shares which were separated by opening of separate accounts were also liable to be sold jointly with the residuary share.

On the second ground, which was confined to three cases only, the learned Subordinate Judge found that the shares of the plaintiffs in Suit No. 33 of 1919 in villages Lawahar. Karangarh and Kothi Khas were protected by separate accounts Nos. 34 and 50; and that in Suits Nos. 282 and 54 of 1919 the plaintiffs owned certain *pokhta* share in villages Simri, Karhani and Amnabad amounting to 1 anna 12 *dams* or 4 annas 18 *dams* and 13 *kowris kham* which were protected by separate accounts, whereas in the Collector's registers these shares were shown as 1 anna 12 *dams kham* with the result that a portion was included in the residuary estate which ought to have been fully protected by the separate accounts. In the result, the learned Subordinate Judge passed a decree declaring that the sale of the properties of the plaintiffs held on the 23rd December 1918 was null and void and beyond the jurisdiction of the Collector to hold and that the auction purchasers defendants acquired no title by their purchase. He passed a decree for recovery of possession in favour of the plaintiffs.

On behalf of the appellant it is contended in the first place that it is not the function of the Civil Court to check the accounts of the Collector on what must be imperfect materials, and that these accounts must be presumed to be correct except perhaps in a case where it can be shown that in fact there were no arrears due. It is true that the learned Subordinate Judge has gone into the question whether the arrears were correctly apportioned between the new separate accounts and the remaining residuary share; but this was in reality a subsidiary matter, because the main position taken up by the learned Subordinate Judge was that apportionment could not be made at all and that if a separate account is to be opened while the residuary share is in arrears, this can

only be done after an account has been taken of the payments made by the different co-proprietors since the time when the residuary share fell into arrears. The respondents further contend that the opening of a separate account while the residuary share is in arrears affords no protection at all and that the share which ought to be sold is the share as it stood when the share fell into arrears. The learned Counsel for the appellant on the other hand argues that although there is no legal obligation on the Collector to apportion the arrears, this is an equitable and just procedure sanctioned by revenue practice, and that the Civil Court has no right to go behind the apportionment as made.

In order to deal with this argument it is necessary to consider the relevant sections of the Revenue Sales Act and of the Bengal Land Registration Act. The sections relating to the opening of separate accounts are ss. 10 and 11 of Act XI of 1859 and s. 70 of the Bengal Land Registration Act (Bengal Act VII of 1876). Without going into the details which differentiate these sections, what they require generally is that "when a recorded sharer of a joint estate desires to pay his share of the Government revenue separately, he may, submit to the Collector a written application to that effect" which "must contain a specification of the share held in the estate by the applicant" and in the case where: "the share consists of a specific portion of the land of the estate.....specification of the land and of the boundaries and extent thereof, together with a statement of the amount of *sadar jama* heretofore paid on account of it." The Collector is then required to publish in certain places a copy of the application; and: "if within six weeks from the date of the publication of these notices no objection is made by any other recorded sharer the Collector shall open a separate account with the applicant and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account shall be held to be that from which the separate liabilities of the share of the applicant commence." Section 12 provides that "if any recorded proprietor of the estate...object that the applicant has no right to the share claimed by him, or that his interest in the estate is less or other than that claimed by him, or if the application be in respect of a specific portion of the land of an estate, that the amount of *sadar jama* stated by the applicant to have been heretofore paid on account of such portion of land is not the amount which has been recognized by the other sharers as the *jama* thereof the Collector shall refer the parties to the Civil Court and shall suspend proceedings until the question at issue is judicially determined." Section 74 of Act VII of 1876 contains a similar provision. Now at this point a question arises whether the Collector has any discretion to refuse to open a separate account when the residuary share is in arrears. On behalf of the appellant it is contended that if s. 12 was not there, it could not be said that the Collector could not deal with objections, that the fact that s. 12 provides for the disposal of three particular kinds of objections by the Civil Court, must not be taken to imply that the Legislature contemplated no other kind of objection and that any proprietor may raise the objection that the residuary account is in arrears and if the objection is not raised it must be taken that the parties acquiesce and the Collector is entitled to open a separate account. For the respondents it is argued that the Collector has no power to deal with objections; that they are for the Civil Court and that the question of arrears does not concern the Collector as the law gives ample security for the revenue. It is not perhaps necessary to decide the question, but it may be pointed out that the three kinds of objections specified in s. 12 are the only objections that could be made to the only statements that the application is to contain. It would seem to follow from this that if no such objection is made the Collector is bound to open a separate account whether the share from which the separate account is to be opened is in arrears or not at the time. No inference, therefore, unfavourable to the respondents, can, in my opinion, be drawn from the fact that when the separate accounts were opened no objection was raised on the ground of the existence of arrears.

The next question is whether the Collector's procedure in dealing with the arrears was correct, and if not, whether this in itself affects his jurisdiction to sell the residuary share.

There is no special procedure appointed

by the Act for dealing with the case where the residuary share is in arrears possibly because it was not contemplated that there should be arrears, or because the security of the revenue is not affected by the opening of a separate account. There is no authority in the Statute for apportioning the arrears, whether after taking an account, as the learned Subordinate Judge has suggested, should be done, or merely according to the ratio between the Government revenue assessed on the separate account and that remaining to be assessed on the residuary share. It is true that this latter method appears to be authorized by the practice of the Revenue Courts [see the letter from the Commissioner of the Patna Division to the Collector of Gaya (Ex. GG)]. The justice of such a method may be open to question because it may be that the proprietor who is applying for a separate account has been punctual in his payments and normally it would be the proprietor who was punctual in his payments who would seek protection against the less punctual proprietors by opening a separate account (see the preamble to Act XI of 1859). But so far as this is a matter of accounts it would be merely an irregularity which at the most might give ground for impugning a sale under s. 33 of the Act. But I do not see how the defect in the method of dealing with the arrears can affect the jurisdiction of the Collector to sell a share which admittedly was in arrears and was liable to sale.

But there is another aspect of this matter and it is upon this aspect that the respondents specially insist. They contend that there is no means of dealing with arrears and that no means is necessary because the opening of a separate account when the residuary share is in arrears has no effect at all; the share which is to be sold when it eventually become liable to sale is the share as it stood when it fell into arrears. The consequence is that the Collector has in effect split up the revenue unit which he ought to have sold and which was liable for the arreras and has sold a part of it for an arrear for which it was only partially responsible; this, it is contended he had no jurisdiction to do and the sale is bad on this ground apart from s 33 altogether. On the first part of this argument it is contended that if the share of *A*, *B*, *C* and *D* is liable for a debt, that debt, cannot be thrown upon the share of *B*, *C*, and *D* while the share of *A* is saved from liability by being separated out after the debt had been incurred. It seems clear on general grounds that the residuary share as it stood when the debt was incurred would be charged as a whole with that debt and that no part of it could escape from the charge by subsequent separation. The question is whether the Sale Law prevents the application of this principle. The section relevant to this question is s. 13 which provides that: "Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector...in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revnue may be due." Section 14 then further provides for the contingency that the highest offer for the share may not equal the amount of the arrear, and for the liability of the whole estate to be sold in such a case. It is argued for the respondents that s. 13 contemplates the case of an estate becoming liable to sale for arrears of revenue after the separate account has been opened; that it deals with the case where the Collector shall have ordered a separate account to be opened and that in such a case, if the estate shall become liable to sale, then certain consequences follow; and that there is nothing in this section to protect a separate account which has been opened after the liability to sale arose, because the section does not deal with such a case. But the section does lay down a general rule and it must be construed so as to express a general rule. The learned Counsel for the appellant contends that all that the Collector has to do is to look at the separate accounts as they stand and if he finds that any separate account is not in arrear, he is not entitled to sell that share; he can only sell the share from which according to the separate accounts an arrear of revenue is due. He points out that the Collector is not permitted to sell a share merely because that share is in arrears; but he can only sell if the estate is in general arrear. It must be shown, therefore, that the estate as a whole is in arrears and liable to sale; and it is contended that the date on which this liability to sale arose must be the date which will fix the extent

of the residuary share of the estate to be put up for sale, if it is that share which is in arrears, as in the present case. This contention appears to be sound. The argument accepts the main position of the other side, but seeks to escape from the effects of that concession by throwing the date after the period when the separate accounts in question were opened. It is contended in short that although the residuary share may have been in arrears, and in considerable arrears, since 1908, there is nothing in this record to show that the estate as a whole became liable to sale for arrears before June 1917 when it was actually put up for sale. The Sale Law contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest day of payment; and it must be presumed that inasmuch as the estate was not put up for sale until June 1917, it did not become liable to sale before that date. In any case it is for the plaintiffs to show that the estate became liable for sale before the separate accounts in question were opened. They have not shown that the estate became liable to sale before June 1917, or that any separate account was opened after March 1917, and they must, therefore, accept what the separate accounts show at that date and consequently the sale was properly held according to the provisions of s. 13. The apportionment of arrears was made in 1916 and, therefore, cannot affect the question. Section 13 lays down what the Collector has to do at the time when he takes action under that section and he is bound by what the separate accounts show at that point of time. The co-sharers may have rights of contribution *inter se*, but that is not a matter with which the Collector is concerned. The point of time which determined the action of the Collector in the present case was June 1917 and no separate account was opened after that date and, therefore, the residuary share as it stood at that time was properly put up for sale. It may be that the arrears shown at that date as due by the residuary share had in fact come down from an earlier period when the residuary share was larger in extent; that is a matter which may give rise to a claim for contribution, but the Collector is bound by what his accounts show as they stand. The argument for the respondents is that the residuary share which was sold in 1918 was not the share from which the arrears were due. Between September 1913 and September 1915 at least eighteen separate accounts were opened, *viz.*, separate accounts 368, 370, 372, 374, 379, 380, 381, 382, 383, 386, 388 to 395. These all formed part of the residuary share and were opened out of it and were responsible in part of the arrears for which the sale took place. Therefore, the sale of the residuary share as it stood in 1918 for these arrears was without jurisdiction. Now it is admitted that when the estate became liable to sale, the share which according to the separate accounts was liable to sale for an arrear of revenue was the share that had to be put up for sale. The phrase "according to the separate accounts" is construed by the respondents as requiring the Collector to trace the arrear back to its origin, taking into consideration all the separate accounts which had been opened since the arrear began and to determine what the share then was and to put that up for sale. This does not seem to me to be the natural force of the words but a strained and artificial sense. It is pointed that this is the view which has been adopted by the Board of Revenue in the rule relating to Wards estates quoted by the learned Subordinate Judge framed under ss. 23 to 26 of Act IX (B. C.) of 1879. That rule, however, is not binding on the Civil Court in construing s. 13 of the Revenue Sale Law. It leads to obvious difficulties. Thus in the present case, in 1913 when arrears were Rs. 2,205-1-6 separate accounts Nos. 368, 370, 372 and 374 were opened and separate accounts Nos. 16, 17, 22, 56, 66, 89, 163, 182 and 191 were closed. In January 1914 separate account No. 363 was closed. In March 1914 when the arrears were Rs. 2,493-12-9 separate accounts 377 and 378 were opened and in June 1914 when the arrears were Rs. 2,782-9-9 separate accounts 379, 380, 381, 382 and 383 were opened. In September 1914 separate account 276 was closed. In January 1915 separate accounts 386 and 388 were opened, the arrears being then Rs. 2,680-9-5. In March 1915 separate accounts Nos. 389 and 390 were opened when the arrears were Rs. 3,057-1-11. In June 1915 when the arrears were Rs. 3,326-2-8 separate account 391 was opened and in September 1915 separate accounts 392 to 395 were opened when the arrears were Rs. 3,356-0-6. It is

difficult to see on what principle these separate accounts which have had a separate existence which sets them free from the burden of the accumulating arrears can be held liable to sale for an arrear much greater than any arrear for which they could be held responsible. Again, for ought we know the separate accounts which have been opened may have been formed partly out of the residuary share and partly by amalgamation with other separate accounts. On what principle are they to be disintegrated? It seems, therefore, that the construction for which the respondents contend is not practicable. The explanation must be this that the Collector is concerned with the collection of the revenue, and sales take place with this object in view, the co-sharers being left to the ordinary remedies for enforcing their rights *inter se*. I hold, therefore, that the Collector was entitled to put up for sale in June 1918 the residuary share as it stood at that date for the arrears then shown against it in the Collector's books.

The second part of the argument is equally without force. It is admitted that the estate was in general arrears and that the share in arrears according to the separate accounts was liable to sale. The Collector, therefore, had jurisdiction to sell. If there was any irregularity in the exercise of the jurisdiction the remedy was provided by s. 33. But where there is jurisdiction, an irregularity in its exercise cannot take the sale outside the Act. The respondents rely on the decision in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1). But the facts of that case were entirely different from the facts of the present case and the question was one of construction of the notice under s. 6 of the Act, *viz.*, whether the dominant description of the property sold was the word "*ijmal*" or the detailed list of the villages annexed thereto. The decision on that question cannot throw any light on the present case.

I hold, therefore, that the Collector had jurisdiction to sell the property and as the sale is not attacked on any of the grounds stated in s. 33 it must stand.

I now turn to the second ground, which concerns three of the cases. The contention of the plaintiffs in Suit No. 33 of 1919 was that the shares in Lawahar, Karangarh and Kothi Khas were protected by separate accounts Nos. 34 and 50. Now Register D does not show these separate accounts for any of these three villages. A *Rubakar* of 1871 (Ex. 57d) shows that a separate account was opened for certain shares in certain villages in this estate including Lawabar and Karangarh for a share of 1-anna 16 *dams* 19 *kaure* 17 *bauri* 10 *phouri* and Kothi for a share of 18 *dams* 9 *kauri* 18-*bauri* 15-*phouri*. The revenue assessed on this separate account is Rs. 650; and as this is the amount shown against the separate account No. 34 in the *tauzi* roll (Ex. Z) it may be taken that separate account which is shown in Ex. Z to have been opened on the 21 March 1871, the date of Ex. 57d, is that separate account. Similarly by a *Rubakar* Ex. 57c, dated the 14th of September 1874 a separate account was opened for shares in Lawabar and Karangarh of 1-anna 4-*dams* and 1-*krant* which by reference to the *tauzi* roll Ex. Z is seen to be separate account No. 50. The *tauzi* roll shows that numerous separate accounts have been opened out of accounts 34 and 50 although these accounts still exist because Ex. Z shows that a revenue of Rs. 347-1-0 and Rs. 37-13-0 is still assessed on separate accounts 34 and 50 respectively. But the question is whether, after the subsequent dealings with these separate accounts, what remains contains the three villages in question. The register of separate accounts Register No. 12A (Ex. 44 to 44b) does not show any separate account 34 so far as Lawabar is concerned. Moreover the total of separate accounts 249, 317, 318 and 320 which the *tauzi* roll shows to have been opened out of separate accounts 34 and 50 covers a greater share in Lawabar than was covered by the original separate accounts 34 and 50.

With regard to Karangarh, separate account 50 does not appear. Separate account 395 which has been opened out of both separate accounts 50 and 34 (see Ex. Z) is shown as well as the separate accounts 317, 318 and 320 which were opened out of separate account 34. It is true that separate account 34 is also shown as covering a share of 1 anna 8 *gandas* but it is contended that this is an error due to the omission to strike out this old account from the Register when new accounts were opened out of it. This may be so because

(1) 40 Ind. Cas. 13; 2 P. L. J. 402; 2 P. L. W. 229.

the total of the shares in Karangarh opened out of separate account 34 comes to more than the share originally represented by that account. In Kothi Khas, separate account 34 is still shown for a share of 18 *gandas* and odd. Three separate accounts 317, 318 and 320 opened out of separate account 34 total more than the share in Kothi Khas originally represented by separate account 34. Probably, therefore, the continued appearance of Separate Account 34 in Register 12A is a mistake.

It is contended on behalf of the respondents that the continuity of the separate account must be presumed and that the defendant must show that it went back to the *ijmali* account or became part of some other account and that it is enough for the plaintiffs to show that a separate account once existed. In my opinion this argument throws the burden of proof wrongly. It is not for the defendants or the Collector to show what became of these separate accounts. The burden is on those who callenge the sale to show that these separate accounts which were opened so far back as 1871 and 1874 still exist. The evidence shows that they do not exist in their original form any longer. Register 12A is inaccurate as is admitted by both sides and the traces of one or other of these accounts in the register cannot be relied upon. Register D does not show their existence and this, in my opinion, is the best evidence in the case. I hold that the plaintiffs have failed to establish their case on this head.

In Suit No. 282 of 1919 (First Appeal No. 140 of 1922) the plaintiffs claim that their shares in *Mauzas* Simri and Kurhani are protected by separate account 152. Their case is that these villages fall in three *mahals* namely, Pankhardih Malihari, Garua and Khaira (see *Mahalwar* Register, *Pargana* Sherghati, Ex. 45). Kurhani appears as No. 62 in the register to the extent of 5 annas 6 *dams* and 2 *kowris*, and Simri as No. 184 with a similar share in *Mahal* Pankhardih Malihari. that is to say, one-third of each of these villages belongs to that *mahal*, and is treated for the purposes of that *mahal* as being 16-annas. The documents show that the plaintiff's purchased 1-anna 12 *dams* 17 *kowris* 13-*bowris* and 6-*phouris* in these villages out of 5-annas 6 *dams* and 2 *kowris*. Separate account 152 was opened in respect of this share in March 1889. According to the plaintiffs' case this separate account ought to have been shown in the Collector's register as being opened in respect of 4 annas 18 *dams* and 13 *kowris*, treating the share of these villages in *Mahal* Punkhardih Malihari as 10 annas; whereas, in fact, it was opened in respect of only 1 anna 12-*dams* 17 *kouris* 13 *bouris* and 6 *phouris*, with the result that the difference was left unprotected by the separate account and went into the *ijmal* share which was sold for arears of Government revenue The application for the opening of separate account is Ex. 38A. That application was made under s. 70 of the Land Registration Act. In accordance with the requirements of that section it specified the share of the petitioner as 1 anna 12 *dams* 17 *kauris* 13 *bouries* 6 *phouris*. It also specified *jamas adar* of the 16-annas as Rs. 12-4-3 and the proportionate revenue on the share of the petitioners as Rs. 3-12-9. Consequently it is clear from the Government revenue stated to be due on the share in respect of which the application was made, that the share referred to in the application was a *pokhta* share and that the separate account ought to have been opened for 4 annas 18 *dams* and 13 *kowris*. The Government revenue on that share has all along been paid and it was only by mistake that in the Collector's register the share was entered as a *kham* share and not *pokhta* with the result that the greater portion of it was left unprotected.

In Suit No. 54 of 1920 (First Appeal No. 144 of 1922) this plaintiff's case is similar and relates to a similar share in *Mouza* Amnabad which is one of the constituent villages of *Mahal* Pankhardih Malihari and which appertains also to two other *mahals*, the shares in the three *mahals* being equal. The plaintiff purchased 1 anna 12 *dams* 17 *kowris* 13 *bowris* and 6 *phouris* out of 5 annas 4 pies share in this village and made an application for the opening of a separate account (Ex. 38) and separate account 158 was opened under s. 70 of the Land Registration Act. The petition is not as clear as it might have been. It describes the share as 1 anna 12 *dams* 17 *kowris* 13 *bowris* and 6 *phouris* out of 16 annas; but it states the previous *jama sadar* to be Rs. 5-13-10 and the proportionate revenue Rs. 1-13-0. The relation between the total *jama sadar* and the

jama sadar proportionate to the applicant's clearly shows that the application was made in respect of a *pokhta* share. The separate account, therefore, ought to have been opened for 4 annas 18 *dams* 13 *koworis kham* share; but, in fact, it was opened in respect of 1 anna 12 *dams* 17 *kowris* 13 *bowris* and 6 *phouris kham* share. The plaintiff has all along been paying Government revenue on full extent of her interest; but, owing to the mistake in Collector's register, that interest has not been fully protected by the separate account which was opened. The contention on behalf of the appellants is that it is not the duty of the Collector to ascertain whether the share specified in the petition is *pokhta* or *kham*; but in my opinion, the relation between the total *jama sadar* and the *jama sadar* and the *jama sadar* assigned in the application to the share in respect of which the application was made is the determining factor; and the Collector, in opening the separate account, ought to have interpreted the share according to this proportion.

I think, therefore, that the entire shares of the plaintiffs in these suits were protected, and as it is not disputed that the Government revenue had been fully paid in respect of the entire shares the sale of these shares was without jurisdiction. Moreover the shares sold were in fact no part of the residuary share and did not pass by the sale of the same. The plaintiffs are, therefore, entitled to succeed in these two suits and Appeals Nos. 140 and 145 of 1922 must be dismissed with costs. The other appeals are decreed with costs and the suits are dismissed with costs.

Das, J.—I agree.

Z. K.

Appeals Nos. 140 and 145 dismissed; Remaining appeals allowed.

LAHORE HIGH COURT.

CIVIL APPEAL No. 2211 OF 1921.

February 23, 1925.

Present:—Mr. Justice Broadway and Mr. Justice Jai Lal.

SITA RAM—PLAINTIFF—APPELLANT

versus

BALKISHEN—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 15—Contract for sale of immoveable property—Vendor only owner of part of property—Specific performance, suit for—Procedure—Damages, purchaser, right of, to recover.

Defendant agreed to sell to the plaintiff an undivided plot of land owned by himself and a stranger who subsequently declined to join in the sale. Plaintiff brought a suit for specific performance of the contract and in the alternative for damages:

Held, (1) that the case was governed by the provisions of s. 15 of the Specific Relief Act and that plaintiff could be granted a decree for the specific performance of that part of the contract which related to the share of the property owned by the defendant, provided the plaintiff was willing to pay the entire purchase-money and to relinquish all claim to further performance and all right to compensation for the deficiency; [p. 473, col. 1.]

Baluswami Aiyar v. *Lakshmana Aiyar*, 63 Ind. Cas. 374; 44 M. 605; 13 L. W. 562; 29 M. L. T. 306; (1921) M. W. N. 316; 41 M. L. J. 129, relied on.

(2) that if the plaintiff was not willing to accept specific performance on these terms, he was entitled to recover damages from the defendant for breach of the contract. [p. 473, col. 2.]

First appeal from a decree of the Subordinate Judge, First Class, Lahore, dated the 30th June 1921.

Lala *Mahesh Das* and Babu *S. K. Mukerji*, for the Appellant.

Lala *Badri Das*, R. B., for the Respondent.

ORDER.—On the 30th of September 1919 Bal Kishen, defendant-respondent, agreed to sell to Sita Ram, plaintiff-appellant, a plot of land measuring 25·88 *marlas* situated in Gawalmandi Lahore at the rate of Rs. 450 per *marla*. Rupees 200 were received by him as earnest-money and the rest was to be paid on the 1st of November 1919 when the sale-deed was agreed to be executed and registered. This land had been purchased by Bal Kishen and his son-in-law Jagat Ram jointly. Jagat Ram was no party to the agreement for sale but Bal Kishen gave an assurance that he would have no objection to sell. It appears that about the end of October Bal Kishen informed Sita Ram that Jagat Ram was not prepared to sell the land and, therefore, he was not willing to sell his own share also and consequently offered to return the earnest-money. On the 29th October Sita Ram served a notice on Jagat Ram claiming performance of the agreement to sell the land. In reply Bal Kishen intimated to him that as Jagat Ram has raised objections to the sale, the execution of the sale-deed had, therefore, become impossible. He returned Rs. 200 by means of a cheque, payment of which was consequently stopped by him.

The plaintiff-appellant instituted this suit on the 2nd of February 1920 against Bal

Kishen and Jagat Ram claiming specific performance of the agreement to sell the whole land. In the alternative he claimed specific performance in respect of the portion of land owned by Bal Kishen and for damages for non-performance of the conract as regards the other half.

Jagat Ram defendant denied that he had ever authorised Bal Kishen to sell his share of the land and generally traversed the allegations made by the plaintiff so far as they related to his share.

Bal Kishen, defendant, pleaded that he did not purport to agree to sell the land on behalf of defendant No. 2 but only expressed a hope that defendant No. 2 would not object to the sale, that defendant No. 2 was not agreeable to sell his share and, therefore, the agreement had become impossible of performance. He further pleaded that s. 15 of the Specific Relief Act governed the case and that the plaintiff was not entitled to claim any damages with respect to the share of defendant No. 2.

The Trial Court decreed specific performance against Bal Kishen as regards his share and as regards Jagat Ram's share it gave the plaintiff a decree against Bal Kishen for Rs. 100 as damages. The suit against Jagat Ram was dismissed.

The plaintiff appeals from this decree claiming Rs. 2,364-8-0 as damages instead of Rs. 100. The respondent has filed cross-objections claiming that specific performance in respect of a part of the land could not be granted and that in any case it should have been granted only on payment by the plaintiff of the price agreed to be paid for the whole land and further that no damages could be decreed as regards the remaining land.

In our opinion the case is fully covered by s. 15 of the Spesific Relief Act. Section 16 has no application to the facts of this case. The contract before us does not consist of parts which could be styled as being separate and independent of each other. The respondent had agreed to sell an undivided plot of land owned by himself and a stranger to the agreement who subsequently declined to join in the sale and, therefore, under s. 15 specific performance could be directed in respect of so much of his part of the contract as he could perform. In other words, he could be directed to sell his half share of the land to the plaintiff but this could be done provided the latter relinquished all claim to further performance and also all right to compensation for the deficiency. We are further of opinion that if the plaintiff cared to purchase the share of Bal Kishen alone, he was bound to pay the full price that he had agreed to pay for the whole plot of 25·88 *marlas*. Section 15 of the Specific Relief Act provides this. This section was so interpreted in *Baluswami Aiyar* v. *Lakshmana Aiyar* (1) and we are in full accord with this view. The plaintiff-appellant is not prepared to relinquish his claim for damages or to pay the full price of the entire plot for the purchase of the share of Bal Kishen defendant-respondent. His Counsel stated this before us at the hearing. That being the case it is obvious that specific performance cannot be granted to the plaintiff even of the share of Bal Kishen. At the same time it is clear that Bal Kishen agreed to sell to the plaintiff a plot of land measuring 25·88 *marlas* and he has failed to perform this agreement. No valid reason has been shown why he should be absolved from the consequences of his failure. He is, therefore, liable to pay damages for breach of the contract.

We, however, find that there is no satisfactory material on the record to enable us to assess the damages suffered by the plaintiff. At the trial of the suit the parties do not seem to have attached much importance to the question of *quantum* of damages. The contest there ranged mainly round the question of specific performance. In order to do justice between the parties it is necessary to hold a further enquiry into this matter. Under O. XLI, r. 25, C. P. C., we direct the learned Subordinate Judge to take such additional evidence as may be adduced by the plaintiff and Bal Kishen defendant on the question of assessment of damages and to return the evidence together with his finding thereon and reason therefor to this Court within three months. The parties may file memorandum of objections to such findings within ten days of their receipt in this Court. Then the appeal shall be put down for further hearing here.

Appeal accepted.
Case remanded.

Z. K.

(1) 63 Ind. Cas. 374; 44 M. 605; 13 L. W. 562; 29 M. L. T. 306; (1921) M. W. N. 316; 41 M. L. J. 129.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 237 OF 1924.

April 9, 1925.

Present :—Mr. Wazir Hassan, A. J. C.

GAURI SHANKAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BADRI NATH AND OTHERS—PLAINTIFFS—RESPONDENTS

Hindu Law—Joint family—Alienation by father—Antecedent debt—Terms, whether binding on sons—Mortgage—Redemption—Improvements—Consent of mortgagor, absence of, effect of.

It may be that in certain cases where the bulk of the consideration for an alienation made by a father in respect of joint family property consists of antecedent debt or is justified by legal necessity the alienation may be held binding upon the sons; but where there is much more in an alienation than the simple question as to the amount of the consideration that might be of a valid character the Court must consider it in its entirety and come to the conclusion in the particular circumstances of each case as to whether it should be upheld or set aside. [p. 175, col. 1.]

A Court of Equity has jurisdiction to impose terms on reliefs that it might think proper to grant to one or other of the parties to a litigation. [*ibid.*]

A mortgagee cannot be permitted to improve a mortgagor out of his estate. [*ibid.*]

A mortgagee of a *kachcha* structure is not entitled to convert the structure into a *pucca* building without the consent of the mortgagor. Where a mortgagee makes such improvements without the consent of the mortgagor, he cannot claim the value of the improvements at the time of redemption. [*ibid.*]

Appeal against a decree of the First Additional Subordinate Judge, Gonda, dated the 12th May 1924, modifying that of the Munsif, Tarabganj, dated the 21st December 1923.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

Mr. *Bishesharnath*, for Respondents Nos. 1 and 2.

JUDGMENT.—This is the defendants' appeal. On the 9th July 1917 Bisheshar defendant No. 3 to the suit out of which this appeal arises and father of the minor plaintiffs, Badri Nath and Kedar Nath who are respondents to the appeal made a mortgage of the ancestral joint family property in favour of Gauri Shankar and Mangal defendants Nos. 1 and 2 for a sum of Rs. 1,000. The property mortgaged was the family residential house with a compound attached to it and one shop similarly attached. The mortgagees were put in possession of this property. The usufruct was to be appropriated by the mortgagees in lieu of interest due on half of the mortgage-money. The other half was to carry interest at the rate of 24 per cent. per annum compoundable yearly. The mortgage was irredeemable for a term of 45 years.

The mortgagees have been continuously in possession of the mortgaged property. The suit now under appeal was instituted by the sons of the mortgagor as already stated to recover possession of this property on the ground that the alienation made by their father was not justified by any purpose recognised under the Hindu Law.

Several pleas were taken in defence to this suit. It was pleaded that the entire consideration for the alienation was binding on the plaintiffs because it constituted either antecedent debt or was incurred for legal necessity. It was also pleaded that the suit was premature in view of the terms of the mortgage making its continuance certain for a period of 45 years. It was further pleaded that the mortgagees had spent a large sum of money over the mortgaged property converting it from a *kachcha* structure into a *pucca* building and they were entitled to be recompensated for the money they had spent on the new construction.

The Court of first instance rejected all the pleas in defence and decreed the suit for possession. On appeal by the defendants mortgagees, the First Additional Subordinate Judge of Gonda held that out of the total consideration of Rs. 1,000 for the mortgage the sum of Rs. 660 constituted antecedent debt as being due under a prior mortgage executed by the same mortgagor in favour of the same mortgagees. He, therefore, modified the decree of the Court of first instance by imposing a condition for the payment of this sum of Rs. 660 by the plaintiffs before they could enter into the possession of the mortgaged property.

The first argument in second appeal is that as the bulk of the consideration for alienation has been found to be valid as constituting antecedent debt the Courts below should not have set aside the mortgage but that it should have been upheld with all its conditions. I am unable to accept this argument. I have to consider the propriety of the alienation as a whole. It may be that in certain cases where the bulk of the consideration for an alienation made by a father in respect of joint family property consists of antecedent debt

or is justified by legal necessity the alienation may be held binding upon the sons; where there is much more in an alienation than the simple question as to the amount of the consideration that might be of a valid character the Court must consider it in its entirety and come to the conclusion in the particular circumstances of each case as to whether it should be upheld or set aside. This, it seems to me, is a proper method of dealing with questions of the nature that I have before me. It is more so in view of the fact that, sitting as a Court of Equity, this Court has jurisdiction to impose terms on reliefs that it might think proper to grant to one or the other of the two parties to a litigation. When the transaction before me is considered in all its bearing how does it stand? The family residential house is the subject of the mortgage. Rupees 500 are to carry interest at a highly unconscionable rate and finally we have the term of 45 years imposed on the continuance of the mortgage. As is pertinently pointed out by the learned Additional Subordinate Judge, at the end of 45 years' time the mortgage-money would far exceed the value of the house. Even at the end of five years, as that Court again observes, it would be of no advantage to redeem the property. In the circumstances, therefore, I am of opinion that the Courts below were right in setting aside the mortgage.

The second argument advanced before me was that the plaintiffs should be made to pay compensation for the improvements which the defendants have made in respect of the property. I must reject this argument also. In the first place, there is no material on this record to exactly determine the money value of the improvements which the defendants have made. This fact is pointed out by the learned Munsif in his judgment. In the second place, a mortgagee cannot be permitted to improve a mortgagor out of his estate. In the third place, improvements of the nature which the defendants claim to have made in the mortgaged property, are not permitted in law to be made by a mortgagee without the clear consent of the mortgagor. This last mentioned point is of great significance in the case before me for the reason that the property mortgaged was not absolutely owned by the mortgagor but was the family property of himself and his two sons.

Finally, it was argued that the defendants are entitled to the sum of Rs. 340 on the same title as they are entitled to the amount of Rs. 660. We have already seen that the last mentioned amount has been made payable by the lower Appellate Court to the defendants by the plaintiffs as a condition precedent to the recovery of the property in suit. The facts that the sum of Rs. 660 constituted antecedent debt is of no importance whatsoever as soon as the alienation which it was intended to support is set aside as it is being done in the present case. The sons' liability to pay the sum of Rs. 660 in such circumstances rests on their pious obligation to discharge their father's debt when it is not incurred for any immoral or illegal purpose. The two amounts of Rs. 340 and of Rs. 660, therefore, stand on the same footing in so far as the liability of the sons to re-pay them is concerned. It is not possible to make any distinction between them and when the Court orders the plaintiffs to pay the sum of Rs. 660 as a condition precedent to the recovery of the joint family property it only exercises an equitable jurisdiction and does so by imposing terms upon a successful party. I, therefore, accept this argument of the learned Counsel for the appellants.

The result is that the appeal is allowed, the decree of the lower Appellate Court is modified and the suit for the recovery of possession is decreed on condition of payment of the sum of Rs. 1,000 by the plaintiffs to the defendants within six months from this date. I allow no interest on the sum of Rs. 500 for the reason that in my opinion the essential nature of the original transaction was nothing but a usufructuary mortgage and the mortgagees were content to lend out the money which they did on the basis of that transaction. I make no order as to costs in this Court. The order as to costs passed by the lower Appellate Court will stand.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3005 OF 1924.

May 20, 1925.

Present:—Mr. Justice Zafar Ali.

KHUSHALA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISHAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Mortgage—Redemption—Mortgagee continuing in possession after redemption—Suit to recover possession—Limitation.

Plaintiff mortgaged a certain holding with the defendants and subsequently sold two-thirds of it to one *M* it being agreed between the plaintiff and *M* that out of the consideration for the sale the mortgage in favour of the defendants should be paid off and *M* should obtain the two-thirds sold to him free from the mortgage and plaintiff should obtain the remaining one-third of the holding unencumbered. Defendants, however, pre-empted the sale in favour of *M* and continued in possession of the entire holding. More than 12 years after the enforcement of the decree for pre-emption plaintiff sued to redeem the entire holding from the defendant:

Held, (1) that as the result of the pre-emption decree the mortgagees had become owners of two-thirds of the holding;

(2) that as regards the remaining one-third they were in possession of it without any title after the date of the enforcement of the pre-emption decree and that their possession was consequently adverse to the plaintiff and had ripened into ownership after the lapse of 12 years, and that the fact that they were still shown as mortgagees in the Revenue Records did not give the plaintiff a right to redeem them.

Second appeal from a decree of the District Judge, Jullundur, dated the 27th August 1923, affirming that of the Subordinate Judge, Third Class, Phillaur, District Jullunder, dated the 23rd May 1923.

Mr. *Sagar Chand*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The facts are briefly as below:—

Defendants Nos. 1 and 2 were the owners by purchase of one-half of the proprietary holding of Gulab and were the mortgagees of the other half for Rs. 400. Gulab sold two-thirds of the latter half to one Mana for Rs. 500 out of which he received Rs. 100 and the remaining Rs. 400 was to be paid to defendants Nos. 1 and 2 to redeem the mortgage. If the mortgage had been redeemed Mana would have got possession of two-thirds of the half share free from mortgage and Gulab would have got the remaining one-third of that half quite unencumbered. But defendants Nos. 1 and 2 brought a suit for possession by pre-emption of the share sold to Mana and the latter admitted their claim and gave up his rights under the sale on receiving Rs.100 from them as evidenced by the order of the Court dated the 27th August 1902. Gulab then became entitled to obtain possession of one-third of that half of the holding from the defendants Nos. 1 and 2 but he never took any steps to do so, and the defendents remained in possession of the entire holding. However, Hari Chand son of Gulab sold one-third of the half share which defendants Nos. 1 and 2 formerly held on mortgage to the plaintiffs and they sued to obtain possession of the full half share by redemption as the defendants were still shown in the Revenue Records as mortgagees of that half share, and the plaintiffs asserted that they could redeem the whole of the mortgaged half. But, it is clear, that the mortgage was redeemed on the 27th August 1902 and that from that date defendants Nos. 1 and 2 were in possession of two-thirds of the half in dispute as owners and of the remaining one-third without any title. Their possession of the latter portion was adverse to the owner and it has ripened into title by lapse of more than 12 years. The fact that in the Revenue Records defendants Nos. 1 and 2 were still shown as mortgagees does not affect their title which they undoubtedly acquired from Mana. The argument that the bargain with Mana was of no effect, because the decree for pre-emption was never executed is fallacious, because as a matter of fact no decree seems to have followed the *razinama* that took place between the defendants Nos. 1 and 2 and Mana as the former were already in possession and Mana gave up his rights under the sale from Gulab. The plaintiff's suit for possession of the half that the defendants previously held on mortgage was rightly dismissed because they (defendants Nos. 1 and 2) had acquired two-thirds of the half from Mana and the rest by adverse possession.

I, therefore, dismiss with costs this second appeal against the concurrent judgments of the Courts below.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 28 OF 1923.
April 30, 1925.
Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

GIRISH CHANDRA CHOUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOPAL CHANDRA PODDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Point taken in plaint but not raised in issue or tried, whether can be taken.

A point which though adumberated in the plaint was not raised in the issues or tried by the Courts below and on which no evidence was led cannot be allowed to be taken in second appeal.

Appeal against a decree of the Additional District Judge, Sylhet, dated the 5th of June 1922, modifying that of the Munsif, First Court at Habigunj, dated the 15th December 1920.

Babus *Brojolal Chakravarti* and *Paresh Lal Shome*, for the Appellants.

Babus *Jogesh Chandra Roy* and *Hemendra Kumar Das*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit brought by them under O. XXI, r. 63, C. P. C. Defendant No. 1 obtained a decree against two persons Kailash and Prokash, said to be tenants of the disputed land and in execution of that decree he attached the property in suit. The plaintiffs preferred a claim against the attachment which was rejected on the 6th October 1917. Thereafter the property was sold and purchased by defendant No. 1. Having lost the claim case the plaintiffs brought the present suit for a declaration of their title and for a permanent injunction against defendant No. 1 restraining him from taking possession of the property sold in execution of the decree and purchased by him. The suit was decreed in the First Court but that decree was reversed in appeal. The facts established by the findings of the lower Appellate Court are that Kailash and Prokash obtained a settlement of this land in 1878 before the Transfer of Property Act was passed for the purpose of erecting houses. They have since then been in possession of the land. The present *malik* is one Jitendra Pal. In June 1916 Kailash and Prokash sold this tenancy to the plaintiffs by a *kobala* (Ex. 7). The plaintiffs being apprehensive of the validity of the title derived by this purchase obtained a *putni* settlement of this land from Jitendra Pal in November 1916. The First Court decreed the plaintiff's suit holding the *kobala* to be a genuine and *bona fide* document but the lower Appellate Court found it to be without consideration and a colourable transaction resorted to protect the judgment-debtors' interest from the hands of his creditors. The finding of the Court, therefore, was that the tenancy of Kailash and Prokash subsisted at the date of the sale and that the defendant No. 1 purchased it and obtained delivery of possession of the same. In this view the plaintiffs' suit was dismissed with the declaration of the plaintiffs' *putni* right therein. The plaintiffs appeal and it is argued on their behalf that the tenancy having been created before the Transfer of Property Act came into force, the interest of the tenant must be regarded as non-transferable and, therefore, not liable to be attached in execution of the decree. This point was no doubt adumberated in the plaint but it was never put forward before the Courts below. There was no issue framed on this question and evidently no evidence was directed with regard to it. In the Courts below it was never disputed that the tenancy of Kailash and Prokash was not transferable because the plaintiffs themselves came to Court as purchasers from Kailash and Prokash. Having lost their case on that point they cannot now be allowed to raise a point not put forward in the Courts below. We are asked to hold either that the tenancy of Kailash and Prokash was not transferable and, therefore, the defendant No. 1's purchase is invalid or to remand the case for the determination of this question. We are not prepared to adopt the first cause suggested; but if we follow the second one the result will be that the case will be re-tried from the very beginning. All the evidence taken in the case will have to be discarded and fresh evidence will have to be given to prove custom in favour of the transferability of such tenures. This question, therefore, cannot be raised now. We do not express any opinion with regard to any right which the plaintiffs may possess to proceed against the defendants upon any other cause of action. This appeal accordingly fails and is dismissed with costs.

The cross-objection is now pressed and is therefore dismissed.

Appeal and cross-objection dismissed.

Z. K.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 230 of 1924.

July 4, 1925.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

RAM GOPAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

HAR KISHEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Death of plaintiff—Substitution, absence of—Abatement—Defendant not demanding abatement, effect of.

An abatement takes place *ipso facto* if an application for impleading the legal representatives of a deceased party is not made within the period prescribed by law. The question of abatement does not depend upon the opposite party demanding or not demanding an abatement.

Miscellaneous second appeal from an order of the Senior Subordinate Judge, Rohtak, dated the 10th December 1923, reversing that of the Subordinate Judge, Fourth Class, Jhajjar, District Rohtak, dated the 4th June 1923.

Mr. *Shamair Chand*, for the Appellants.

Mr. *Sagar Chand* for Mr. *B. A. Cooper*, for the Respondent.

JUDGMENT.—In this case four persons, with the leave of the Court obtained under O. I, r. 8, C. P. C., sued on behalf of the proprietary body of the village of Chhara for an injunction for the demolition of a building erected by the defendants on a part of the common land which the plaintiffs alleged had been reserved for the common purposes of the village. One of the plaintiffs, namely Lajje, died while the case was pending in the Trial Court and his legal representatives were not brought on the record. The suit was dismissed as being barred by limitation, the Court finding that the building on the land had been erected 8 or 10 years before. On an appeal being filed by the three surviving plaintiffs and the legal representatives of Lajje the defendants pleaded that the suit had abated as Lajje's representatives had not been brought on the record within the period of limitation. The lower Appellate Court overruled this plea on the ground that the defendants, not having demanded an abatement in the Trial Court, had impliedly allowed the remaining plaintiffs to prosecute the suit, and finding that the structures on the land had been erected only three months before suit, and that the suit was, therefore, within time, it remanded the case for decision on the merits.

The defendants have appealed to this Court from the order of remand, and it is again urged on their behalf that the suit had abated. The lower Appellate Court's view on this point is wrong. There is no question of the defendants demanding or not demanding an abatement, as an abatement takes place *ipso facto* if an application for impleading the representative of the deceased party is not made within time. So far as Lajje was concerned the suit must be held to have abated under O. XXII, r. 3 of the C. P. C., which is not rendered inapplicable by the fact that the suit was brought on behalf of the whole proprietary body of the village. This matter is, however, of no practical importance, as the remaining plaintiffs are not debarred from prosecuting the claim for an injunction. The suit has not abated *in toto*.

The only other point urged on behalf of the appellants is that the proprietary body was represented by the four plaintiffs collectively and is not bound by the proceedings taken after the death of one of those plaintiffs without fresh permission having been obtained by the three survivors under O. I, r. 8, to prosecute the suit on behalf of the whole body of proprietors. This argument is a very technical one, and we think that it has no real force, seeing that the four persons who brought the suit were only self-constituted representatives of the proprietary body and had not been nominated by that body to represent it.

We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 68 OF 1922.

February 16, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

Sheikh IMDAD ALI—DEFENDANT No. 1—APPELLANT

versus

NAND KUMAR LAL, MUNSIF, AND OTHERS—PLAINTIFFS AND *Munshi* TILAKDHARI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Statement in pleading that property was purchased by certain person, whether admission of purchaser's title.

An admission that a certain person has purchased certain property is not an admission that that person has acquired a good title in the property, for it is quite consistent with an assertion that the purchase was bad in law and did not operate to confer any title on the alleged purchaser.

A written statement contained a recital that a certain property had been purchased by certain persons who had not, however, been able to obtain possession of it:

Held, that the statement did not amount to an aknowledgment of the title of the purchasers within the meaning of s. 19 of the Limitation Act.

Appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 24th June 1921, reversing that of the Munsif, Ranchi, dated the 4th August 1920.

Messrs. *N. C. Sinha* and *N. C. Ghose*, for the Appellants.

Mr. *N. N. Sen*, for the Respondents.

JUDGMENT.

Das, J.—The only question in this appeal is whether there is a sufficient acknowledgment within the meaning of s. 19 of the Limitation Act to take the case out of the Statute of Limitation. In 1902 the plaintiff along with certain other persons purchased an 8-annas share of a *jagir* in *Mouzah* Jaipur which belonged to defendant No. 1. It is admitted that the plaintiff did not recover actual possession of the land although there was a delivery of possession through the Court on the 10th of August 1902. The Record of Rights recorded defendant No. 1 as in possession of the disputed land. The present suit was instituted on the 30th January 1920 and is *prima facie* barred by limitation. But the plaintiff relies upon a certain acknowledgment made by defendant No. 1 sometime in June 1913 in a suit which was instituted by Bishun Lochan against him. The acknowledgment is contained in the 12th paragraph of his written statement as is as follows:—"That 8 annas of village Jaipur out of 16 annas, that is to say, four annas *mokarrari* share of Jamadar Jageswar Dayal Singh and 4-annas share of the defendant total 8 annas together with the disputed property, was sold in execution of a certificate for arrears of road-cess and was purchased by Dinesh Prasad, Goraknath Nandkumar and Tilakdhari Lal, who obtained a certificate. That in spite of the fact that a *tanaza* was filed in the Settlement Department they did not get possession but were ordered to sue for possession before Civil Court. So long as all these persons are not made parties to the suit, the plaintiff's suit cannot proceed." It is admitted that the property to which reference is made in the 12th paragraph of the written statement is the same as that which is the subject-matter of the present litigation. The learned Judicial Commissioner has come to the conclusion that there is an acknowledgment of the title of Dinesh Prasad, Gorakhnath Nandkumar and Tilakdhari Lal in this written statement which was filed by defendant No. 1 in June 1913 sufficient in law to take the case out of the Statute of Limitation. I am unable to agree with this view. It is undoubtedly admitted that the property was sold in execution of a certificate for arrears of road-cess and was purchased by Dinesh Prasad, Gorakhnath Nandkumar and Tilakdhari Lal; but an admission that a certain party has purchased the property is not an admission that that party has acquired a good title in the property for it is quite consistent with an assertion that the purchase was bad in law and did not operate to confer any title on the alleged purchaser. A case is cited in Halsbury's Laws of England, 19th Vol, at page 132, para. 253 where it was held that an admission that a person has recovered judgment in an action of ejectment is not an admission of title, for it is quite consistent with an assertion that the judgment in ejectment was wrong and that the person had no title at all. In my opinion the principle is equally applicable to a case like this. The admission that the property was purchased amongst others by Nandkumar Lal was coupled with an assertion that the purchasers did not get possession of the land and I am unable to read the statement in para. 12 of the written statement as an acknowledgment of the title of the purchasers. In my opinion the decision of the learned Judicial Commissioner should be reversed and the decision of the Court of first instance should be restored.

I would accordingly allow the appeal, set aside the decision of the learned Judge in the Court below and restore the decision of the Court of first instance. The result is that the suit is dismissed with costs in all the Courts.

Adami, J.—I agree.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 516 OF 1924.
March 27, 1925.

Present:—Mr. Findlay, O. J. C.

SECRETARY AND PRESIDENT, MUNICIPAL COMMITTEE, NAGPUR—DEFENDANTS—APPELLANTS

versus

DEVIDAS—PLAINTIFF—RESPONDENT.

C. P. Municipalities Act (II of 1922), s. 12 (1) (a), scope of—Joint Hindu family—Separate income of member up to requisite amount—Member, whether entitled to vote.

Under s. 12 (1) (*a*) of the C. P. Municipalities Act, every member of a joint Hindu family is entitled to a vote provided he is in receipt of an income of not less than Rs. 120 per year or such other less sum as may be prescribed under the rules made thereunder, irrespective of the fact that he pays the income to the manager for being thrown into the common stock. The manager alone is entitled to a vote if the total income of the entire joint family aggregates to the amount prescribed under the Act or the rules made thereunder, but the income of individual members falls short of that amount. [p. 481, col. 1.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 4th December 1924, in Civil Appeal No. 91 of 1924.

Mr. *M. B. Niyogi*, for the Appellants.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The plaintiff-respondent Devidas, a resident of Nagpur City, is a Pleader's clerk in receipt of an income not less than Rs. 120 per year, and is also a member of a joint Hindu family. He sued the defendants-appellants, the Secretary and President of the Nagpur, Municipal Committee, for a decree to the effect that they should be ordered to show his name in the register of Municipal voters, and for other consequential relief.

The facts of the case are not in dispute, and from Ex. P. 1, filed, it is clear that the Municipal President declined to enter the plaintiff-respondent's name on the ground that he is a member of a joint Hindu family and that his brother, who is the manager of the said family having been registered as a voter, the respondent was not entitled to have his name also shown in the electoral roll.

The Subordinate Judge duly passed a decree in favour of the plaintiff, and an appeal by the present appellants was dismissed by the Additional District Judge, Nagpur. The appellants have now come up on second appeal to this Court.

The facts of the case are not in dispute. The only question with which I am concerned in the construction of s. 12 (1) (*a*) of the C. P. Municipalities Act, 1922. The canon of construction known as the golden rule, which has been quoted in the judgment of the First Court, is one which, it need hardly be said, I fully accept. In the present case, however there seems to me little or no need to have recourse to technicalities. Section 12 (1) (*a*) reads as follows :—

" The following persons shall be qualified as voters for the purpose of electing members of a Committee other than members representing special constituencies, namely, persons residing within the limits of a Municipality and in receipt of an annual income of not less than Rs. 120 or such less income as may be prescribed by rules made under this Act;

Explanation—For the purposes of this clause the manager of a joint Hindu family shall be deemed to be in receipt of the joint family income; ".

On the construction, which the appellants ask me to put on the explanation just quoted, this explanation would have to be read as a most important exception barring each and every member of a joint Hindu family, who is in receipt of a separate income, from being entered in the electoral roll, if the manager of the said family appears therein as a voter.

I find it difficult to suppose that the Legislature would have ever drafted the explanation in question in the form, it has, were it intended to disfranchise every member of a joint Hindu family other than the manager, even if such member were in receipt himself of an annual income of not less than Rs. 120. Had such been the intention of the Legislalure, the exception would, doubtless, have appeared in sub-s. (3) of s. 12. As it stands, the explanation seems to me to have only one possible reasonable interpretation. This interpretation is that the Explanation to cl. (*a*) was clearly meant to apply only to the case of a joint Hindu family, whose total income aggregates Rs. 120 per year, although the income of the individual members thereof may be less than that amount. In such a case the Legislature has obviously attempted to lay down the rule that the manager alone of such a joint Hindu family will have the vote and not every individual member of the family. In other words, the explanation meets the case where the particular members of a joint

Hindu family receive less than Rs. 120 per year, but the total annual income of the joint family exceeds that amount. The provision in question, therefore, rightly finds place as an Explanation to cl. (*a*). Had it been intended to disfranchise each and every member of a joint Hindu family, save the manger, the provision in question would have formed a highly important exception to this section, prescribing the qualifications of voters, and would undoubtedly have found place in sub-s. (3).

The plaintiff is clearly a person in receipt of annual income of not less than Rs. 120. Can it be argued on any reasonable interpretation of the explanation that this latter explanation in any way takes away the right of voting from him? I am wholly unable to accept any such proposition. To construe the explanation in question in any way, I am asked to do by the appellants, would involve my transgressing every accepted principle of interpretation.

On the other hand, the position of the plaintiff-respondent is one which squares completely with the clear and obvious meaning of the provision in question. It matters not, in my opinion, whether the plaintiff-respondent eventually pays in or does not pay in his income or part thereof to the joint family fund. He is clearly under cl. (*a*) entitled to a vote, and the explanation thereto is not a disabling provision, but clearly and obviously only applies where the total income of a joint Hindu family exceeds Rs. 120, but the income of individual members is less than that amount. In such a case, the Legislature obviously intended to provide that the manager of a joint Hindu family alone should have a vote in a *quasi* representative capacity on behalf of the family.

The appeal, therefore, fails and is dismissed. The appellants must pay the respondent's costs. Costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 258 OF 1924.

April 21, 1925.

Present:—Mr. Ashworth, A. J. C.

Musammat AMNA KHATUN AND OTHERS —DEFENDANTS—APPELLANTS

versus

MOHAMMAD WALI—PLAINTIFF—RESPONDENT.

Practice—Postponement of case—Party missing train, whether ground for postponement—Plea, rejection of—Evidence, failure to produce, effect of.

The fact that a party to a suit has missed the train is no sufficient ground for postponement of a case. Parties must leave a safe margin in order to enable them to arrive in Court in time before their cases are called. [p. 482, col. 1.]

A Court is justified in rejecting a plea where the party putting forward the plea fails to produce evidence in support of it. [p. 482, cols. 1 & 2.]

Second appeal against a decree of the District Judge, Lucknow, dated the 7th March 1924, affirming that of the Munsif, Haveli, Lucknow, dated the 8th May 1923.

Kuar *M. A. Ghaffoor Khan*, for the Appellants.

Messrs. *Murli Manohar* and *Manohar Lal*, for the Respondent.

JUDGMENT.—This is a second civil appeal arising out of a suit brought for restitution of conjugal rights by the plaintiff-respondent. The main defence was that there had been a divorce, so that the plaintiff could have no right to sue for restitution of conjugal rights. Other points taken up apparently were that there had been some sort of compromise or award outside the Court and that the Munsif had no jurisdiction, and that the suit was premature. The Munsif decreed the suit after finding against the contention that there had been a divorce. There was an appeal to the District Judge of Lucknow. One of the grounds taken was that the Munsif had failed to decide seven out of the eight issues framed by himself. The District Judge rejected this ground because the burden of proof of each of these issues was on the defendant, and he had not produced evidence to sustain the burden. The main ground of appeal before the District Judge was that the Munsif's improper conduct of the suit had prevented the appellant from producing his evidence.

In second appeal to this Court two of the grounds are based on the allegation that there were not sufficient materials be-

fore the lower Courts to come to any decision. Another ground is that issue No. 8 which should have been decided was not decided. Two other grounds merely state that the judgment is wrong and misconceived. Lastly it is urged that the Court of first hearing acted wrongly and improperly on the 7th May by only giving the appellant one day's further time to produce his evidence, and that the Court acted wrongly in deciding the case on the 8th without giving the appellant further time thereafter.

These last two points may be decided first. For the reasons given by the District Judge I hold that the Court of first hearing was quite justified in its procedure. The one day's grace given on the 7th was given because the appellant's agent stated that he could produce his witnesses the next day. The adjournment which was unnecessary would not have been granted but for this assurance on the part of the agent. The appellant cannot now turn round and say that the one day was not sufficient. As to the complaint that the Court should not have decided the case on the 8th because the agent sent a telegram that he had missed a train, it cannot be too emphatically laid down that the missing of a train is no sufficient ground for postponement of a case. Even if the missing of the train was proved to be for good cause, and it is not so proved, parties must understand that they must leave a safe margin for appearance in cases.

As to the rest of the grounds of this appeal, the appellant's case is that he could not produce the requisite evidence because he was not given time to do so. His case is not that he did produce the necessary evidence. Now it has already been held that the appellant was to blame for not producing this evidence. He must, therefore, stand the consequence of that evidence not being produced and he cannot complain of issues being decided by the lower Court against him owing to non-production of evidence by himself, inasmuch as the burden of proving those issues was on himself. Nor again can he complain that the materials before the lower Court were insufficient for the passing of a decree. They were only insufficient if it were necessary to decide the pleas in defence by the appellant. Those pleas had to be rejected for want of evidence produced by the appellant. A Court is perfectly justified in rejecting pleas for failure of evidence by the party putting forward those pleas. There is no force in the appeal which is dismissed with costs.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

February 9, 1925.

Present:—Lord Shaw, Lord Carson, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

KEDARNATH GOENKA—APPELLANT

versus

ANANT PRASAD SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 12—Civil Procedure Code (Act XIV of 1882), ss. 211, 212—Decree passed under Code of 1882—Mesne profits, ascertainment of—Proceedings, nature of—Death of decree-holder—Substitution, whether necessary.

Under the C. P. C. of 1882 a proceeding for the ascertainment of mesne profits was a proceeding in execution; therefore in a decree passed under that Code such proceedings must be held in execution and not in the suit. Where in the course of such proceedings one of the decree-holders dies the case is covered by r. 12 of O. XXII of C. P. C. and no substitution under r. 3 of the Order is necessary.

Appeal from a decree of the Patna High Court (Das, J.), dated the 10th March 1921, and printed as 61 Ind. Cas. 4, rejecting an application for revision of an order of the Subordinate Judge, Monghyr, dated the 9th April 1920.

Messrs. *A. M. Dunne, K.C.*, and *E. B. Raikes*, for the Appellant.

JUDGMENT.

Lord Shaw.—The question raised on this appeal is one of procedure. The judgments of the Courts below are concurrent; they are gathered together in the final paragraph of the judgment of the High Court, in which Mr. Justice Das says:—

"I hold that, under the Code of 1882, a proceeding for the ascertainment of mesne profits was a proceeding in execution and that, as the decree, in the present case, was passed under the Code of 1882, such proceedings must be held in execution and not in the suit. That being so, O. XXII, r. 12, applies, and it must follow that substitution was not necessary."

Their Lordships have heard a persistent argument criticising the entire authorities cited in the case; they have considered that argument and the authorities; and they now declare that nothing has been urged which would induce them upon this point of procedure to express disagreement with the result arrived at in the Courts below.

In their Lordships' opinion, the appeal accordingly ought to be dismissed, and advice will be humbly tendered to His Majesty in that sense.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant :—Messrs. *Watkins and Hunter.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 104 OF 1921.

January 2, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

Kamar KAMAKHYA NARAYAN SINGH —PLAINTIFF—APPELLANT

versus

BECHU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 139—*Mokarrari *lease for lifetime of grantee—Death of grantee—Suit to eject successor of grantee—Limitation —*Marfatdari *receipt, what is.*

A *marfatdari* receipt is a receipt made out in the name of the original tenant although it shows that the rent has been actually paid by a third person. [p. 483, col. 2; p. 484, col. 1.]

Plaintiff granted a *mokarrari istumrari* lease in favour of *M*. The lease was not a hereditary one and operated only for the lifetime of the grantee. *M* died in 1902 and defendant got into possession of the land. Defendant paid rent to the plaintiff during 1903 and 1904 obtaining *marfatdari* receipts. In 1905 defendant refused to pay rent unless a receipt was granted in his own name and the plaintiff refused to grant such a receipt. Thereafter the defendant continued in possession without payment of rent and in 1920 plaintiff brought a suit to eject the defendant:

Held, that inasmuch as the plaintiff had refused to treat the defendant as his tenant there was no creation of a fresh tenancy in favour of the defendant and that defendant's possession after 1905 being adverse to the plaintiff the plaintiff's suit was barred under Art. 139 of Sch. I to the Limitation Act. [p. 484, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Hazaribagh, dated the 31st January 1921.

Messrs. *Sultan Ahmad* and *S. M. Mullick*, for the Appellant.

Messrs *K. B. Dutt* and *B. C. De*, for the Respondents.

JUDGMENT.

Das, J.—The predecessor-in-title of the plaintiff granted a *mokarrari istumrari* lease in favour of Dipnath Singh and Mitarjit Singh. It is conceded that the lease was not a hereditary lease but that it was operative for the lifetime of the grantees. Mitarjit Singh who survived Dipnath Singh died sometime in 1902. The suit out of which this appeal arises was instituted on the 1st of April 1920 for the ejectment of the defendants. The suit has been dismissed as against defendants Nos. 8 to 11 on the ground that they have acquired a title by adverse possession.

It is contended that, on the admission made by defendants No. 8, there was no question of adverse possession to be tried. Defendant No. 8 said in examination-in-chief that he never paid rent for the *mauza* to the Ramgarh Raj. In cross-examination he said as follows: "I paid rent for the *mauza* in suit for two or three years after Mitarjit's death to Narsingh Dyal the *zarbharnadhar* of the *mauza* under the Raja, and I used to get receipts from him. I paid rent to him for 9 or 10 years in all. The receipts which I got from the *zarbharnadhar* are at home. They were *marfatdari* receipts."

It is contended that there is a direct admission by defendant No. 8 that there was payment of rent by him to the Raj and that the payment of such rent by defendant No. 8 and the acceptance thereof by the plaintiff operated as a recognition of defendant No. 8 as a tenant from year to year, and that, that being so, the defendants could not put forward a title by adverse possession as against the plaintiff. If this argument is to succeed at all it could not help defendants other than defendant No. 8; but, in my opinion, the argument ought not to succeed at all. It will be noticed that the Court below has proceeded on the hypothesis that rent was never paid by these defendants and it appears that the argument was not put in this form in the Court below. But what is the admission made by defendant No. 8 in this case? his admission is that the *zarbharnadhar* of the Raj accepted rent from him and granted him *marfatdari* receipts. Now *marfatdari* receipts are receipts made out in the name

of the original tenant although they show that the rent has been actually paid by a third person. The question is whether the grant of *marfatdari* receipts operated as a recognition of defendant No. 8: as a tenant from year to year.

In my opinion, the question is essentially one of fact. I can quite understand the position where for a number of years such receipts are granted without any protest by anybody and the inference may be raised that there was creation of a tenancy. But in this case defendant No. 8 says that in 1904 or 1905 he went to the Raja and demanded receipts in his own name. The Raja was willing to grant *marfatdari* receipts but was not willing to give him receipts in his own name. He declined to take *marfatdari* receipts and the Raja threatened to sue him in ejectment. It is conceded that since that interview no rent has ever been paid by defendant No. 8 or by any of the defendants. Mitarjit Singh, as I have said before, died in 1902.

Now the story told by defendant No. 8 has been accepted by the learned Judge in the Court below and we have not been invited in this Court to dissent from the view expressed by the learned Judge on this point.

Now the question is, was a tenancy in favour of defendant No. 8 created by acceptance of rent from him. It seems to me that the facts clearly establish that there was no intention on the part of the plaintiff to treat defendant No. 8 as a tenant and that there was no intention on the part of defendant No. 8 to pay rent to the Raj except on receipts made out in his name. That being so, there was no creation of a fresh tenancy in favour of any of the defendants and the plaintiff's suit is clearly barred by the provision of Art. 139 of the Limitation Act.

It was then contended that the learned Judge erred in dismissing the plaintiff's suit in respect of the 15-annas 9-pies interest claimed by defendants Nos. 8 to 11. It appears that defendant No. 8 holds as mortgagee to the extent of 1-anna 6-pies and that defendants Nos. 9 to 11 hold as mortgagees to the extent of 2-annas, and the contention is that so far as these interests are concerned, the plaintiff should have succeeded. The point was not argued in the Court below; nor has it been taken in the grounds of appeal in this Court. But in any case I do not understand how the point can be raised. The defendants were actually in possession of this land. It was necessary for the plaintiff to sue for recovery of possession of this land within 12 years from the death of Mitarjit Singh. The suit not having been brought within 12 years from the death of Mitarjit Singh, the whole suit must be dismissed as barred by limitation.

In my opinion the decision of the learned Subordinate Judge is right and it ought to be affirmed.

I would dismiss this appeal with costs.

Adami, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 132 OF 1924.

June 12, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Sulaiman.

BISHNATH SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BASDEO SINGH—DECREE-HOLDER—RESPONDENT.

Bundelkhand Land Alienation Act (II of 1903), ss. 9 (3), 16—Mortgage—Land protected under the Act—Mortgage-decree—Reference to Collector, whether can be made.

It is advisable that Original Courts, when they find that a mortgage has been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under s. 9 (3) of the Bundelkhand Land Alienation Act before passing a mortgage-decree, and should not wait to take action under the section till the decree has been passed. There is nothing, however, in the wording of the section to support the contention that the provisions of the section can take effect only before a decree is passed and not afterwards.

Letters Patent Appeal against a judgment of Mr. Justice Kanhaiya Lal, dated the 28th of July 1924, reported as 82 Ind. Cas. 1037.

Mr. *Baleshwari Prasad*, for the Appellants.

Mr. *Abu Ali*, for the Respondent.

JUDGMENT.—This is a Letters Patent Appeal arising out of certain execution proceedings on the 13th May 1909. The judgment-debtors had executed a mortgage-deed of property situated in Bundelkhand in favour of the decree-holder. A preliminary decree for sale was obtained on the 17th June 1918 which was followed up by

a final decree on the 20th December 1919 when an application for execution was filed and the decree-holder wanted to have the mortgaged property sold. An objection was raised by the judgment-debtors that the property being situated in Bundelkhand was not liable to be sold under s. 16 of the Bundelkhand Land Alienation Act (U. P. Act II of 1903). This objection was allowed, and the application was dismissed. After this, the decree-holder filed an application purporting to be an application under s. 9, sub-cl. (3) of the Act requesting the Court to refer the case to the Collector with a view to the exercise of the power conferred upon him by sub-s. (1) of s. 9. The objection was raised on behalf of the judgment-debtor that that sub-section was not applicable after the final decree was passed. This objection was disallowed by both the Courts below and also by a learned Judge of this Court.

Section 9, sub-cl. (3) is not limited to a case where the point is raised before the decree is actually passed by the Court. We, therefore, find it impossible to hold that the Civil Court ceased to have jurisdiction to act under that sub-section as soon as a nominal decree was passed which cannot, in fact, be executed by the sale of the property mortgaged. The position of the judgment-debtor and the decree-holder would be the same even if a decree has been passed which is incapable of execution. This view is supported by a decision of this Court in Execution Second Appeal No. 1457 of 1920, decided on the 18th July 1922, where it was held that there was nothing in the wording of the section to support the contention that the provisions of s. 9 have effect only before a decree is passed and not afterwards. The view taken by the learned Judge of this Court is in accordance with the previous decision with which we agree.

We would, however, like to point out that it is advisable that Original Courts when they find that a mortgage has been made which is ordinarily enforcible but which covers property situated within Bundelkhand which cannot be sold, should take action under s. 9 (3) before passing the decree and not wait till the decree has been passed. We accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 274 OF 1921.

February 19, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

SURAJ NARAYAN CHAUDHURY —DEFENDANT—APPELLANT

versus

SARASWARI BAHURIA—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), ss. 2, 3, 6, 7—Notice under s. 7, contents of—Date to be mentioned—Amount of arrears, whether must be mentioned—Sale, when can take place—Application to set aside sale—Burden of proof.

Once a sale has taken place under the Bengal Land Revenue Sales Act it is for the person who challenges the validity of the sale to show that there was no jurisdiction in the Collector to put up the property for sale. [p. 486, col. 2.]

In a notice under s. 7 of the Bengal Land Revenue Sales Act it is necessary for the Collector to mention the last date fixed for payment of Government revenue under s. 3 of the Act. It is not necessary for him to state the date on which the Government revenue should have been paid according to the Settlement and *kistbandi* of the *mahal*. [p. 487, col. 1.]

Government revenue is not in arrear until the first of the month following the date on which the Government revenue should be paid according to the original *kistbandi* and the Collector has no power to put up the estate for sale until the expiry of the latest date fixed for payment of Government revenue after the estate is in arrear. For instance, if the revenue is payable in the month of March according to the original *kistbandi* then the estate is not in arrear until the first of April and the Collector has no jurisdiction to put up the estate for sale until the expiry of the next latest date fixed for payment after the first of April. [p. 487, col. 2.]

Section 6 of the Bengal Land Revenue Sales Act does not require the Collector to mention the amount of the arrears for which the property is put up for sale. [p. 488, col. 1.]

Appeal from a decision of the Subordinate Judge, Darbhanga, dated the 25th June 1921.

Messrs. *Fazal Ali*, *S. K. Mitter* and *Hasan Jan*, for the Appellant.

Messrs. *B. N. Mitter* and *N. K. Moitra*, for the Respondents.

JUDGMENT.

Das, J.—The question for determination in this appeal is whether the sale of 5-annas 10-*gandas* in Ladugaon, *Touji* No. 554 for arrears of Government revenue ought, in the circumstances of the case, to be set aside. The respondent was the proprietor of this share which was the residuary share in the *touji*. On the 6th June 1919 this residuary share was put up for sale and

was purchased by the appellant. According to the notice under s. 6 of Act XI of 1859 the estate was in arrears for Rs. 45-7-3. The respondent unsuccessfully moved the Commissioner for setting aside the sale. The suit out of which the present appeal arises was thereupon instituted on the 6th February 1920 and on behalf of the plaintiff two specific points were argued in the Court below; first, that there was collusion and conspiracy between the plaintiff's *patwari* and the defendant second party and that her share was purchased by the defendant second party in the *benami* name of defendant first party as a result of that conspiracy; and, secondly, that the estate was not in arrears on the 6th of June 1919 and that accordingly the Collector had no jurisdiction to put up that share for sale on that date. On the first question the learned Subordinate Judge found against the plaintiff and I entirely agree with his decision on the point. As the question is a short one I will deal with it at once. The allegation in regard to the question of fraud and collusion is as follows:—"When she (the plaintiff) learned of this 'namely the sale of her estate' she began to make enquiries and came to know that the defendants second party having bribed the plaintiff's *patwari* Khantar Das and won him over to their side, did not let the arrears of revenue be paid, in spite of the fact that the *patwari* had money with him. They took recourse to fraudulent, illegal and surreptitious proceedings and having got the disputed share sold by auction on the 6th June, 1919, for a grossly inadequate price, purchased the same in the name of their relative, defendant first party." In her evidence the plaintiff repeated her allegations made in the plaint. She said that defendant second party won over Khantar Das to his side by bribe and "hence he did not pay Government revenue and the property was sold." In cross-examination she said that her *patwari* had sufficient money with him to pay the Government revenue and that he acted in collusion with defendant second party. She was then asked the following questions:—

Q. How do you say that Khantar, in collusion with defendant second party got the property to be sold?

Her answer was as follows:—

"I always saw Khantar having friendly relation with defendant second party and the property was sold through Khantar and I say so. There is no other reason for my saying so."

It seems to me that on this evidence the learned Judge was right in saying that the plaintiff has entirely failed to establish her case of fraud and collusion. It may be that she was defrauded by her *patwari* Khantar, but if that be so, she ought to proceed against Khantar In order to succeed in this action she must establish collusion between her agent and the actual purchaser at the revenue sale and upon her own evidence it is impossible for the Court to give her any relief on the footing that there was fraud and collusion between her agent and the purchaser at the revenue sale.

But although the learned Subordinate Judge decided this particular issue in favour of the defendants he actually set aside the revenue sale on the second ground urged before him on behalf of the plaintiff. As I have said before the property was actually put up for sale on the 6th June 1919. The case of the plaintiff is that the property was sold for her default in paying the *Chait kist* and that the estate was not in arrears until the 1st of *Baisak* corresponding to 7th of June. She accordingly contends that the sale held on the 6th of June 1919 was entirely without jurisdiction. If the plaintiff be right in her view that the property was sold for her default in paying the *Chait kist*, she is, undoubtedly, entitled to succeed in the action.

The sale having taken place, it is for the plaintiff to show that there was no jurisdiction in the Collector to put up the property for sale on the 6th of June 1919. The only evidence which she adduces in support of her case is a notice issued by the Collector under s. 7 of Act XI of 1859 and the sale certificate issued in this case. The notice under s. 7 runs as follows: Whereas a sum of Rs. 45-7-2 is due on account of arrears of revenue for the period ending the 21st *Chait*, 1326, corresponding to the 28th March, 1919 in respect of *Touji* No 554, having a *sadar jama* of Rs. 167-8-3 lying within the jurisdiction of this Court for the realization of the same, the 6th of June 1919, is hereby fixed as the date of sale by auction. A notification is, therefore, issued in the name of *Musammat* Saroshwati Bahuria forbidding all the tenants as well as the co-sharers of the said *mahal* to pay to the defaulting proprietor their dues accru-

ing after the last day fixed for payment of Government revenue on pain of not being allowed credit in their accounts with the purchaser in respect of the sum so paid.

In order to understand the significance of this notice, it is necessary to consider s. 7 of Act XI of 1859. That section provides as follows:—

"Whenever an estate or share of an estate is notified for sale, as provided by s. 6 of this Act, the Collector or other officer as aforesaid shall affix a proclamation in the language of the district, in his own office, and as soon thereafter as may be in the Munsif's Courts and Police *thanas* within which the estate or share of an estate, or any part of it, is situated, and also at the *cutchery* of the *malguzar* or the owner of the estate, or share of an estate, or at some conspicuous place upon the estate or share of an estate, forbidding the *raiyats* and under-*raiyats* to pay to the defaulting proprietor any rent which has fallen due after the day fixed for the last day of payment, on pain of not being entitled to credit in their accounts with the purchaser for any sums so paid."

It is necessary then for the Collector to mention in the notice under s. 7 the last day fixed for payment of Government revenue under s. 3 of Act XI of 1859. It is not necessary for him to state the day on which the Government revenue should have been paid according to the Settlement and *kistbandi* of the *mahal*. As has been often pointed out, care should be had in avoiding confusion between the month for which the instalments are due according to the Original Settlement and *kistbandi* of the *mahal* and the month in which the latest dates of payment are fixed. Section 2 of Act XI of 1859 defines an arrear of revenue and it provides that if the whole or a portion of a *kist* or instalment of any month of the era according to which the Settlement and *kistbandi* of any *mahal* have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue. Section 3, on the other hand, empowers the Board of Revenue to determine upon what dates all arrears of revenue and all demands which by the Regulations and Acts in force, are directed to be realized in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estate in arrears in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder. It is necessary to remember that Government revenue is not in arrear until the first of the following month when the Government revenue should be paid according to the original *kistbandi*; and the Collector has no power to put up the estate for sale until the expiry of the latest date fixed for the payment after the estate is in arrear. Now, there can be no doubt as to this on the construction of s. 2 and s. 3 of the Land Revenue Sales Act. To take a concrete example: if revenue should be paid in the month of March according to the original *kistbandi*, then the estate is not in arrear until the first of April and the Collector has no jurisdiction to put up that estate for sale until the expiry of the next latest date fixed for payment after the first of April. The argument of the plaintiff in this case is that according to the original *kistbandi* the revenue, to recover which the property was ultimately sold, should have been paid on the 28th of March. The estate was, therefore, not in arrear until the 1st April and as the next latest date fixed for payment of the Government revenue was the 7th of June, the Collector acted beyond jurisdiction in putting up the property for sale on the 6th June 1919. In my opinion there is no substance in the argument on the construction of the document upon which the plaintiff relies. As I have said, that was a notice issued under s. 7 of the Act; and, as it appears from s. 7, the date mentioned in that document is the latest date fixed for payment under s. 3 and not the date for payment of Government revenue under s. 2 of the Act. That being so, it is clear that the estate was already in arrears and the latest date fixed for payment was the 28th of March. That being so, the Collector had complete jurisdiction to put up the property for sale on the 6th June.

The learned Vakil also relies on the sale cartificate Ex. G. No doubt it is stated there that the property was sold for arrears of revenue of March *kist* of 1919; but the document was inartistically drawn, and there is nothing to indicate that the term "*kist*" used in that document is used in the sense in which that term is used in s. 2 of the Act. I may point out that the manner in which these notices are drawn up in the Collectorate give us endless trouble

and that care should be had in avoiding confusion between the month for which the instalments are due according to the Original Settlement and *kistbandi* of the *mahal* and the month in which the latest dates for payment are fixed under s. 3 of the Act. On the construction of Ex B, I have no doubt at all that the latest date fixed for payment was the 28th of March and that the property was liable to be put up for sale on the 6th of June.

The only other point which has been argued before us is that there was an excess payment of 10-annas 7-pies per year ever since 1902 on behalf of the respondent and that accordingly there was in the hands of the Collector Rs. 11 in all which he should have credited to the respondent in her account. Assuming that the argument of the learned Vakil is right, it is to be pointed out that the arrear to recover which the property was sold was Rs. 45-7-3. The learned Vakil states that in that case the notice issued under s. 6 was wrong in so far as that notice stated that the arrears were Rs. 45-7-3. But s 6 does not require the Collector to mention the arrears for which the property is put up for sale.

In my opinion the decision of the learned Subordinate Judge on the second question which I have dealt with is erroneous. It follows that this appeal must be allowed and the judgment and decree of the learned Subordinate Judge must be set aside and the plaintiff's suit must be dismissed with costs in this Court and in the Court below.

Adami, J.—I agree.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No 39 OF 1923.

February 8, 1924.

Present:—Mr. Wazir Hasan, J. C., and Mr. Kendall, A. J. C.

Pandit SHEO DAYAL—PLAINTIFF—APPELLANT

versus

THE DEPUTY COMMISSIONER, KHERI, AS MANAGER OF COURT OF WARDS—DEFENDANT—RESPONDENT.

U. P. Court of Wards Act (IV of 1912), ss. 9, 17, 20—Estate taken under superintendence of Court of Wards—Failure to notify claim—"Good and sufficient cause", what amounts to—Attendance under s. 9, whether sufficient.

The object of the enquiry under s. 9 of the U. P. Court of Wards Act is absolutely different from that of an enquiry under s. 17 of the Act. Under the former section the enquiry is held with a view to determine as to whether the Local Government should or should not place a particular estate under the superintendence of the Court of Wards. On the other hand, an enquiry under s. 17 is intended to invite applications of all persons having claims against the ward or his property in order to settle those. A person who has attended an enquiry under s. 9 of the U. P. Court of Wards Act is not absolved from the further obligation of notifying his claim within six months of the publication of the notice under s. 17 of the Act. His attendance and setting up of a claim under s. 9 does not constitute "good and sufficient cause" within the meaning of the proviso to s. 20 of the Act. [p. 489, cols. 1 & 2.]

First appeal against a decree of the Subordinate Judge, Kheri, dated the 20th December 1923.

Messrs. *Raj Narain Shukla* and *Bisheshar Nath*, for the Appellant.

Mr. *N. N. Ghoshal*, R. B., for the Respondent.

JUDGMENT.—This is the plaintiff's appeal in a suit for the recovery of Rs. 8,160 on the basis of a pro-note executed by Thakurain Dambar Kumari of Bijwa on the 2nd October, 1919. Since the execution of the alleged pro-note the estate of the said Thakurain has been taken under the management of the Court of Wards and is still held by it. The plaintiff's suit was, therefore, instituted against the Deputy Commissioner of Kheri, who represents the Court of Wards. In his defence, the defendant denied the execution of the pro-note in question and further pleaded that the suit was barred by the proviso attached to s. 20 of the U. P. Court of Wards Act, 1912, which is as follows :—

"Provided that where the claimant has failed to notify his claim under s. 17 no suit or proceeding in respect of such claim shall be maintainable unless the claimant shows good and sufficient cause for such failure." The learned Subordinate Judge has not decided the issue relating to the execution of the pro-note. On the second question, he has decided against the plaintiff. Hence this appeal.

The only point argued in support of the appeal before us is that the circumstances of this case establish "good and sufficient cause" within the meaning of the proviso quoted above. It is argued that the appellant had laid his claim on the basis of the

pro-note in question before the Deputy Commissioner when that officer was engaged in an inquiry directed by the Local Government under s. 9 of the Court of Wards Act, that, at the time of the notice under s. 17 of the Act, the appellant was too ill to attend the proceedings held by the Deputy Commissioner under the said section, that his illness continued to April, 1920 and he was again ill from August 1920 to January 1921, that he was not aware of the publication of the notice under s. 17 mentioned above and finally that the executant of the pro-note, Thakurain Dambar Kumari, has in her evidence in the present case admitted the genuineness of it.

In respect of the question of illness of the plaintiff, the learned Subordinate Judge framed a specific issue. On that issue he observed that the only evidence in support of it was the uncorroborated testimony of the plaintiff. The learned Judge seems to have decided that issue against the plaintiff. We do not think that we are justified in disagreeing with him in this behalf, nor are we prepared to accept the plaintiff's version that he had no knowledge of the notice under s. 17 of the Act. It seems to us that having once before laid his claim in relation to the inquiry under s. 9 it was his duty to be vigilent in respect of his claim when the estate was actually placed under the superintendence of the Court of Wards in virtue of the provisions of s. 15 of the Court of Wards Act. In the first place, we are not satisfied that the plaintiff did not, as a matter of fact, receive the notice. In the second place, if he did not, that must have been due to his wilful neglect of his duty in the circumstances.

As regards the admission of the lady in respect of the execution of the pro note in suit, that is a matter which has not been decided by the Court below nor do we think that the alleged admission has any bearing on the question which we have to decide.

Now it remains to consider the effect of the fact that the plaintiff set up his claim under the pro-note in question in the course of the inquiry conducted under s. 9 of the Court of Wards Act. It is impossible to lay down broadly that a person who has attended an inquiry under s. 9 of the Act is absolved from the further obligation of notifying his claim within six months of the publication of the notice under s. 17 of the said Act. That would be the result if we accept the argument of the learned Advocate for the appellant that the attendance of a creditor and setting up of a claim by him under s. 9 would constitute "good and sufficient cause" within the meaning of the proviso to s. 20. The object of the inquiry under s. 9 is wholly different from that of the inquiry under s. 17. Under the former section the inquiry is held with a view to determine as to whether the Local Government shall or shall not place any particular estate under the superintendence of the Court of Wards. On the other hand, an inquiry under s. 17 is intended to invite applications of all persons having claims against the ward or his property and what is of greater importance to settle those claims under s. 18 of the same Act.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 211 OF 1923.

March 30, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.

AJIT KUMAR SHAHA—JUDGMENT-DEBTOR—APPELLANT

versus

MRITUNJOY KUNDU—DECREE-HOLDER AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXX, r. 3—Suit against partners of firm—Service of summonses.

Order XXX, r. 3 of the C. P. C. has no application to a suit which is not brought against the partners in the name of their firm but against them individually. [p. 490, col. 2.]

Appeal against an order of the Judge, Nadia, dated the 17th of February 1923.

Babu *Tarakeswar Pal Chowdhury*, for the Appellant.

Mr. *M. N. Roy* and Babu *Phanindra Lal Maitra*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal against an order of the Subordinate Judge of Nadia refusing to set aside an *ex parte* decree passed against Ajit Kumar Saha the appellant. Ajit says that he was never served with the summons and that it had never been brought to his notice before the *ex parte* decree was passed. The learned Subordinate Judge has found that Ajit

was aware of the service of the summons and of the suit. It appears that there were three brothers, defendants Nos. 10, 11 and 12 who formerly lived at a place called Kumarkhali. It is established on the evidence that Ajit left Kumarkhali some 12 years ago and that since that date he had been residing and carrying on a business at Ranchi. It is true upon the evidence that occasionally he does visit Kumarkhali that he has become a *Brahmo* and that as a result his visits are rare. Whether he is still interested in the joint family property I feel some doubt upon the evidence. He himself says that he has no longer a share in the joint family property and that his interest was sold after he went to Ranchi. Defendant No. 12 Arun Kumar Saha gives evidence to the same effect stating that there had been an amicable partition as regards Ajit's share but that there was no partition so far as others were concerned. There is some evidence to the contrary but I am inclined to think that Ajit's evidence is true, that he has no longer an interest in the joint family property. But even if he had an interest my view would not be affected as to whether there has been good service in the present case. Now what happened is this. Arun was residing at Kumarkhali and according to the peon and the identifier the peon went there and tendered the summons to Arun and was told to affix the summons of Ajit. I am satisfied that the peon made no enquiry as to the real facts though he does state in his return that he made some enquiry. Even if his story is correct that Arun was told that one summons was for his brother and told the peon to affix it I am of opinion that that would not be a good service under the circumstances I have stated upon Ajit. Consequently I think upon the facts that there was no service of the summons upon Ajit. But it is urged by the learned Advocate who appears for the respondents that having regard to the form of the suit the service upon Ajit was a good service. For this he relies on the provisions of O. XXX, r. 3 of the C. P. C. Order XXX, r. 3 provides that where persons are sued as partners in the name of their firm the summons shall be served either upon any one or more of the partners or at their principal place of business and that such service shall be deemed good service upon the firm so sued and it is, therefore, stated that the service upon Atul who we shall assume was a member jointly with Ajit of the partnership Firm of Hari Nath Saha and late Purnananda Saha was good service. We think that this would be sufficient if the suit had been brought merely in the firm's name. But a perusal of the plaint shows that the suit was brought against the Firm of Hari Nath Saha and the late Purnananda Saha and the partners of the said firm and then follows the names of the various partners and the plaint asks that a decree should be passed against the defendants for the amounts of their claim. The decree does not make it quite clear whether the decree was one against the firm or against the individual partners. But I am inclined to think that it was a decree against the individual partners because the defendant were ordered to pay to the plaintiff the sum decreed. This being so, O. XXX, r. 3 has no application as the suit was not a suit against the partners in the name of their firm under O. XXX, r. 3. This being so, for the reasons I have indicated there was no good service upon Ajit and the appeal succeeds and we set aside tho order of the Subordinate Judge refusing to set aside the *ex parte* decree and we set aside the *ex parte* decree.

The appellant will be entitled to his costs in this appeal hearing-fee two gold mohurs.

Let the record be sent down without delay.

Cuming, J.—I agree.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 75 OF 1924.

March 23, 1925.

Present:—Mr. Daniels, J. C.

Babu SHIVA PRASAD—PLAINTIFF—APPELLANT

versus

Bhaiya LAL BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Weight to be attached to evidence—Omission to refer to particular piece of evidence—Finding of fact, interference with.

The weight to be given to one particular piece of evidence is a question for the Court which has to deal with the facts. [p. 491, col. 2.]

An omission by a lower Appellate Court to refer to a particular piece of evidence in its judgment is not a sufficient ground for setting aside in second appeal a finding of fact arrived at by that Court. [p. 491, col. 2.]

Appeal against the judgment and decree of the District Judge, Gonda, dated the 24th November 1923.

Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *Tara Shankar*, for Respondants Nos. 1 to 7 and 9 to 11.

JUDGMENT.—This appeal arises out of a declaratory suit filed under the orders of the Revenue Court under s. 11 (1) (*b*) of the U. P. Land Revenue Act, 1901. The plaintiff-appellant, Babu Sheo Prasad acquired title under a foreclosure decree passed in favour of his father, B. Narotam Das, on a mortgage executed by Sant Bakhsh Singh, the original proprietor. The foreclosure decree was passed in the year 1880. The mortgage purported to hypothecate a 5-annas 4 pies share in each of six hamlets out of the village of Chandapur. These hamlets were not recognised as separate entities in the Revenue Records, and the recorded share of Sant Bakhsh Singh was 9-pies out of the entire village consisting of 16-annas A partition took place in the year 1891 at which 6-annas 8-pies out of the entire village was separated and formed into a separate *mahal*. The share of the plaintiff fell in the remaining 9-annas 4-pies, and from the time of the partition it was recorded as a share of 1-anna 3-pies, 8.57-1/7-*krants*, the 9-annas 4-pies having become a *mahal* of 16-annas. A new partition of this *mahal* is now pending in the Revenue Courts, and the plaintiff seeks for a declaration that instead of the share recorded in his name in the *khewat* he really owns a share of 5-annas 4-pies in each of the six hamlets specified in the plaint. His suit has been dismissed by both the Courts below.

The grounds stated in the memorandum of appeal are three in number.

1. That the Courts below have erred in throwing out the suit merely on the ground that it is not cognizable by the Civil Courts as the hamlets in suit are not separately demarcated and have no separate Records of Rights.

2. That the plaintiff has all along been in possession in accordance with his foreclosure decree, and the Court should have given him a decree in accordance therewith.

3. That the Courts below have misunderstood the plaintiff's case and wrongly dismissed it on the plea of want of jurisdiction.

It appears to me that these grounds of appeal or at any rate the first and third of them, are more applicable to the judgment of the Trial Court than to the judgment of the learned District Judge. The Trial Court did, on grounds which I am unable to appreciate, definitely hold that it had no jurisdiction to give the declaration asked for. The learned District Judge has dealt with the case differently. He states what the plaintiff's claim is and then, as the burden of proof was on the plaintiff, proceeds to discuss the evidence on which the plaintiff relied to show that the *khewat* entry is wrong. He holds that the terms of the foreclosure decree were determined by the share as entered in the mortgage, and finds that that share did not represent the share really held by the plaintiff. The effect of his finding on this issue is that the plaintiff has not established the case which he set up. The learned District Judge then proceeds to hold, agreeing with the Trial Court, that the hamlets in which the separate share is said to exist have never been demarcated. He says that without this having been done the plaintiff cannot succeed, as otherwise his contention that he owns a share in the particular hamlet is impossible. If the learned District Judge means that the mere fact that the hamlets had not been demarcated in the revenue papers would prevent the plaintiff succeeding his finding is incorrect, but if he means that it is necessary for the plaintiff to show that these hamlets had consisted of definite areas of land in which a specific title can be claimed there is no reason to object to it. The finding on the first issue was, however, sufficient to dispose of the appeal and this was a finding of fact and not of law. It is contended before me that the learned District Judge has not referred to, and, therefore, has not given proper weight to an admission contained in the partition proceeding of an abortive partition suit which was instituted in the year 1893 but was ultimately withdrawn or dismissed. The weight to be given to one particular piece of evidence was, however, a question for the Court which had to deal with the facts, and I am not prepared to hold that the omission to refer to this piece of evidence in the judgment is a sufficient ground for setting aside the District Judge's finding. The appeal must,

therefore, fail but the fact that the plaintiff has failed to establish separate title will not prevent the Revenue Courts from giving effect as far as possible to his possession of any lands of which he may be found to be in separate possession. For these reasons I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2377 TO 2380 OF 1921.

February 4, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SATINDRA MOHAN TAGORE—PLAINTIFF—APPELLANT

versus

JAYNABI BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenancy, nature of—Actual user.

Where the *kabuliyat* does not indicate the nature of the tenancy, the Court can properly look to the actual user of the land for determining the matter.

IN S. A. No. 2377 OF 1921.

Appeal against the decree of the Special Judge, Tipperah, dated the 8th of September 1921, affirming that of the Assistant Settlement Officer, Chandpur, dated the 7th of June 1920.

IN S. A. Nos. 2378, 2379 AND 2380 OF 1921.

Appeals against the decrees of the Special Judge, Tipperah, dated the 8th of September 1921, modifying and affirming those of the Assistant Settlement Officer, Chandpur, dated the 12th of June 1920.

Babu *Heeralal Chakravarty*, for the Appellant.

Babu *Upendra K. Roy*, for the Respondent, in Appeals Nos. 2377 to 2380.

Babu *Biraj Mohan Majumdar*, for the Dy. Registrar, in Appeal No. 2377.

JUDGMENT.

IN S. A. No. 2377 OF 1921.

This is an appeal by the landlord from a decision of the Special Judge of Tipperah, dated the 8th September 1921.

Two points have been raised on his behalf. First, that on a proper construction of the *kabuliyat* in some of the cases in which the learned Judge has held that the tenancies are tenures, he should have held that they were *raiyati* holdings. The learned Judge being of opinion that the *kabuliyat* did not render any help in determining the question whether the tenancies were tenures or *raiyati* holding, proceeded to consider the evidence of actual user of the lands. In some cases he came to the conclusion that the tenants held the lands in *khas* cultivation and hence the tenancies were *raiyati* holdings and in some other cases he found that the lands were in possession of sub-tenants and so he held that those tenancies were tenures. There is nothing in the *kabuliyats* in this case in which the tenancies have been held to be tenures to show that the lease was for any particular purpose either for cultivation or for farming out the lands. In our judgment the learned Special Judge was quite right in the procedure he adopted in looking to the actual user of the land to find out the nature of the tenancies.

The second point raised is that even if it be held that the tenancies are tenures the appellant landlord should have been granted enhancement under s. 7 of the Bengal Tenancy Act. On this point the learned Judge has observed that there are not sufficient materials for him to say that any enhancement would be fair. The landlord failed to adduce any evidence of the existence of any customary rate and it appeared to the learned Judge that there had been no increase in the assets of the tenure-holders, namely, that the assets on which the rent was fixed at the time of the Settlement of these tenures remained the same up to the present date. On these considerations he is of opinion that no ground has been made out for enhancement of rent. There has been no change of position of the parties, and the tenure-holder has not got greater advantages than what he had at the time of the Settlement. There is no reason, therefore, to allow more profit to the landlord than what he is entitled to under the *kabuliyat*.

This appeal is accordingly dismissed with costs one gold *mohur*.

It is conceded that this judgment will govern S. A. Nos 2378, 2379 and 2380 of 1921. These appeals will be dismissed with costs one gold *mohur* in each.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 36 OF 1924.

April 23, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

FIRM SHIAM LAL-JOTI PRASAD —PLAINTIFF—APPELLANT

versus

DHANPAT RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 105, 107, O. XLI, r. 20—Appeal—Appellate Court's power to implead party who was not party to suit—Procedure—Order directing a person to be impleaded as party—Appeal, whether lies.

Under O. XLI, r. 20, of the C. P. C., an Appellate Court has power to implead in an appeal a person who was a party to the suit but who has not been made a party to the appeal. Under that rule an Appellate Court has no power to implead a person as party to the appeal who was no party to the original suit at all. [p. 494, col. 1.]

Where an Appellate Court is of opinion that a certain person was a necessary party and ought to have been impleaded in the suit, the proper procedure for the Court is to remand the case to the Court of first instance with a direction that that Court should implead the person whose presence on the record is necessary and then proceed to dispose of the case. [*ibid.*]

An order made by an Appellate Court directing that a certain person should be impleaded as a party to the suit is not open to appeal but can be challenged in an appeal filed from the order finally passed by the lower Appellate Court on the merits of the appeal. [*ibid.*]

In answer to a suit for accounts the defendants pleaded that the transactions in dispute were entered into by them with one *C* and not with the plaintiff and that they had settled the accounts with *C*. They contended that *C* should be impleaded as a party to the suit. The Trial Court after taking evidence came to conclusion that *C* had nothing to do with the transactions in dispute and that the defendants had divided the sale-proceeds of those transactions between themselves and *C* in order to defraud the plaintiff. It refused to implead *C* as a party to the suit and eventually made a decree in favour of the plaintiff. On appeal by the defendants the District Judge directed that *C* should be impleaded as a party to the suit:

Held, that if the defendants had acted collusively with *C* they could not complain if a decree was passed against them on a finding that *C* had no concern with the dispute at all and that, on the other hand, if the lower Appellate Court had come to the finding that the defendants in the honest belief that the only person with whom they had to deal was *C* had settled accounts with him and had paid over the amount due to him then the plaintiff would have had no case against the defendants and that, therefore, the appeal ought to have been disposed of by the lower Appellate Court on the merits and it should not have directed that *C* should be impleaded as a party to the suit which would involve a new trial of the suit altogether. [*ibid.*]

First appeal from an order of the District Judge, Aligarh, dated the 15th December 1923.

Mr. *Panna Lal*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for accounts against the defendants on the ground that the amount claimed is due to the plaintiff on account of certain business transactions carried on with the defendants through the plaintiff's servant. The defence was that the plaintiff had nothing to do with these transactions at all, but that the business was carried on between Chhitar Mal and the defendants and that accounts were settled between them. The defendants said that they subsequently discovered that the plaintiff claimed to be a partner. The defendants, however, pleaded that Chhitar Mal should be impleaded as a *pro forma* defendant in the suit.

The Court of first instance framed an issue (No. 4) as to whether Chhitar Mal was or was not a necessary party. After examining the evidence and the statement of Chhitar Mal, who was examined as a witness the Court came to the conclusion that the story about Chhitar Mal's interest in the business had been concocted to defraud the plaintiff. It also remarked that the evidence showed that Chhitar Mal and the defendants had collusively divided the sale-proceeds of the goods in dispute half and half between them in order to deprive the plaintiff of his money. Having come to this conclusion, it was of opinion that Chhitar Mal was not a partner of the plaintiff in the goods in dispute and was not a necessary party.

The claim was accordingly decreed against the defendants.

The defendants in their appeal to the District Judge *inter alia* took the ground that Chhitar Mal ought to have been impleaded. The learned District Judge first passed an order without giving any reasons in detail directing that Chhitar Mal should be impleaded as a respondent in the case. After this was done, notice was issued to him. When he appeared on the date fixed for hearing of the appeal, he naturally applied to the Court for permission to file a written statement in order to contest the claim. The learned Judge thought that, as he had had no opportunity to file a written statement and to produce his evidence, he ought to be given an opportunity to do so. He accordingly set aside the decree of the Court of first instance and remanded the case for re-trial.

We are of opinion that the trouble has arisen owing to the irregular way in which Chhitar Mal was impleaded. Under O. XLI, r. 20, C. P. C., the Appellate Court has power to implead in the appeal a person who was a party to the suit, but who has not been made a party to the appeal, but under that rule a Court has no power to implead a person who was no party to the original suit at all; *vide Pachkauri Raut* v. *Ram Khilawan* (1). The learned Judge seems to have invoked the aid of the general section (107, C. P. C.) but that gives an Appellate Court powers, generally speaking, as a Trial Court. In our opinion, if the learned District Judge was of opinion that Chhitar Mal was a necessary party and ought to have been impleaded, the proper procedure for him was to remand the case to the Court of first instance with a direction that that Court should implead Chhitar Mal and then proceed to dispose of the case. It is obvious that by impleading Chhitar Mal in the appeal the inevitable result was that the case had to be tried *de novo* as Chhitar Mal had never had an opportunity to contest the claim.

On the merits we are of opinion that the order as it stands cannot be upheld. The plaintiff never admitted that Chhitar Mal had any concern in this business. The Court of first instance has distinctly found that he was not a partner at all and that the defendants had divided the sale-proceeds between themselves and Chittar Mal in order to defraud the plaintiff. If the defendants acted collusively, it is obvious that they cannot complain if a decree is passed against them on a finding that Chhitar Mal had no concern in the business at all. On the other hand it is conceded by Mr. Panna Lal that if the finding were that the defendants in the honest belief that the only person with whom they had to deal was Chhitar Mal had settled accounts with him and paid over the amount due to him, then the plaintiff would have no case against the defendants. It seams to us, therefore, that this appeal ought to have been disposed of on the merits.

We may mention that the order impleading Chhitar Mal in the appeal was not an appealable order but we think that it is open to the present appellant to challenge that order in the appeal which has been preferred from the order finally passed by the lower Appellate Court. As we have already indicated, that order was wrong and should not have been passed.

We accordingly allow this appeal, and, setting aside the order of the lower Appellate Court, send the case back for restoration to its original number and disposal according to law.

We direct that the costs of this appeal should abide the event. The costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 25 Ind. Cas. 25 ; 37 A. 57; 12 A. L. J. 1277.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 222 OF 1924.

March 30, 1925.

Present :—Mr. Daniels, J. C.

Pandit JWALA SAHOY—DEFENDANT—APPELLANT

versus

Thakur BALBHADDAR SINGH—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), ss. 34, 72, 73, 77—Registration, refusal of—Appeal, whether lies—Suit to compel registration—Failure to apply for extension of time for appearance of executant, effect of—Plea that document is not binding on executant, whether can be entertained.

Where a refusal to register a document is based on any ground except denial of execution, s. 72 of the Registration Act applies and the remedy of the aggrieved party is by appeal to the Registrar. If the appeal also fails a suit may be instituted under s. 77 of the Registration Act.

Section 34 of the Registration Act does not make it compulsory on a party to apply for extension of time where the executant fails to appear. It would be useless to ask for extension where the executant is purposely keeping out of the way, because by the very terms of the section extension can only be given where the absence of the executant is due to urgent necessity or unavoidable accident.

The failure to make a useless application for extension of time under s. 34 of the Registration Act does not affect the plaintiff's right to a decree in a suit brought under s. 77 of the Act.

In such a suit the plea of the defendant that the document is not binding on him cannot be gone into.

Second appeal from the judgment and decree of the Subordinate Judge, Unao, dated the 16th February 1924, reversing that of the Munsif, Purwa at Unao, dated the 17th September 1923.

Dr. *J. N. Misra*, for the Appellant.

Mr. *K. P. Misra*, for Mr. *Haider Husein*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit under s. 77 of the Registration Act to compel registration of a document. The suit was dismissed by the Munsif but decreed by the Subordinate Judge in appeal. The learned Munsif was evidently not familiar with the provisions of the Registration Act and has entirely misunderstood them. Before the learned Subordinate Judge it was not denied that the document was executed by the defendant. He claimed that the document was not binding on him, but this is not a matter which could be gone into in a suit of this nature. The defendant's case both before the learned Subordinate Judge and in this Court was that the suit was time-barred and that it was not maintainable because the plaintiff had not adopted the proper procedure before the Registration Authorities.

The document was executed on 6th March 1922. The plaintiff obtained four months' extension of time from the District Registrar under s. 25 of the Registration Act and presented it for registration within the time thus extended. The plaintiff applied under s. 34 for the executant to be summoned, but service could not be effected and the executant did not appear at all within the period of eight months allowed from the registration of the deed. Ultimately under the orders of the District Registrar the Sub-Registrar made an order refusing to register the deed on the ground that the executant had not appeared to admit execution. This was on 13th November 1922. The plaintiff then presented an appeal to the District Registrar under s. 72 of the Registration Act. The appeal was dismissed on 26th February 1923. The present suit was filed on 5th March 1923, that is to say, within a week of the order dismissing the appeal.

The appellant's case is that the appeal to the District Registrar was incompetent and that limitation should be reckoned from the date of the order of refusal made by the Sub-Registrar. There is no force in this contention. The Sub-Registrar's refusal was not based on the ground of denial of execution, and, therefore, the remedy was not under s. 73 as contended by the appellant. Where refusal to register is based on any ground except denial of execution s. 72 applies. The appeal to the District Registrar was, therefore, properly brought and the suit is within time.

The other main ground urged for the appellant is that it was incumbent on the plaintiff to apply for extension of time for the appearance of the executant under s. 34 of the Registration Act, and that having failed to do this he cannot succeed in the present suit. Section 34 nowhere makes it compulsory on a party to apply for extension of time where the executant fails to appear. It would be useless to ask for such extension where the executant is purposely keeping out of the way because by the very terms of the section extension can only be given where his absence is due to urgent necessity or unavoidable accident. To apply for extension of time in the present case would have been perfectly useless proceeding and the plaintiff's failure to make a perfectly useless application cannot affect his right to a decree in the suit which he subsequntly brought under s. 77. The decision of the learned Subordinate Judge is correct.

I, accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 94 AND 95 OF 1924.

May 19, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Macpherson.

PARMESHWAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS IN BOTH

versus

Musammat SUREBA KUER AND OTHERS—DEFENDANTS—RESPONDENTS IN APPEAL No. 94.

RAM PERSHAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS IN APPEAL No. 95.

Transfer of Property Act (IV of 1882), s. 111 (d)—*Landlord and tenant—Lease—Purchase of tenant's interest by co-sharer landlord, effect of—Merger, when takes place—Ejectment, suit for—Record of Rights, entry in*—Kabuliyat *executed by tenant, statement in—Presumption—Burden of proof.*

Section 111 (*d*) of the Transfer of Property Act only applies to a case where the interests of the lessee and of the lessor in the whole of the property become vested at the same time in one person in the same right. Where a co-sharer landlord purchases the interest of a tenant then unless the purchase is made on behalf of all the co-sharers the interests of the lessor and the lessee do not become merged in the purchaser. [p. 497, col. 2.]

Plaintiffs sued to eject the defendants from a certain plot of land on the allegation that the defendants were under-*raiyats* holding under the plaintiffs who were themselves *raiyats* under the proprietors. The defendants were shown in the Record of Rights as sub-tenants under the plaintiffs and certain *kabuliyats* executed by the defendants also described them as sub-tenants:

Held, that whatever onus might originally have been upon the plaintiffs to make out their case, it had been shifted to the defendants to show that the Record of Rights and the *kabuliyats* executed by them did not really disclose the true state of affairs. [p. 498, col. 1.]

Second appeal from a decision of the District Judge, Shahabad, dated the 30th June 1923, reversing that of the Subordinate Judge, Arrah, dated the 14th May 1919.

Messrs. *S. M. Mullick*, *N. N. Sinha* and *S. S. Prasad*, for the Appellants.

Messrs. *S. Sultan Ahmad* and *A. B. Mukharji*, for the Respondents.

JUDGMENT.

Miller, C. J.—The suit out of which these appeals arise was instituted as far back as the 7th September 1917 and it has had an important history. The plaintiffs who are the descendants and representatives of one Balgobind Singh instituted the suit against Daroga Singh and others claiming to recover possession of 17 *bighas* 16 *cottas* of land on the ground that the land was held by the defendants as the under-*raiyats* of the plaintiffs who in turn held the land as *raiyats* from the proprietors who are known as the Kulharia Babus. The lease under which the defendants held expired within three months of the date of the institution of the suit and notice was given to the defendants to quit. They refused to go out; hence the present suit was brought for possession.

The learned Subordinate Judge before whom the case came for trial decided the issues in favour of the plaintiffs and passed a decree in their favour declaring their right to possession of the land.

The District Judge of Arrah before whom the case came on appeal overruled the decision of the Subordinate Judge and from that decision a second appeal was brought to this Court. The learned Judges who heard that appeal considered that the decision of the District Judge could not be supported, he having taken a wrong view as to the doctrine of merger and they remanded the case to the Court of the District Judge to be re-heard in appeal.

The District Judge has re-heard the appeal and has again overruled the decision of the Subordinate Judge and dismissed the plaintiffs' suit.

From that decision the present appeal is brought. The facts of the case in so far as they are material for present purposes and in so far as they are known, for the history of the matter goes back to the year 1866, are these. One Parbesh Singh and others had a holding of some 30 *bighas* in *Mauza* Jalpura which they held under Mitrajit Singh and Balgobind Singh who were co-sharer landlords in the *mauza*. In that year, the tenants having failed to pay their rent and a rent-decree having been obtained, the land was put up for sale in execution of the rent-decree. It was purchased by Balgobind Singh who was a co-sharer landlord in the *mauza* he having a 1-anna share out of the 16-annas. There is no evidence to show what exactly took place immediately after that sale, that is to say whether Balgobind Singh took actual *khas* possession of the land and turned the defaulting tenants out or whether he re-let it to others or whether he permitted the tenants to remain in as his under tenants or whether, which is the case contended for by the defendants, he did not in fact attempt to turn them out or in any way to alter their status as occupancy tenants but allowed them to remain in on exactly the same terms as they had been before, that is to say occupancy *raiyats* holding under the same landlords. It appears, however, from a document dated the 20th September 1866 that in addition to the rent which was the subject of the rent-decree in execution of which the property had been sold there was further rent due from these tenants and a petition was filed in Court stating that they had no means of paying the subsequent rent due but that the *maliks* might realise their rent from the crops grown on the land which had been planted apparently by the tenants and which were still standing and that the *maliks* had accepted that prayer and the petition was filed praying that it might be placed with the record of the execution case of Babu Mitrajit Singh and others as evidence I presume of the payment of the subsequent rent. The next evidence we have as to the relationship between the parties is a *kabuliyat* dated in the year 1889 executed by the tenants or those who at that time represented them acknowledging that Balgobind Singh was the *guzastadar* of the property in suit and that they had taken Settlement of 17 *bighas*

17 *cottas* under him as *shikmi* tenants. That document was for a term of years; in due course it expired and afterwards up to the present day further leases have been entered into between the plaintiffs or their predecessors and the defendants or their predecessors in practically the same terms, that is to say the defendants taking as under-*raiyats* of the plaintiffs who are acknowledged to have a *raiyati* interest under the present landlords.

I ought to mention that some nine years after the sale in question, namely, in the year 1875, the proprietary interest in *Mauza* Jalpura was partitioned amongst the various co-sharers and separate *takhtas* were allotted to the proprietors respectively. Of the 30 *bighas* which had been held originally by Parbesh Singh 19 *bighas* 9 *cottas* fell to the share of Mitrajit who is now represented by the persons known under the name of the Kulharia Babus. Another portion amounting to 8 *bighas* or thereabouts fell to the share of Balgobind Singh. What happened to the small remaining share is not very clear but 2 or 3 *bighas* or thereabouts appear to have been an orchard and this may have been left *ijmal* or it may have been either then or subsequently divided amongst the different proprietors. The property which is the subject of the present suit, namely, 17 *bighas* 16 *cottas*, is a part of the 19 *bighas* 9 *cottas* which fell to the share of Mitrajit Singh now represented by the Kulharia Babus. They were undoubtedly from that time on the sole proprietors of this property and in so far as there is any evidence on the point they have always treated the plaintiffs as their immediate tenants and the plaintiffs have always treated the defendants as *shikmi* tenants holding under them.

In the year 1911 or thereabouts Survey and Settlement operations took place in the village and in the finally published Record of Rights published in 1911 the land in suit is described as the *guzashta* land of the plaintiffs and the defendants are described as *shikmidars* holding under them. Therefore it would appear that so far as the evidence before the Court was concerned there can be little doubt that for a long time, that is to say from the year 1889 at the latest, this relationship between the plaintiffs and the defendants has been in existence.

When the plaintiffs instituted the present suit the defendants raised the plea that they were not under-tenants at all but that they were occupancy tenants although it is not very clear from their written statement whether they claimed to be occupancy tenants holding under the plaintiffs or occupancy tenants holding under the proprietors. They further raised a plea that by the custom prevailing in the *mauza* under-tenants could also acquire occupancy rights by long possession. This plea, however, has been found against them by all Courts and it is no longer urged in this appeal. In fact it was a question of fact which the lower Appellate Court was alone competent to determine and we are not concerned with it.

I have already said that when the case first of all came on appeal from the District Judge before this Court on the previous occasion the Court took the view that in the particular circumstances of this case there could be no merger of the *raiyati* interest with the proprietary interest of the purchaser Balgobind Singh. It is important to bear in mind that at that time neither the Transfer of Property Act of 1882 nor the Bengal Tenancy Act of 1885 were in existance and the law of merger as it then existed with regard to the interests of landlords and tenants was not the same as exists at the present day under the provisions of the Bengal Tenancy Act. Whether it was the same as was enacted in the Transfer of Property Act is not a matter which we need discuss, for even assuming that the law laid down in section 111 (*d*) of the Transfer of Property Act was the same as that which previously existed, that section only applies to a case where the interests of the lessee and of the lessor in the whole of the property become vested at the same time in one person in the same right. In the present case it is quite clear that, unless Balgobind Singh purchased on behalf of his co-proprietors, the interests of the lessor and the lessee did not become merged in one person. Balgobind was not the proprietor of the whole property. He merely had a 1-anna share in it and the evidence which is clear and has been accepted is that he purchased for himself and not on behalf of his co-proprietors. Whether he could do that at the present day under the Bengal Tenancy Act or not, we are not concerned with. Therefore I consider that Mr. Justice Das in the judgment he delivered when the case was remanded was right in the view he took, but we are not really

concerned with that question because I think we are bound by the finding of Mr. Justice Das in the case, as he set aside the decree of the learned District Judge and remanded the case for re-trial. There was no appeal from that decision and it is no longer open to us to question the finding come to by the learned Judge in that appeal. It must be taken, therefore, that when Balgobind purchased the defendants' holding in 1866 the interest which he purchased did not merge in the proprietary right.

The learned District Judge on remand, whilst accepting the directions of the High Court on the question of merger, has dealt with the case as if the onus were entirely upon the plaintiffs to make out that they had in fact kept alive the interest which they purchased at the auction-sale in 1866 and had not given up the right which they then acquired by allowing the defendants to remain in possession of the property upon exactly the same terms and in the same right as they had before the auction-sale. In my opinion the learned District Judge was wrong in the view he took. Whatever onus there may have been upon the plaintiffs to make out their case I think they had clearly discharged that onus by putting in evidence the Record of Rights. The Record of Rights shows that their position was that of tenants under the landlord and the position of the defendants was that of sub-tenants under them. The evidence of the *kabuliyats*, documents signed by the defendants themselves or their predecessors was also to the same effect. Therefore the onus wherever it may have rested originally was clearly shifted to the defendants to show that the Record of Rights and their own documents did not really disclose the true state of affairs. Now the way the learned District Judge dealt with the case was this. He said that the plaintiffs had failed to call any evidence to show exactly what took place between the year 1866 and the date of the first *kabuliyat* in 1889 and having failed to do that he said "I cannot but presume that the auction-sale was never given effect to and that Parbesh Singh continued to remain in possession of the holding as before as if no sale had been practically brought about." He goes on: "The plaintiffs relied on the recitals in the *kabuliyats* but to my mind such recitals can not affect the interest of the defendants in the disputed land if it remained unaffected by the auction-sale itself." If it remained unaffected by the auction-sale itself no doubt the learned District Judge might be right in saying that the *kabuliyats* could not alter their status but it seems to me that the learned Judge was in no way justified in presuming that a state of affairs existed of which there was absolutely no evidence whatsoever and with regard to which the only evidence before him was entirely the other way including the Record of Rights which raised a presumption the other way. It seems to me that that presumption has not been rebutted in this case by the defendants and, however, much one may regret that after all these years they can no longer remain in possession of the property, the only conclusion to which I can come is that they have been holding all this time merely as under-tenants of the plaintiffs and according to the law at the termination of the existing agreement between them they are liable to be ejected if the plaintiffs should desire to bring the lands into their own possession. In these circumstances, though it is with some regret that I arrive at this conclusion, I am satisfied that the learned District Judge's decision cannot stand and that it should be set aside and the decree of the learned Subordinate Judge restored. As there were two appeals from the decision of the Subordinate Judge by different sets of defendants there have consequently been two appeals to this Court. They are numbered at present 94 and 95. The judgment which I have just pronounced will apply to both appeals. There will be one set of costs throughout.

Macpherson, J.—I agree.

Z. K. *Decree set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2172 OF 1922.

April 2, 1925.

Present :—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.

BAIKUNTHA NATH CHAKRAVARTI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UMANATH CHAKRAVARTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XIII, rr. 1, 2—Documents, production of—Witness, documents of.

It is open to a witness to produce at the hearing documents which are not referred to in the summons requiring him to give evidence. Such documents are admissible in evidence. [p. 500, col. 1.]

There is no obligation on a party summoning a witness to procure the filing of documents which belong to the witness and which are not in the possession or power of the party summoning the witness. [*ibid.*]

Appeal against a decree of the Second Additional District Judge, Mymensingh, dated the 27th of June 1921, affirming that of the Officiating Subordinate Judge, Third Court of that District, dated the 22nd of December 1919.

Babus *Braja Lal Chakravarti* and *Birendra Kumar De*, for the Appellant.

Babu *Kalikinkar Chakravarti*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiffs sued for partition of some 11 plots of land. The plaintiffs' allegation was that out of 11 plots of land plots Nos. 1 to 4 had already been partitioned and of these plots plots Nos. 1 to 3 had fallen to the share of defendant No. 9 Mahim and plot No. 4 to defendants Nos. 1 to 3 and the remaining plots Nos. 5 to 11 were held joint as between defendants Nos. 1 to 9. The plaintiffs had purchased the share of defendant No. 9 in the property by a *kobala* dated 21st *Sraban* 1323 and on this allegation he asked for partition of the property. The First Court dismissed the plaintiffs' suit holding that they had no title or possession in the property in dispute and this finding was upheld on appeal to the District Court. The plaintiffs have now appealed to this Court and their contention is that certain documents, namely, a geneology, *jama-kharach* and collection papers which he had desired to be produced by defendant No. 9 and a list of the names of ancestors used in the ceremonies performed on behalf of the family which they wished the witness Kailash to produce had not been allowed to be put into evidence by the Court of first instance nor by the lower Appellate Court. Now it is not disputed that the plaintiffs wanted that these documents should be produced by the two witnesses, defendant No. 9 and Kailash. The Trial Court rejected these documents and did not allow them to be produced by the witnesses and to be proved on the ground that the plaintiffs' witnesses should before long have filed these documents if any they had brought for the purpose of being used in evidence and for this reason he did not allow them to be produced or proved. A question was raised in the lower Appellate Court and in that Court apparently two documents were dealt with by the Judge. But it does not appear that the plaintiffs were given an opportunity of summoning witnesses Kailash and Mohim to produce the documents which they had desired to be produced and proved. The plaintiffs argue that it was not necessary for them to produce these documents before hand because these documents were not in their possession and power and that, therefore, they could not produce them before the witnesses were put into the box to give their evidence nor was it necessary for them to do so. The respondents contend that under O. XIII, r. 2 no documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of r. 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing. But the respondents seem to have never realised that these documents are not documents which were in the power and possession of the witnesses, and, therefore, the plaintiffs clearly could not cause them to be filed before the witnesses were put into the box to adduce evidence and O. XIII, rr. 1 and 2 have, therefore, no application. It seems, therefore, clear that the learned Judge was wrong in refusing to admit these documents and the plaintiffs must be given an opportunity of producing these documents in Court.

The case, therefore, must be sent back to the lower Appellate Court to re-hear the appeal after giving the plaintiff an opportunity of summoning these two witnesses Mohim and Kailash, Mohim to produce the geneology *jama-kharach* and collection papers and Kailash to produce the list of the names of the ancestors used in the ceremonies he had performed. The defendants will be allowed to cross-examine these witnesses and if they so desire to produce evidence to rebut the documents.

Costs of this appeal will abide the result.

Greaves, J.—I want to add a few words to the judgment which has just

been delivered by my learned brother not with regard to the facts but with regard to some of the views expressed by the Court of first instance as to documents produced by some of the witnesses which the Judge refused to admit as they had not been previously filed. It is necessary to state that the documents in question were not in the possession or power of any party to the suit but were documents belonging to the witnesses. It is clear that it is the duty of the parties to the suit under the provisions of O. XIII rr. 1 and 2 to produce at the first hearing all the documents in their possession or powers. Secondly, if a party desires to summon witnesses to give evidence on his behalf he can either summon them merely to give evidence or to give evidence and produce documents which he possesses or has reason to believe to be in their possession or he can merely summon a witness to produce documents in his possession without requiring him to give oral evidence. But, in my opinion, it is open to a witness to produce at the hearing documents which are not referred to in the summons requiring him to give evidence and these documents are admissible in evidence on behalf of the party calling the witness although they may not be mentioned in the summons addressed to the witness. There is no doubt that the fact that they are not referred to in the summons may be a factor to be taken into account in considering the value of the evidence but, in my opinion, they are admissible in evidence even if they are not referred to in the summons. It seems to me extraordinary that the Judge should have refused the documents tendered by the witness Kailash and by defendant No. 9 on the ground that they were not filed befor hand. There is no obligation on a witness so to do nor is there an obligation on the party summoning the witness to procure this filing for clearly he cannot compel the witness to file before hand the documents which are the documents of the witness and which are not in the possession and power of the party summoning the witness. These are elementary matters and I should not have thought it necessary to state them but for the view expressed by the Judge and strenuously pressed upon us by the learned Vakil who appeared for the defendant.

The money deposited in the Court here on the ground that the sufficient Court-fees have not been paid in the Courts below will be returned to the appellants and it will be for the Court below to decide whether the plaintiffs or the defendants were in possession of the properties of which partition is sought. If it is found that the plaintiffs were in possession then *ad valorem* Court-fees must be paid. If, however, they were not in possession then a Court-fee of Rs. 10 will suffice and the lower Appellate Court will decide which Court-fee is payable.

Cuming, J.—I agree.

N. H.

Appeal allowed:
Case remanded.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 109 OF 1924.

April 23, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Musammat SARVI BEGAM—OBJECTOR—APPELLANT

versus

RAM CHANDER SARUP—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 90—Limitation Act (IX of 1908), s. 18—Execution of decree—Sale, application to set aside on ground of fraud—Application to set aside on deposit, dismissal of—Application under r. 90, whether maintainable—Fraud, proof of.

Where a judgment-debtor applies to set aside an auction-sale both under the provisions of r. 89 and under the provisions of r. 90 of O. XXI of the C. P. C., the Court ought to call upon him to make his election either to withdraw his application under r. 90 or to elect to proceed with it, and in case the judgment-debtor insists upon proceeding with his application under r. 90 his application under r. 89 should be dismissed. Where, however, the application under r. 89 is heard and disposed of during the pendency of an application under r. 90, it does not necessarily follow that the latter application is not maintainable. [p. 501, cols. 1 & 2.]

Where a judgment-debtor applying to set aside an auction-sale alleges that owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of the sale was withheld from the judgment-debtor, then so long as he did not come to know of the sale, the effect of the fraud would continue and the Court would be entitled to come to the conclusion that the judgment-debtor was kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder. [p. 502, col. 1.]

First appeal from an order of the Subordinate Judge of Meerut, dated the 5th March 1924;

Dr. *K. N. Katju*, for the Appellant.

Mr. *K. C. Mital*, for the Respondent.

JUDGMENT.—This is an appeal from an order refusing to set aside a sale on the ground of fraud. The learned Judge has dismissed the application on two grounds (1) that in view of a previous application under O. XXI, r. 89, having been made and pressed, the present application was not maintainable and (2) that the allegations contained in the application were not sufficient to bring the case within s. 18 of the Indian Limitation Act. The learned Subordinate Judge without allowing the appellant any opportunity to prove the allegations made by her in the application has dismissed the application after hearing arguments only.

In execution of a decree as well as for some further amount which the decree-holder claimed that he was entitled to as a refund, the property in question was put up for sale and sold on the 21st of January 1924. No application, under O. XXI, r. 90, was made by the judgment-debtor within thirty days of this date but, on the 19th of February 1924 she put in an application under O. XXI, r. 89, praying that the sale be set aside on payment of the decretal amount, the costs, etc It so happened that the amount deposited by her was short by a few rupees. The matter was argued and on the 1st of March 1924 she filed a supplementary application offering to make good the balance. This application was refused. While the application was still being argued another application under O. XXI, r. 90, was filed which was registered after the application under O. XXI, r. 89 had been dismissed.

The learned Subordinate Judge was of opinion that inasmuch as the applicant did not withdraw her application under O. XXI, r. 89, but pressed it seriously and as it was ultimately dismissed on the merits, it must be presumed that she had withdrawn her application under O. XXI, r. 90. This is based on the provisions contained in O. XXI, r. 89, sub-cl. (2) under which it is provided that where a person applies under r. 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under r. 89. It seems to us that the Court ought to have called upon the applicant's Counsel to make his election either to withdraw his application under r. 90 or not. If he declined to do so the Court should not have allowed him to press his application under O. XXI, r. 89. But from the fact that he was not called upon to make his choice it would be too much to presume that he withdrew his application under r. 90, particularly when the order-sheet shows that the application was argued at length and the judgment was not pronounced on that date merely because it was too late. In our opinion, the converse proposition that an application under O. XXI, r. 89 having been heard and disposed of an application under O. XXI, r. 90 is not maintainable, does not necessarily follow from sub-cl. (2) of r. 89.

As to the second point the learned Judge says that the allegations of fraud in the application are too general and it is not alleged that the decree-holder kept the judgment-debtor from the knowledge of the fraud entitling her to make an application under O. XXI, r. 90. This, in our opinion, is not at all correct. In para. 2 of the application the judgment-debtor alleged that the decree-holder cunningly and fraudulently kept all the execution proceedings concealed from the petitioners from the very beginning, and all the notifications to the petitioner were caused by the decree holder to be issued to her under a wrong address which was deliberately and intentionally filed in order to conceal the proceedings; and entirely fictitious reports of service, with names of fictitious persons as witnesses were caused to be made in collusion with the process-server. She repeats the allegation as to false address in para. 3, and she repeats her allegation of the concealment of these proceedings in para. 4, and finally in para. 12 she says that the petitioner had no knowledge whatsoever of the proceedings till the 15th of February 1924 and that she remained in the dark owing to the deception practised by the decree-holder.

It is urged by the learned Vakil for the respondent that even if there was a fraudulent concealment of the proceedings, by the decree holder up to the time of sale, this does not entitle her to claim the benefit of s. 18 of the Limitation Act. The contention before us has been that it is necessary for the petitioner to allege and prove that after the sale, when the right to apply accrued there was some fraud practised by the decree-holder which kept

her right to apply concealed from her. It seems to us that this contention is not sound. If it be assumed that owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of sale was withheld from the petitioner then so long as she did not come to know of the sale the effect of the fraud continued, and the only conclusion to which we can come is that she had been kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder. It is only after she became aware of the sale that she came to know of her right to apply Her case is that she did not come to know of this right earlier because of the fraud originally practised by the decree-holder.

We accordingly allow this appeal and setting aside the order of the lower Court send the case back to that Court for disposal according to law. Costs of these proceedings will abide the result. The costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 10 OF 1922.
April 6, 1925.
Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir Jwala Prasad, KT.

RAMBHUJAWAN SINGH AND ANOTHER—DEFENDANTS Nos. 9 AND 10—APPELLANTS
versus
SURAJ PRASHAD SINGH AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Widow—Attestation by reversioner, effect of—Consent, proof of—Presumption.

The signature of a party as a witness to a deed or as the scribe who wrote it is not in itself evidence of his consent to the transaction and the same principle applies to the case of a person who signs the name of another on a deed at that other's request. It may or may not be that he was fully aware of the contents of the document and it may or may not be that he approved of it, but the fact that he merely acted as the amanuensis of another affords in itself no evidence of his own knowledge of the contents of the document still less can it be said to express his concurrence in the matters expressed therein. His part is merely mechanical and expresses no separate intention of his own but merely the intention of the party on whose behalf he acts. [p. 504, cols. 1 & 2.]

A transfer effected by a limited owner, such as a Hindu widow, with the consent of the next reversioner is a valid and a binding transaction. The consent of the next reversioner, however, cannot be held to be established by the mere fact that the deed of transfer was signed by the reversioner on behalf of the widow. [p. 504, col. 1.]

First appeal from a decision of the Subordinate Judge, Chapra, dated the 29th March 1921.

Messrs. *H. Imam* and *L. N. Singh*, for the Appellants.

Messrs. *B. N. Mitter* and *H. P. Sinha*, for the Respondents.

JUDGMENT.

Miller, C. J.—The dispute in this appeal concerns the right to certain lands in *Mauza* Jhitkahi which at one time formed part of the estate of Udit Narain Singh, who died many years ago about the year 1860 leaving a widow *Musammat* Jasoda Kuer and a daughter *Musammat* Barat Kuer but no male issue. The daughter Barat Kuer married one Bihari Singh and by him had a son Suraj Singh, who predeceased his mother leaving a widow Mukha Kuer, who is the first defendant in this suit. Upon Udit Narain's death his property was inherited by his widow Jasoda and on her death sometime later Barat Kuer succeeded to the property and died in the year 1918. Upon her death without leaving issue, her son Suraj Singh having predeceased her, the succession re-opened. The plaintiff Suraj Prashad Singh a distant collateral relation of Udit Narain Singh claims to be entitled to the land in dispute as the next reversionary heir of Udit Narain on the death of *Musammat* Barat Kuer. The appellants Rambhujawan Singh and Manoge Rai who are the defendants Nos. 9 and 10 in the suit claim the property under two sale-deeds, dated the 18th May 1909, executed in their favour by the defendants Nos. 7 and 8, Mr. Herbert Edward Cox and Miss. H. H. Cox who in turn had purchased from *Musammat* Barat Kuer under a registered conveyance executed by her in January 1908. There were a number of other defendants in the suit who either by relationship to the last male-holder or by title derived from the appellants-(defendants Nos. 9 and 10) claimed to have some interest in *Mauza* Jhitkahi or the other properties which form the subject of the present suit. In the present appeal, however, we are concerned only with the

interest in *Mauza* Jhitkahi and the rival claims thereto of the plaintiff Suraj Prashad Singh and the appellants-defendants Rambhujawan Singh and Manoge Rai.

Numerous pleas were raised in defence by the appellants. It was contended that the property was not part of the estate of Udit Narain Singh but the *stridhan* of his widow *Musammat* Jasoda Kuer and that it was inherited from her by her daughter Barat Kuer as her absolute property over which she had complete powers of disposal. The plaintiff's right as next reversionary heir of Udit Narain Singh was also denied. It was further contended that in any event the sale by *Musammat* Barat Kuer to the Coxes (defendants Nos. 7 and 8) from whom the appellants derived their title was justified by legal necessity. It also appeared that the conveyance executed by Barat Kuer in 1908 was made in order to raise money to pay off certain debts one of which was a *zarpeshgi* mortgage debt of Rs. 1,100 under an instrument executed by Jasoda Kuer in 1902, the document having been signed on her behalf, she being illiterate, by her grandson Suraj Singh who was then alive and who was at that time the next reversioner. It was contended before the Trial Court that this transaction in which the then reversioner signed on behalf of his grandmother was evidence of his consent and should be taken as proof of justifying necessity for that transaction. On appeal in argument before us although the point had not been raised in the pleadings or issues it was argued that the fact that Suraj Singh signed the *zarpeshgi* of 1902 on his grandmother's behalf, he being the sole reversionary heir at that time, constituted the transaction valid and binding apart from any question of legal necessity.

The learned Subordinate Judge found that the plaintiff Suraj Prashad Singh was the next reversionary heir of Udit Narain after the death of *Musammat* Barat Kuer a finding which is no longer disputed. He further found that *Mouza* Jhitkahi formed part of the estate of Udit Narain Singh and was not the *stridhan* property of his wife and daughter. Although this finding was questioned in argument before us the point was subsequently abandoned on it being pointed out that Udit Narain Singh during his lifetime had purported to deal with this property as his own. The learned Judge also found that out of the sum of Rs. 5,000, the purchase price paid to *Musammat* Barat Kuer under the conveyance of 1908, a sum of Rs. 1,300 only was justified by legal necessity and ordered the sale to be declared void and possession to be given to the plaintiff Suraj Prashad Singh on payment of that sum to the appellants who had purchased as already stated from Barat Kuer's transferees. He was also of opinion that there was no proof of legal necessity by the fact that Suraj Singh (Barat Kuer's son) had signed the mortgage of 1902 on his grandmother's behalf.

The appellants contended before us, although somewhat half heartedly, that the whole of the purchase price paid to Barat Kuer was justified by legal necessity and, secondly, that the mortgage debt of 1902 for Rs. 1,100 to discharge which was one of the objects of the sale was binding on the reversioners and that that sum should in any event be added to the amount repayable to the appellants out of the purchase price.

The sale-deed of 1908 in favour of the Coxes recites that the vendor *Musammat* Barat Kuer is pressed for money and that suits are threatened against her and that it is necessary to sell the property in order to raise money. The purchase price of Rs. 5,000 was said to be required for the following purposes :—

(1) To discharge a debt of Rs. 2,000 due to Mr. William Herbert Cox under a *zarpeshgi* bond dated the 2nd August 1897 executed by *Musammat* Jasoda Kuer.

(2) To discharge a *zarpeshgi* bond of Rs. 1,100, executed by Jasoda Kuer on the 30th November 1902 in favour of Barhamdeo Singh.

(3) To discharge a mortgage debt of Rs. 424, executed by Jasoda Kuer in favour of Bhikan Sheikh on the 26th September 1898.

(4) The balance of Rs. 1,476 was required to pay other petty debts and Government revenue and for necessary expenses the amounts and details of which are not specified.

The sum of Rs. 1,300 allowed by the Subordinate Judge as justified by legal necessity formed part of the first of the above items for Rs. 2,000. This sum was said to have been borrowed by Jasoda Kuer to pay off a previous *zarpeshgi* of Rs. 1,200 executed by Udit Narain in 1860 in favour of Mr. Henry Hill, proprietor of the Bara factory, the balance of Rs. 800 being required

to pay a debt of Rs. 700 due to Ganesh Das Marwari, the remaining Rs. 100 being for household expenses and maintenance during a time of scarcity. The learned Judge considered that the *zarpeshgi* executed by Udit Narain was a debt due from his estate and, therefore, justly payable out of the same. There was no satisfactory evidence of necessity for the loan due to Ganesh Das Marwari and the learned Judge disallowed it. He thought, however, that the circumstances showed that Rs. 100 might well be required for the necessary personal expenses of Jasoda Kuer as 1897 was a famine year. He accordingly allowed Rs. 1,300 in all out of the purchase price. The appellants have not seriously contended that any further portion of this item can be justified on the ground of legal necessity and I see no reason to differ from the conclusions of the Trial Court.

The second item of Rs. 1,100 and the third item of Rs. 424 were both loans contracted by Jasoda Kuer to pay off debts due to the Bara factory owned by Mr. Hill but the Judge found that there was no evidence of any justifying necessity for contracting these debts and it has not been seriously urged before us that there is any evidence to support them on that ground. It was argued, however, that the mortgage-bond for Rs. 1,100 which was signed in Jasoda's name by her daughter's son, then the next reversioner must be taken as having been consented to by him. It was argued that a transfer effected by a limited owner such as a Hindu widow with the consent of the next reversioner was a valid and binding transaction. Accepting this proposition as a correct exposition of the law there is nothing apart from the fact that the reversioner signed on behalf of his grandmother to prove his consent to the transaction. It has frequently been held that the signature of a party as a witness to a deed or as the scribe who wrote it is not in itself evidence of his consent to the transaction and I can see no reason why a different principle should be applied to a person who simply signs the name of another at that other's request. It may or may not be that he was fully aware of the contents of the document and it may or may not be that he approved of it but the fact that he merely acted as the amanuensis of another affords in itself no evidence of his own knowledge of the contents of the document. Still less can it be said to express his concurrence in the matters expressed therein. His part is merely mechanical and expresses no separate intention of his own but merely the intention of the party on whose behalf he acts. To hold otherwise would, in my opinion, in many cases work injustice and be fraught with much danger.

The fourth item of Rs. 1,476 paid in cash to Barat Kuer was according to the sale-deed required by the vendor to pay debts due to *mahajans* for sums borrowed during time of famine, for maintenance and for payment of Government revenue and other necessary expenses. There was no evidence to support these recitals in the sale-deed but some evidence was given to the effect that money was required for the *sradh* of Jasoda Kuer and the *gaona* of Barat Kuer's son Suraj Singh who was then alive but this was not alleged in the sale-deed and the learned Subordinate Judge rejected the evidence as untrustworthy. The learned Counsel for the appellants has not referred us to any evidence which could be said to show that there was any legal necessity for this sum. The verbal evidence in fact was not even referred to in argument but having looked at it I consider that there is no reason to differ from the learned Judge's findings. As the onus lies on the purchaser to prove the necessity for the sale this appeal fails and is dismissed with costs.

Jwala Prasad, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 179 OF 1924.

May 13, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

SANWALIA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NATHI LAL—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 4, 167—Co-sharers—Suit by one co-sharer to recover share of produce of tank, nature of—Suit, whether cognizable by Civil Court—Jurisdiction of Civil and Revenue Courts.

A suit by a co-sharer in one *mahal* of a village against a co-sharer in another *mahal* of the village to

recover a certain share of the produce of a tank which is the joint property of the two *mahals* is not a suit for the recovery of rent and is not excluded from the cognizance of a Civil Court.

First appeal from an order of the Subordinate Judge, Muttra, dated the 3rd September 1924.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *Ajodhia Nath*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the learned Subordinate Judge of Muttra returning a plaint for presentation to the Revenue Court on the ground that the suit is one for arrears of rent under the Tenancy Act. The plaintiffs are co-sharers in *mahal* Sanwalia in M. Pingri in the Muttra District: the defendant is a co-sharer in another *mahal* known as *mahal ghair khwahindagan*. According to the plaintiffs' case, a certain tank is joint between the two *mahals* and the *zemindars* of the former *mahal* are entitled to a certain share in the produce of it. It appears that *singharas* are grown in the tank. The learned Munsif, in whose Court the suit was filed, decreed it in favour of the plaintiffs. The learned Judge without considering the merits of the claim held that the amount claimed was rent as defined in s. 4 of the Tenancy Act and that, therefore, he had no jurisdiction. The learned Subordinate Judge is quite right in saying that, according to the definition, rent may include what is paid on account of the produce of tanks. What he has overlooked is that rent is a payment by a tenant to his landlord. Here the plaintiffs are not the landlords of the defendant but the parties are proprietors in distinct *mahals*. The learned Subordinate Judge was, therefore, in error in holding that he had no jurisdiction. We set aside his order and direct him to restore the case to his file and dispose of it on the merits.

Costs will abide the result.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2089 OF 1922.

March 19, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

PEARY LAL MULLIK—DEFENDANT—APPELLANT

versus

SURENDRA NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 91, O. I, r. 8—Suit for declaration of public right—Advocate-General's consent, whether necessary—Public right—Immemorial user—Lost grant—Presumption—Property obtained on undertaking that it would be used by public—Absolute title, whether can be set up—Estoppel.

Section 91 of the C. P. C. does not take away a right to sue which may exist independently of its provisions. The section does not control or restrict the provisions of O. I, r. 8 of the C. P. C. [p. 506, col. 1]

Where a person takes a lease of certain property on the distinct understanding that the property would be used for the benefit of the public and the undertaking forms a part of the consideration for the lease he or his successors cannot be subsequently allowed to turn round and to say that they have an absolute interest in the property leased and that the public has no right to use it for the purpose mentioned in the lease. [p. 506, col. 2.]

Where it is found that the people of a village have been using a *ghat* from time immemorial a presumption may be made that they have a right to use the *ghat* based on a lost grant. [*ibid.*]

Appeal against a decree of the Second Additional District Judge, 24-Parganas, dated the 10th of May 1922, affirming that of the Subordinate Judge, Second Court of that District, dated the 25th of January 1921.

Mr. *Amarendra Nath Bose* and Babu *Probodh Chandra Chatterji*, for the Appellant.

Dr. *Dwarika Nath Mitter* and Babu *Kanai Dhan Dutt*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This appeal is by the defendant in a suit brought by the plaintiffs on behalf of the Hindu public of a village called Sukhchar and other neighbouring villages on the banks of the Hughli for a declaration that the public have the right to use a certain *ghat* and steps for certain purposes. The claim was based upon the use of the *ghat* from time immemorial and also upon dedication by one Bir Narsingh Dutt who took a lease of this plot of land from the *zemindars*. Both the Courts below have agreed in allowing the plaintiffs a modified decree, namely, a declaration that they were entitled to use the *ghat* for bathing and certain other religious purposes

though the property was the private property of the defendant.

Two points have been raised by the learned Advocate for the appellant. The first objection is as to the competency of the suit in the form in which it is brought. The suit is brought under O. I, r. 8, C. P. C. on behalf of and for the benefit of the Hindu residents of the village Sukhchar and other adjoining villages. It is contended that the suit could only be brought under s. 91, C. P. C. with the consent of the Advocate-General; and it is accordingly argued that it is a case of public nuisance within the meaning of that section. In their plaint the plaintiffs state as follows :— "The defendant who has now purchased the interest of Narsingh Dutta from his heirs obstructed the *ghat* after his purchase and prevented the people from using it freely." We do not think that this is a case of nuisance, much less of public nuisance. 'Nuisance' has not been defined in the C. P. C., but it has been defined in the Indian Penal Code as an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in that vicinity or to persons who may have occasion to use any public right. It is hardly conceivable that for the act complained of the defendant can be prosecuted before the Criminal Court for causing public nuisance. The obstruction on which the cause of action is based is the infringement of their right to use the *ghat* for certain purposes. Be that as it may, s. 91 does not take away the right of the plaintiffs to sue which may exist independently of its provisions. No authority has been placed before us nor do we think that s. 91 controls or restricts the provisions of O. I, r. 8. This contention, therefore, ought not to prevail.

The second point taken by the learned Advocate is that on the facts found the plaintiffs are not entitled to the relief granted to them. It is argued that the plaintiffs came to Court with a case of actual dedication by Bir Narsingh Dutt, but the decree was founded upon long user by the plaintiffs of the property in suit. The view taken by the Subordinate Judge was that the plaintiffs were not able to prove actual dedication by Bir Narsingh Dutt, but from the conduct of the parties and the subsequent events it appeared that, though there was no dedication by Bir Narsingh Dutt, he intended to dedicate the property for public use and that he did so dedicate for more than 40 years ago and the people used it in accordance with his desire. The learned Subordinate Judge was of opinion that written dedication in a case like this is not necessary and he held that the facts disclosed in this case sufficiently created a dedication of the land in favour of the plaintiffs. The learned Additional District Judge in appeal concurred with the Subordinate Judge on these findings and has also supported his judgment by holding that in the circumstances of this case lost grant may be presumed. He has relied upon a circumstance which throws a good deal of light upon the present controversy. Bir Narsingh Dutt took a lease of this property from the *zemindar* on the distinct understanding that it would be for the benefit of the local public and this formed a part of the consideration for the lease. He or his successors cannot now be allowed to turn round and say that they have an absolute interest in the land leased and that the public has no right to use the *ghat* for the purpose mentioned in the lease. He has found that the people of the villages have been using the *ghat*, which was at one time *kachcha* from time immemorial. The learned Judge is right in deducing from these facts that the title is based upon lost grant. He has further found that Bir Narsingh Dutt made the *ghat pucca* and allowed the public to use it in the same way as they used it before; and further that the portion on which this right was exercised by the public was walled off from the portion which is in possession of and used by the defendant. On these facts the learned Judge has come to a finding which we consider to be one which cannot be challenged in second appeal.

The result is that this appeal fails and is dismissed with costs.

Duval, J.—I agree.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 70 OF 1924.

March 16, 1925.

Present:—Mr. Daniels, J. C.

SRI RAM—PLAINTIFF—APPELLANT

versus

SURAJ BALI *alias* BABU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5, 6—Mortgage, simple—Suit for sale—Compromise, decree based on—Personal liability of mortgagor, whether affected—Costs, liability for.

During the course of a mortgage suit brought on the basis of a simple mortgage which provided for the personal liability of the mortgagor a compromise was arrived at by which the mortgagee agreed to accept payment of the decretal amount by instalments, the whole to be recoverable in default of payment of any instalment. The mortgagee obtained a preliminary decree on the basis of the compromise and default being made in payment the preliminary decree was followed by a final decree for sale under r. 5, O. XXXIV of the C. P. C. The sale-proceeds of the mortgaged property did not satisfy the decretal amount and the mortgagee made an application for a personal decree against the mortgagor under r. 6 of O. XXXIV:

Held, (1) that the compromise having been entered into in connection with a suit for sale merely modified the terms on which a decree for sale would otherwise have been passed and that the mere fact that the mortgagor's personal liability was not mentioned in the compromise did not put an end to such liability; [p. 507, col. 2.]

(2) that a preliminary and a final decree having been passed in accordance with the compromise and neither party having appealed against them or contested the correctness of the procedure adopted by the Court it was not open to the mortgagor to contend that the preliminary decree could not have been passed on the basis of a compromise which provided for payment by instalments; [p. 508, col. 1.]

(3) that there was, however, no antecedent liability for costs under the terms of the mortgage-deed and that the mortgagor's personal liability not having been declared by the decree in respect of the costs, the mortgagee was not entitled to recover the amount of the costs from the mortgagor personally. [*ibid.*]

Second appeal against the judgment and decree of the Fourth Additional District Judge, Lucknow, dated the 7th November 1923, reversing the decree of the Subordinate Judge, Lucknow, dated the 28th May 1923.

Messrs. *Rajeshwari Prasad* and *Ramapat Ram*, for the Appellant.

Messrs. *Suraj Bal* and *H. Husain*, for the Respondent.

JUDGMENT.—The question in this appeal is whether the plaintiff-appellant is entitled to a personal decree for the balance of the mortgage-money and costs under O. XXXIV, r. 6. No question of limitation arises and the decision of the issue depends on whether the amount is "legally recoverable from the defendant otherwise than out of the property sold within the meaning of r. 6", or in other words whether the mortgagor is personally liable for the amount.

The mortgage was a simple mortgage and carried a personal liability. The mortgagee brought a suit for sale on the basis of it under the provisions of O. XXXIV, C. P. C. In the course of that suit a compromise was entered into by which the plaintiff agreed to allow payment by instalments, the whole amount to be recoverable in default of any instalment. If the instalments were punctually paid a certain amount was to be remitted but not otherwise. The plaintiff obtained a preliminary decree on the basis of the compromise. Nothing was paid by the defendant and the plaintiff thereupon applied for and obtained a final decree for sale under O. XXXIV, r. 5. The mortgaged property was sold and failed to realize the entire amount due. The present application was, therefore, made for recovery of the balance of the mortgage money under O. XXXIV, r. 6. The Subordinate Judge allowed the application but the Additional District Judge dismissed it.

I will deal with the question of costs separately. As regards the balance of the mortgage-money the Additional District Judge has, in my opinion, taken an entirely wrong view of the law and the decision of the Subordinate Judge should be restored. The reasoning of the learned Judge is that because the compromise does not expressly state the personal liability of the mortgagor, therefore, it must be considered to have been excluded and as the decree is in terms of the compromise it must be considered to be excluded in the decree also. The learned Judge has not, in my opinion, taken sufficient account of the circumstances under which the compromise was passed. It was entered into in connection with a suit for sale and merely modified the terms on which a decree for sale would otherwise have been passed. No question of the defendant's personal liability arose in that suit, and there was no necessity to refer to it in the compromise, which merely dealt with the claim as made in the suit. The personal liability of the mortgagor was not in question and as there is nothing in the compromise to indicate an intention to put an end to it it must be considered to have remained intact.

It was urged by the respondent that a

compromise decree which allowed payment by instalments cannot be considered as a decree passed under O. XXXIV, r. 5, and, therefore, that a sale of the property under such a decree does not comply with the requirements of r. 6. The answer to this contention is that in fact a preliminary and final decree were passed and that neither party appealed against them or contested the correctness of the procedure adopted by the Court. It is, therefore, not open to the respondent to argue now that a preliminary and final decree should not have been prepared or that the decree was not one under O. XXXIV, r. 5, under which it purported to be made.

The question of costs appears to me to stand on a different footing. There was no antecedent liability for costs under the terms of the mortgage-deed. The costs are provided for in the compromise and in the decree and are only recoverable as provided in the decree. The compromise and decree provide only for their recovery from the mortgaged property. I, therefore, dismiss the appeal as regards the amount of costs but allow it and restore the decree of the learned Subordinate Judge as regards the remainder of the amount claimed. The parties will pay and receive costs in this Court and the Court below in proportion to success and failure. In the Trial Court the plaintiff will get costs on the amount allowed.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 622 OF 1923.

July 22, 1924.

Present:—Mr. Justice Page.

BALDEODAS LOHIA—DEFENDANT—APPELLANT

versus

SUBKARANDAS GOENKA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, rr. 12, 17, O. IX, r. 13—Ex parte *decree, application to set aside—Sufficient cause—Non-service of summons—Service of summons, mode of—Substituted service when to be effected*

Under r. 13 of O. IX of the C. P. C. a defendant is entitled to have an *ex parte* decree made against him set aside and the suit restored on such terms as the Court may deem to be fit, if he satisfies the Court either that the summons was not duly served upon him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The two branches of the rule are disjunctive and the defendant, whatever his position may be in respect of one branch, is entitled to the benefit of the rule if he has satisfied the Court that he has made good his contention under the other branch. [p. 508, col. 2; p. 509, col. 1.]

It is of the utmost importance in every case for which provision for personal service is made in the C. P. C., that all available steps should be taken to effect personal service, before resort is had to the provisions of O. V, r. 17 of the Code. It is not enough to attend at the ordinary place of residence or of business of the defendant or the place where the defendant personally works for gain and to conclude that substituted service may be effected merely because at the time when the serving peon attends at such place the defendant does not happen to be there. It makes no difference whether the peon attends at such place once or several times. It is necessary that the serving peon, having discovered or believing that the defendant cannot be served at the time when he is attending, should institute proper enquiries and endeavour to ascertain where the defendant's whereabouts are. The serving peon before he can take advantage of the provisions of O. V, r. 17, must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant he must take reasonable steps to discover where the defendant may happen to be. [p. 509, col. 2; p. 511, col. 1.]

The serving peon went to the place of the residence of the defendants three times and each time on enquiring from the *durwan* was informed that the defendants were not in. The peon made no enquiries as to the whereabouts of the defendants. On the third occasion he proceeded to effect substituted service by affixing a copy of the summons to the entrance gate of the defendants' house:

Held, that under the circumstances the summons had not been duly served. [p. 511, col. 1.]

Messrs. *A. K. Roy* and *B. N. Ghose*, for the Appellant.

Messrs. *N. N. Sircar* and *C. Bagram*, for the Respondent.

JUDGMENT.—This is an application by the members of the defendant firm to set aside a decree in favour of the plaintiff which was obtained *ex parte* on the 15th April 1921. The plaint was filed on the 28th February 1924, and summary proceedings were taken under O. XXXVII. The defendants make this application pursuant to the provisions of O. IX, r. 13 of the C P. C. and they will be entitled to have the *ex parte* decree against them set aside and the suit restored on such terms as the Court may deem to be fit if they satisfy the Court either that the summons was not duly served, or that they were prevented by any sufficient cause from appearing when the suit was called on for hearing. It is to be observed that the two branches of the rule are disjunctive, and the defendant whatever his position

may be in respect of one branch, is entitled to the benefit of the section if he has satisfied the Court that he has made good his contention under the other branch. Having regard to the evidence which has been adduced before me I am satisfied that before the decree was made on the 15th April 1924, even if the defendants themselves were not cognizant of what had taken place, one Madanlal who was the authorised agent of the defendants to take charge of any legal proceedings which might be preferred by or against the defendants, was fully aware that the suit had been launched, and would eventually result in a decree against the defendants unless steps were taken by the defendants to defend the suit.

On the 17th March, which was the day upon which substituted service was effected by affixing a copy of the writ of summons on the door of 12, Banstolla Gully, Calcutta, where the defendants ordinarily resided and carried on business Madanlal was present; he saw the summons affixed; and it was through his intervention that the *durwans* of the defendants at 12, Banstolla Gully, permitted the Sheriff's peon to do his duty in affixing the writ of summons to the door. More than that, Madanlal on the 24th of March approached Babu Satyendra Nath Mitter, an Attorney of the Court, for the purpose of obtaining advice as to what the defendants should do, and, having received the advice, Madanlal left the office of Babu Satyendra Nath Mitter, remarking to the Attorney that he would return on the next day and bring funds with which to meet any possible sum which might have to be deposited in Court as a condition of obtaining leave to defend the suit. On the following day, however, Madanlal did not attend the Attorney's office. According to the defendants no steps were taken by them; because nothing was known about these proceedings until notice of attachment had been affixed on the premises under which the property of the defendants at 396, Upper Chitpore Road, and 12, Banstolla Gully, were attached in execution of the *ex parte* decree which had been obtained on the 15th April. I think it extremely probable that the defendants were aware that these proceedings had been taken against them before the decree was obtained, and as they took no steps either to enter appearance or to apply for leave to defend or otherwise to protect their rights, they fail to bring themselves within one branch of r. 13, for, in my opinion, they were not prevented by any sufficient cause from appearing or taking steps to obtain leave to defend. I am, therefore, loth to give them an opportunity at this late stage to put their defence before the Court. But as I have observed, the branches of r. 13 are disjunctive, and it is still open to the defendants, if they are in a position to do so, to prove to the satisfaction of the Court that the summons in the suit was not duly served upon them. I apply myself, therefore, to a consideration of the circumstances under which the service of summons in this suit was effected. It is of the utmost importance in every case for which provision for personal service is made in the C. P. C., that all available septs should be taken to effect personal service. In this case personal service upon the defendants was not effected. The plaintiff, however, claims that substituted service was duly effected under O. V, r. 17. That rule provides, *inter alia*, that "where the serving officer after using all due and reasonable diligence cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made. the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain." The defendant with respect to this branch of the rule has preferred two contentions. The first is that the service as alleged by the plaintiff was never effected at all, and the second, if the defendants were served, that they were not duly served. In my opinion, service was effected. One Jadunath Singh a Sheriff peon with 18 years' service, attended at 12, Banstolla Gully, with Ramkissen *brahamin*, a *gomasta* of the plaintiff, for the purpose of effecting personal service upon the defendants. These two men went to 12, Banstolla Gully, where admittedly the defendants both carry on the business and ordinarily reside about 5 o'clock in the afternoon of the 15th March. There were two or three persons sitting at the outer gate, Jadu asked them if the Babus were in and the reply was that they were not in. The

peon and the identifier Ramkissen then went away. They came again to the same place about the same hour on the 16th March, and again asked 3 or 4 persons at the gate if the Babus were in, and received again the same reply, "they were not in". The peon then stated that he proposed to go inside the house to search for the defendants, but the *durwans* at the gate said that they would resist any attempt on the part of the Sheriff's officer to enter the house. The peon and Ramkissen then went away. Again, on the 17th the same two men about the same hour came to 12, Bansatolla Gully, and asked if the Babus were in, and the *durwans* at the gate said that they were not in. Jadunath then said that he proposed to go inside, and personally serve the defendants. Once more he was told that he would be resisted by the *durwans* if he attempted to do so. The peon then called out in a loud voice the names of the defendants and demanded that they should come out and accept service of the summons, but no answer came. Thereupon the peon commenced to affix with paste the writ of summons to the outer gate, but the retainers of the defendants resisted his attempt to do so. At this stage Madanlal appeared upon the scene and persuaded the defendants and the other agents of the defendants to allow the peon to do what he considered to be his duty. The writ of summons was then affixed to the outer gate, and the peon and Ramkissen went away. As they were leaving the premises they noticed that Madanlal took the writ of summons off the gate. Now, the question which I have to decide, having reregard to the terms of the O. V, r. 17, is whether the defendants were duly served, and, in my opinion, that depends upon whether the peon before he affixed a copy of the writ of summons to the gate, had used all due and reasonable diligence to discover the whereabouts of the defendants. In my opinion, the law on the subject is to be found stated by Sir Comer Petheram C. J., in *Cohen* v. *Nursing Dass Auddy* (1), where his Lordship observed: "It is true that you may go to a man's house and not find him, but that that is not attempting to find him. You should go to his house, make enquiries and if necessary follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before a service like this can be effected it must be shown that proper efforts had been made to find out when and where the defendant is likely to be found—not as seems to be done in this country, to go to his house in a perfunctory way, and because he has not been found there, to affix a copy of the summons on the outer door of his house. A proper attempt must be made to find the defendant and serve him with the writ." Again in *Sakharam Bhaskar* v. *Padmakar Mahadeo* (2), a similar question arose. The bailiff of the Court reported that he had affixed a notice of an appeal on the outer door of the respondent's house, and that the "respondent was not found; his adult undivided son having refused to receive a copy of the notice, it was affixed to the front door of his house." Jenkins, C. J., in giving the judgment of the Court, observed with respect to the report of the bailiff that in the report "there is merely a statement that the respondent could not be found. But it does not appear that any effort was made to find him, or that even enquiry was made of his son, who was found, as to where the respondent was. The serving officer is not shown to have carried out the requirements of the C. P. C." On this subject reference may be made to *Bhomshetti* v. *Umabai* (3), *Subramania Pillai* v. *Subramania Ayyar* (4) and *Sakina* v. *Gauri Sahai* (5). In each of those cases the serving peon was informed at the time when he attended at the residence or place of business of the defendant that the defendant had left, or would return in a few days, and in each of those cases the Court held that the circumstances disclosed in the peon's report did not justify the service being effected in a substituted manner. The case of *Kassim Ebrahim Saleji* v. *Johurmull Khemka* (6) was a clear one, because in that case the serving peon attended at the defendant's place of business when he thought that he was attending at his residence and in that case, as the Court

(1) 19 C. 201; 9 Ind. Dec. (N. S.) 579.

(2) 30 B. 623; 8 Bom. L. R. 757.
(3) 21 B. 223; 11 Ind. Dec. (N. S.) 150.
(4) 21 M. 419; 7 Ind. Dec (N. S.) 653.
(5) 24 A. 302; A. W. N. (1902) 68.
(6) 34 Ind. Cas. 799; 43 C. 447; 23 C. L. J. 183; 20 C. W. N. 173.

held, there was no escape from holding that the writ of summons was not duly served. In my opinion, the effect of the authorities is that all available steps to effect personal service must be made before resort is had to the provisions of O. V, r. 17. It is not enough to attend at the ordinary place of residence or of business or the place where the defendant personally works for gain, and to conclude that substituted service may be effected merely because at the time when the serving peon attends at such place the defendant does not happen to be there. In my opinion, it makes no difference whether the peon attends at such places once or three times. It is necessary, in my opinion, that the serving peon, having 'discovered or believing that the defendant' cannot be served at the time when he is attending, should institute proper enquiries and endeavour to ascertain where the defendant's whereabouts are. In my opinion, the serving peon before he can take advantage of the provisions of O. V, r. 17, must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant he must take reasonable steps to discover where the defendants may happen to be. In my opinion, the observations of Sir Comer Petheram, C. J., made in 1892 are at least as opportune to-day as they were 32 years ago. In my experience in these Courts I have come to the conclusion that the service of notices is often effected in a most perfunctory manner. But the result of not conforming strictly to the rules laid down in the C. P. C. is that great hardship and injustice may be done. Now, applying the principles which I have enunciated to the facts of this case, it is quite obvious that service was not duly effected. The peon, after discovering that the defendants, at the time when he attended at 12, Banstolla Gully, were not in the house, made no enquiries whatsoever of anybody as to their whereabouts. It is conceded that the defendants were in Rajputana, but without making any attempt to discover their whereabouts the serving peon, after calling on them by name to come out and receive a copy of the summons, proceeded to effect substituted service by effixing a copy of the summons to the entrance gate. In my opinion, in this case the summons was not duly served, and under these circumstances the *ex parte* decree and the attachment proceedings incidental thereto will be set aside, and the suit will be restored to the list. The question remains as to the terms upon which the case should be restored to the list. So far as the costs are concerned the condition which I think it right to impose upon the defendants in order that they may be in a position to take further proceedings to defend the suit is that they pay all the costs of this application in any event as of a hearing. Such costs are to be taxed forthwith and paid to the plaintiff's Attorney, and are to be held by him until further order.

The plaintiff's Solicitor undertakes to serve the defendant's Solicitor with a copy of the summons to-morrow.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 29 OF 1925.

March 19, 1925.

Present:—Mr. Daniels, J. C.

HIRA LAL—DEFENDANT—APPLICANT

versus

Musammat MANGAL DEI—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 35 (ii), 43 (a)—Suit to recover value of property made over to defendant, whether cognizable by Small Cause Court.

A suit to recover the value of property made over to the defendant which the latter has failed to return is not excluded from the cognizance of a Small Cause Court, especially where there is no allegation in the plaint of a criminal offence having been committed by the defendant with regard to the property in dispute.

Application against an order of the Subordinate Judge, Barabanki, dated the 8th January 1925.

Mr. *Moti Lal Saksena*, for the Appellant.

ORDER.—This application is based on the provisions of Arts. 35 (*ii*) and 43 (*a*), Sch. II, of the Provincial Small Cause Courts Act. I find, however, on a reference to the plaint that the plaintiff carefully avoided making any allegation of criminal offence. His case was that the property had been made over to the defendant; it had not been restored and he, therefore, sued for its value. The jurisdiction of the

Small Cause Court was not, therefore, excluded and I reject this application.

Z. K. *Application rejected.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 36, 38, 42, 43, 44, 46, 47, 48, 50, 51, 52 AND 101 OF 1923.

February 6, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SATINDRA MOHAN TAGORE—PLAINTIFF—APPELLANT IN ALL

versus

BAMA SUNDARI DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 7 (2)—Enhancement of rent—Landlord, what must prove—Customary rate, failure to prove, effect of—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Mistaken view of law—Withdrawal of suit.

In order to claim benefit of s. 7 (2), Bengal Tenancy Act, the landlord must prove that there is no customary rate of rent and if he asserts that there is such a customary rate but fails to prove it, he is not entitled to ask the Court to determine a fair and equitable rent.

The fact that a plaintiff's claim has failed on account of a mistaken view of the law, is not sufficient ground for permitting withdrawal of suit in second appeal, under O. XXIII, r. 1, C. P. C.

Appeals against the decrees of the Special Judge, Tipperah, dated the 19th of May 1922, affirming those of the Assistant Settlement Officer, Comilla, dated the 14th of October 1920.

Babu *Hira Lal Chakrabarty*, for the Appellant.

Babus *Chandra Sekhar Sen* and *Upendra K. Roy*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—In these appeals the landlord objects to the order of the learned Special Judge disallowing his claim for enhancement of rent under s. 7, Bengal Tenancy Act. The learned Judge has found that the appellant has not adduced any evidence to show what is the customary rate payable by persons holding similar tenures in the vicinity. He then proceeds to consider whether the appellant is entitled to enhancement of rent under sub-s. (2) of s. 7. In two of these cases he says that the claim should fail simply because no ground for enhancement on equitable considerations has been made out. In some other cases he finds that there are some lands in the *khas* possession of the tenure-holders, and, therefore, the landlord is apparently entitled to enhancement of rent on the ground of rise in the price of staple food crops; but as the *kabuliyats* mention only one ground of enhancement, namely, when the rent payable by the tenant is below the prevailing rent in the neighbourhood, the learned Judge disallowed the plaintiff's claim for enhancement of rent also in respect of the lands in the possession of the tenants. It is not necessary to consider the observation made by the learned Judge with regard to the stipulation in the *kabuliyat* because his finding that the appellant has not adduced any evidence to show what the customary rate is, disentitles the appellant from claiming any enhancement under s. 7, Bengal Tenancy Act. In some of the cases of this group which we have decided we have observed that the landlord in order to claim the benefit of s. 7 (2), must prove that there is no customary rate; and if he asserts that there is such a customary rate but fails to prove it, he is not entitled to ask the Court, to determine a fair and equitable rent. The claim of the appellant, therefore, for enhancement of rent under s. 7, Bengal Tenancy Act, must fail.

The learned Vakil for the appellant asks for permission to withdraw the suits or the claim for the enhancement of rent on payment of all costs to the other side with liberty to bring fresh suits on the ground that it was on account of a mistaken view of the law that the appellant's claim has failed. We do not think that it is a sufficient ground for our giving the permission asked for under O. XXIII, r. 1, and we do not think that such permission ought to be granted in second appeals.

These appeals, therefore, fail and are dismissed with costs one gold *mohur* each.

Cuming, J.—I agree.

N. H. *Appeals dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 567 OF 1924.

September 13, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Campbell.

LABH SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 395, 396—Criminal Procedure Code (Act V of 1898), s. 162 (1)—Dacoity—Number of persons, finding as to, whether necessary—Dacoity with murder—Charge, form of—Statement made to Police during investigation, when admissible—Proof of statement—Criminal case—Acquittal of some accused, effect of, upon others.

An offence under s. 395 of the Penal Code can be committed only if the number of persons concerned in the robbery is not less than five. [p. 513, col. 2.]

Where murder is committed during the course of a dacoity it is proper to charge the accused persons with an offence under s. 396 of the Code rather than with two offences of murder and dacoity separately. [*ibid.*]

There is no presumption as to the genuineness of the statements of witnesses entered in Police diaries, and unless the statements are duly proved the evidence given in Court cannot be contradicted by them. [p. 514, col. 1.]

The statement of a Sub-Inspector as to what the witnesses told him during the course of the investigation is inadmissible in evidence under s. 162 (1) of the Cr. P. C. [*ibid.*]

Where several persons are charged with the commission of an offence and some of them are acquitted not on the ground that their innocence is proved but on the ground that the case against them is not free from doubt, it cannot be argued that the remaining accused have been falsely implicated. [p. 513, col. 2.]

Criminal appeal from an order of the Sessions Judge, Lahore, dated the 30th May 1924.

Mr. *D. N. Mehra*, for the Appellant.

Kunwar *Dalip Singh*, for the Opposite Party.

JUDGMENT.—On the night of the 26th-27th May 1923 a dacoity was committed at the houses of Makhan Singh and his brothers, Wadhawa Singh and Mangal Singh at *Chak* 66 in the Lahore District. The dacoits, who were armed with guns and *chhavis*, murdered four persons in the commission of the dacoity and set Makhan Singh's and Wadhawa Singh's houses on fire. The victims were Gil Jats and the crime is said to have been committed by Randhawa Jats of the same village, who had enmity with the former. Six persons were tried by the learned Sessions Judge, who acquitted all except the appellant Labh Singh, whom he sentenced to death for the offences under s. 302, Indian Penal Code, and to ten years' imprisonment for each of the offences under ss. 395 and 436. We note that the learned Judge has remarked that it is not necessary to come to a definite finding that the number of persons concerned in the crime was five or more. This is obviously wrong so far as the offence under s. 395, Indian Penal Code, is concerned, which can be committed only if the number of persons concerned in the robbery is not less than five. We may also point out that it would have been proper to charge the accused persons with an offence under s. 396, Indian Penal Code, rather than with the two offences of murder and dacoity separately.

Labh Singh was at the time of the occurrence an absconder in certain cases. About a year before Makhan Singh's son Kundan Singh and Wadhawa Singh's son Sunder Singh had informed the Police that he was in the village. He was not, however, arrested, and it is alleged that the dacoity now in question was committed principally on account of Kundan Singh and Sundar Singh having informed against Labh Singh.

Labh Singh was named as one of the dacoits in the report made by Wadhawa Singh at the *thana* very shortly after the dacoity, and Wadhawa Singh and a large number of other persons, either inmates of the houses raided by the dacoits or near neighbours, have deposed that Labh Singh took part in the dacoity. There are two witneses, namely, Nihal Kaur (wife of Sunder Singh) and a girl named Sammon, who did not identify Labh Singh at a parade held after his arrest, but even if their evidence be eliminated there are the statements of eleven other witnesses who state that they identified Labh Singh, and that he was armed with a gun and took a conspicuous part in the affair. He is mentioned in particular as one of three men who went on to the roof of Kundan Singh's house and started firing from there.

There is no doubt enmity between the two parties of Jats, but we do not think that its existence is a sufficient reason for rejecting the mass of evidence which the prosecution has produced. Nor can it be argued that Labh Singh has been falsely accused from the mere fact that the persons who were tried along with him have been acquitted, for they were acquitted not on the ground that their innocence was proved, but on the ground that the case against them was not free from doubt.

Counsel for the appellant has laid stress

on the finding of the learned Sessions Judge that some of the prosecution witnesses implicated one Fauja Singh in their statements to the Police, although Fauja Singh was in fact in the lock-up at Pattoke at the time of the dacoity. It is, however, not proved by legal evidence that the witnesses did name Fauja Singh as one of the dacoits in their statements to the Police. The Sub-Inspector says they named him, but his statement as to what they said is inadmissible in evidence under s. 162 (1) of the present Cr. P. C., which differs materially from the same section of the old Code. The present section lays down that no statement made by any person to a Police Officer in the course of an investigation or any record thereof, can (save as hereinafter provided) be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. The proviso says that when any witness is called for the prosecution in such inquiry or trial, whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and direct that the accused be furnished with a copy thereof in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by s. 145 of the Indian Evidence Act. Although the Sub-Inspector has deposed to having recorded the statements of the various witnesses, he has not said that the statements of which copies have been placed on the record are those which he recorded. There is no presumption as to the genuineness of the statements of witnesses entered in the Police diaries, and unless they are duly proved the evidence given in Court cannot be contradicted by them.

After a careful consideration of the evidence we see no good reason for disbelieving the statements of the prosecution witnesses as to Labh Singh having taken part in the dacoity.

We dismiss his appeal confirming the sentence of death.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

JURY CASE No. 2 OF 1925.

March 17, 1925.

Present:—Mr. Daniels, J. C.

EMPEROR—COMPLAINANT

versus

RAM AVADH *alias* AVADH RAM AND OTHERS—ACCUSED.

Evidence Act (I of 1872), s. 24—Confession made to Pleader's clerk—Inducement—Confession, validity of.

An inducement offered by a Pleader's clerk to an accused person to obtain a confession does not invalidate the confession inasmuch as the clerk is not a person in authority with reference to the charge. [p. 515, col. 1.]

Reference made by the Sessions Judge, Fyzabad, on the 19th February 1925.

The Government Pleader, for the Crown.

ORDER.—This is a Reference by the learned Sessions Judge of Fyzabad under s. 307, Cr. P. C. Six persons were placed on trial before a Jury on a charge under s. 395 read with s. 397. The Jury acquitted them all. The learned Sessions Judge has accepted the verdict as regards five but considers the case against Ram Awadh so clear that he has made this reference, though he considers that the charge falls under s. 460 and not under s. 395. As the punishment for either offence may extend to transportation for life, it is not of much consequence under which the accused is convicted. The complainant Ram Narain is a Pleader of Fyzabad. His house was broken into by a number of men on the night of September 29th. His two brothers, Gokul Prasad and Baldeo Narain, were also in the house. Gokul Prasad's wife, *Musammat* Sampata, felt the accused trying to snatch away her necklet and raised an alarm. She recognised him as he had previously been employed as a coolie on some repairs to the house. Gokul Prasad tried to catch him and was dragged with him out of the room when others of the thieves attacked Gokul Prasad and broke his leg. After the dacoity was over Ram Narain went to the *thana* and made a report in which he named Ram Awadh on the information given him by his sister-in-law. Ram Narain does not profess to have recognised the accused himself but his presence in the dacoity is sworn to by Gokul Prasad, Baldeo Narain and *Musammat* Sampata. It appears also that before the Police arrived on the scene the members of complain-

ant's family had got hold of the accused and brought him back to the house and in the presence of Pandit Bhagirati, clerk to Mr. Speirs, Vakil, he admitted taking part in the dacoity and showed the bars by breaking which the thieves had effected their entrance. Pandit Bhagirathi says that the accused probably made his confession thinking that the witness would help him to escape the consequences. He denies offering any direct inducement but even if such inducement were offered it would not invalidate the confession because the witness is not a person in authority with reference to the charge. Accused also afterwards made a confession before a Magistrate. When the accused was first put up to make a confession the Magistrate by mistake examined him as a witness. This was on 29th September. The mistake was discovered, and on 2nd October the accused's confession was recorded after he had been carefully cautioned that what he said would be used against him. Before the Committing Magistrate and at his trial accused denied the charge and said that he had been accused because he had a dispute with Gokul Prasad about his wages. He called no defence. The case against Ram Awadh is perfectly clear and it is difficult to see how the Jury can have acquitted him, unless as the learned Judge suggests they were unable to differentiate between his case and that of the other accused. I accept the Reference and convicting the accused under s. 460, Indian Penal Code, sentence him to seven years' rigorous imprisonment.

Z. K. *Reference accepted.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 190 OF 1924.

July 23, 1924.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Mukerji.

SATYA CHARAN MANNA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 297—Evidence Act (I of 1872), s. 114, Ills. (a), (b)—*Trial by Jury—Charge to Jury—Accomplice—Corroboration—Possession of stolen goods—Presumption—Misdirection—Criminal case—Burden of proof.*

In a criminal case the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused, and that onus never changes. [p. 516, col. 2.]

Before a presumption can arise under Illustration (*a*) of s. 114 of the Evidence Act, it must be proved that the goods found in the possession of the accused have been stolen. No such presumption will arise in a case where it may reasonably be presumed that the property in question is stolen property. [*ibid.*]

Where in a trial by Jury in respect of an offence of dacoity a witness is examined on behalf of the prosecution with regard to whom the case of the prosecution is that he was himself probably concerned in the dacoity, the Jury must be directed not to accept the evidence of the witness without the most careful scrutiny. Such a witness may not actually be an accomplice but he is little better than an accomplice witness. Failure to direct the Jury in this behalf amounts to a serious misdirection. [p. 517, col. 1.]

In a case of dacoity the Judge in explaining Illustration (*a*) to s. 114 of the Evidence Act gave the Jury the following directions:—"The Court may presume that a man who is in possession of stolen goods, soon after the theft, is either the thief or has received the goods knowing them to be stolen. When it is proved, or may be reasonably presumed, that the property in question is stolen property, the burden of proof is shifted, and the possessor is bound to show that he came by it honestly, and if he fails to do so the presumption is that he is the thief or the receiver according to circumstances. I have already referred to the defence of these two accused. If the gentlemen of the Jury find that the accused have failed to account for their possession, then they may presume that the accused came by them dishonestly:"

Held, that the direction amounted to a serious misdirection inasmuch as

(*a*) no presumption could arise under Illustration (*a*) to s. 114 of the Evidence Act with regard to property which could be merely presumed to have been stolen; [p. 516, col. 2.]

(*b*) the burden of proof was throughout on the prosecution and could not be shifted; [*ibid.*]

(*c*) the Jury were not properly directed that it was their duty to weigh all the circumstances of the case, consider the accused's explanation and then decide whether or not they should make the presumption laid down in the Illustration to the section. [*ibid.*]

Criminal appeal against an order of the Officiating Sessions Judge, Hooghly, dated the 15th February 1924.

Messrs. *Monnier* and *Debendra Nath Kumar*, for the Appellant.

Mr. *N. C. Chatterjee* and Babu *Syama Prasad Mukerjee*, for the Crown.

JUDGMENT.—The two appellants before us and one other accused, Jahar Bhumij, were tried before the Sessions Judge of Hooghly and a Jury on charges of having committed dacoity in the house of Balaram Mukerji, on the 12th August last, and the two appellants were also charged under s. 412 with having dishonestly received and retained stolen property which they knew

and had reason to believe to have been transferred by the commission of dacoity. The Jury found Jahar not guilty by a majority of three to two. They unanimously found the two appellants not guilty of dacoity, and by a majority of three to two found both of them guilty under s 412 of the Penal Code. Under this section the appellants were sentenced to three years' rigorous imprisonment.

For the prosecution evidence has been given that the dacoity was committed on the 12th August last, at about 3 A. M., in the house of Balaram in Bhastara. The evidence in support of the charges on which the appellants have been convicted is to the effect that in the possession of each of them was found an article that was stolen by the dacoits. The houses of these two appellants were searched on the 6th September 1923. In the house of Jatindra Nath Bag a glass chimney was found, which has been identified by Ashutosh Mukerji, P. W. No. 7, as his property. In the house of the appellant, Satya Charan Manna, a gold-ring was found, which has been identified by the witness Rahamani Debi, P. W. No. 3, as an article pledged with her by Sindhu Dulani about three years previously.

Several points have been urged at the hearing of this appeal, but the point with which we are most impressed is that there has been serious misdirection as to the nature of the presumption arising from the possession of these articles. The learned Sessions Judge has, we hold, seriously misdirected the Jury on this point. In explaining Illustration (*a*) to s. 114 of the Evidence Act he has given the Jury the following direction :—" The Court may presume that a man who is in possession of stolen goods, soon after the theft; is either the thief or has received the goods knowing them to be stolen. When it is proved, or may be reasonably presumed, that the property in question is stolen property, the burden of proof is shifted, and the possessor is bound to show that he came by it honestly, and if he fails to do so the presumption is that he is the thief or the receiver according to circumstances. I have already referred to the defence of these two accused. If the gentlemen of the Jury find that the accused have failed to account for their possession, then they may presume that the accused Jatin Bag has come by Ex. XI, chimney, dishonestly, and that Satya Manna has come by Ex. IX, gold ring, dishonestly."

The objections to this description of the law are, firstly, that before a presumption under this section can arise, it must be proved that the goods found in the possession of the accused have been stolen. No such presumption will arise in a case where it may reasonably be presumed that the property in question is stolen property. But the more serious objection is that the Jury were told that the burden of proof was shifted. In this connection we may refer to the case of *Hathim Mondal* v. *Emperor* (1) in which the learned Chief Justice pointed out that in a criminal case the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused. That onus never changes. Reference was then made to the judgment of the Lord Chief Justice of England in the case of *Reg.* v. *Isaac Schama* (2) and the remarks there made are fully applicable to the present case. That the law in India is similar to the law in England in this case is clear from the words used in Illustration (*a*) to s. 114, "may be presumed" and from the definition of those words given in s. 4 of the Evidence Act. The error of the learned Sessions Judge is not confined to his remarks in this particular passage. Reading his charge as a whole, it is evident that it must have left an impression in the minds of the Jury that if they found that these two articles were properly identified, as having been the properties which were stolen at the time of the dacoity, and were found in the appellants' possession, they were bound to presume the appellants' guilt. The Jury were not properly directed that it was their duty to weigh all the circumstances of the case, consider the accused's explanation and then decide whether or not they should make such a presumption. We, therefore, hold that this was a serious misdirection, which has in fact caused a miscarriage of justice. Our attention has been drawn to certain points in the evidence in favour of the appellants, on the question of identification to which the attention of the Jury was not drawn. We do not think that in this respect there was serious misdirection. On the whole

(1) 56 Ind Cas. 849 24 C. W. N. 619; 31 C. L. J. 310; 21 Cr. L. J. 545.

(2) (1914) 11 Cr. App. R. 45; 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 59 S. J. 288; 81 T. L. R. 88.

the evidence has been fairly put to the Jury, and, though every point in the appellant's favour has not been put to them, these are matters of non-direction which would not justify our reversing the finding of the Jury.

In the case of the appellant, Jatindra Bag, there has been serious misdirection on another point. The principal witness against him is the witness Ashutosh Mukerji. He was, it appears, suspected of having himself either taken part in, or instigated, the actual dacoity. He was in fact arrested, though he was never sent up for trial. But at the trial it was a case for the Crown, as argued by the Public Prosecutor, that this witness was probably concerned in the dacoity. This being so, the Jury should have been directed not to accept his evidence without the most careful scrutiny. He may not actually have been accomplice, but he was little better than an accomplice witness. It would have been dangerous to have accepted his evidence without corroboration. Though there is corroboration as to the identity of the chimney, there is none as to the fact that the chimney was actually in the room from which it was alleged to have been taken by the dacoits. On the other hand, it has been shown to us that there is evidence contradicting Ashu's statement that it was in this room. It is not necessary to deal with the other points that have been argued on this appeal.

For the reasons we have given we must hold that the trial was vitiated by serious misdirection. Having regard to the nature of the evidence, and more particularly to the fact that the verdict convicting the appellants was by a bare majority of one, we do not think that it is necessary or desirable that there should be a re-trial.

We accordingly allow this appeal. We set aside the conviction and sentence passed on the appellants and acquit them. The appellant who is in Jail should be released at once, and the appellant who is on bail should now be discharged from his bail bond.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 83 OF 1925.

April 7, 1925.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

EMPEROR—APPELLANT

versus

KRISHNA KANT—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 197—Penal Code (Act XLV of 1860), ss. 169, 403—Cattle Trespass Act (I of 1871), s. 14—U. P. District Boards Act (X of 1922), ss. 31, 89—Sale of impounded cattle—Member of District Board directed to hold sale—Purchase by such member—Member, whether public servant not removeable from office except by Local Government—Prosecution Sanction of Local Government, whether necessary.

A member of a District Board appointed by the Board as an officer for the purpose of holding a sale by auction of cattle impounded under the Cattle Trespass Act is a public servant who by virtue of the provisions of s. 31 of the U. P. District Boards Act is not removeable from his office save by or with the sanction of the Local Government within the meaning of s. 197 of the Cr. P. C. If such an officer proceeds to purchase the cattle himself through a servant, the offence committed by him is committed in the discharge of his official duty, and he cannot be prosecuted in respect of such offence except with the sanction of the Local Government under s. 197 of the Cr. P. C. [p. 518, col. 1.]

Appeal, under s. 417, Cr. P. C., by the Local Government against an order of acquittal passed by the Sessions Judge, Rai Bareli, dated the 8th December 1924.

The Government Pleader, for the Appellant.

Messrs. *A. F. Bahadurji* and *G. H. Thomas*, for the Accused.

JUDGMENT.—This is an appeal by the Crown under s. 417 of the Cr. P. C. against the order of acquittal of the respondent dated 8th December 1924 passed by the learned Sessions Judge of Rae Bareli.

The Trial Court convicted the respondent under ss. 169 and 403 of the Indian Penal Code. Under each section he was sentenced to one month's rigorous imprisonment and to a fine of Rs. 50. The sentences of imprisoment were directed to run concurrently. From the order of the Trial Court the respondent preferred an appeal to the Court of the Sessions Judge of Rae Bareli with the result that the appeal was allowed and the convictions and the sentences were set aside as already stated.

The ground on which the decision of the Court below is based is that the Court is debarred from taking cognizance of the

offence without the previous sanction of the Local Government under s. 197 of the Cr. P. C., 1898, and it is admitted that there is no such sanction in existence. The validity of this ground is challenged in appeal before us.

We are, however, of opinion that the decision of the learned Judge is right and should be maintained. The question for decision is whether the respondent is a "public servant who is not removeable from his office save by or with the sanction of the Local Government" and whether the "offence alleged to have been committed by him" was committed "while acting or purporting to act in the discharge of his duty." (Section 197 of the Cr. P. C., 1898).

The respondent is a member of the Rae Bareli District Board. The charge of which he has been convicted is in effect that he was appointed by that Board to be an officer for the purpose of holding a sale by auction of one she-buffalo on the 18th August 1924 and that he himself purchased the buffalo in the name of a servant of his.

The sale contemplated by the charge was one held under the provisions of s. 14 of the Cattle Trespass Act, 1871. Under that section the officer-in-charge of the nearest Police Station or such other officer as the Magistrate of the District appoints in this behalf is authorized to sell by public auction, after the observance of certain preliminaries, the impounded cattle. The authority thus conferred on the Magistrate of the District was delegated to the District Board by a Government Notification in the year 1899. The District Board could, therefore, appoint an officer for the purpose of carrying out the sale contemplated by s. 14 of the Cattle Trespass Act.

It is admitted that the respondent was appointed such an officer by the District Board of Rae Bareli. It is manifest that he was so appointed because he was a member of the District Board. Under s. 89 of the U. P. District Boards Act, 1922, every officer of the Board shall be deemed to be a public servant within the meaning of the Indian Penal Code. The reasoning which we adopt, therefore, is that the respondent was an "officer" because he was a member of the Board and he was a public servant because he was an officer. It follows that he was a public servant because he was a member of the Board. It is admitted and it is provided by s. 31 of the U. P. District Boards Act, 1922, that a member can be removed from a Board by the Local Government alone. The first condition of s. 197 of the Cr. P. C. is, therefore, satisfied in the present case. As to the second condition the authority under which the respondent held and concluded the sale was clearly derived by him under the provisions of s. 14 of the Cattle Trespass Act already referred to. The closing of the sale was, therefore, an act done by the respondent in the discharge of his official duty and the fact that he closed it in the name of his servant for his own benefit is the essence of the offence with which he was charged. On these grounds we dismiss the appeal.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1335 OF 1924.

January 5, 1925.

Present:—Mr. Justice Campbell.

PHUMAN SINGH AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 256, 537—Further cross-examination of prosecution witnesses—Opportunity to accused to make up his mind, refusal of—Reasons not recorded—Irregularity—Prejudice.

By s. 256 of the Cr. P. C. the Legislature has conferred upon an accused person the privilege that ordinarily, after being charged with an offence, he shall have a period of not less than 24 hours to consider the method in which he will meet the charge, and if the Magistrate trying the accused person, without assigning any reason for departing from the normal procedure and probably because he overlooks or is unaware of the change in the law, does not allow that privilege to the accused, it is difficult to say that the accused has not been prejudiced. [p. 519, col. 2.]

Where an accused person is not defended by Counsel he is more in need of the privilege designed by the Legislature to be granted ordinarily to all accused persons than he would be if his case were in the hands of a Pleader. [*ibid.*]

Criminal revision from an order of the District Magistrate, Ferozepore, dated the 4th August 1924.

Dr. *Nand Lal*, for the Petitioners.

JUDGMENT.—Section 256 (1) of the Cr. P. C. as amended by Act XVIII of 1923 commences as follows:—

"If the accused refuses to plead, or does

not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken."

The present petitioners were accused persons before Sheikh Aizad Bakhsh, Honorary Magistrate, Second Class, Ferozepore District. On the 26th of May they were charged with an offence under s. 323, Indian Penal Code, and on that day they were called upon both to plead to the charge and to state whether they wished to cross-examine any of the prosecution witnesses. The learned Honorary Magistrate did not record any reasons for putting the second question forthwith instead of at the commencement of the next hearing of the case, and the answer given by the accused was in the negative. The next hearing of the case was fixed for 11th of June, but the Magistrate was absent on that day. On the next date, on 20th of June, there is no record of any other question being put to the accused regarding cross-examination of the prosecution witnesses nor is there any record of their having made any representation about such cross-examination. Three witnesses for the defence were examined on that day and judgment was delivered.

The accused were convicted and they appealed to the District Magistrate, one of their grounds being that s. 256 had not been complied with. The learned District Magistrate held that in the circumstances this was not such a mistake as to occasion any failure of justice and applying s. 537 of the Code repelled the plea. The appeal was dismissed, and the convicted persons have come to this Court on revision.

The provision that the accused should be asked whether they wished to re-cross-examine the prosecution witnesses on a date subsequent to that upon which they are called to plead to the charge is a new provision deliberately introduced into the Code by Act XXVIII of 1923, and the only possible reason for the change that I can think of is that the Legislature intended to give accused persons against whom charges are framed an interval of time to think out the lines of their defence before they are called upon to inform the Court how they intend to proceed. I am not prepared to accept this argument of the learned Advocate of the petitioners that s. 537 of the Code could in no circumstances be applied to a case where a Magistrate has infringed the provisions of s. 256. It is a favourite contention put before Appellate Courts that such and such an action or omission by a Court of first instance is not a mere irregularity curable under s. 537, but is an illegality which vitiates the whole proceedings because a mandatory provision of the Code has been contravened. By its terms, however, s. 537 covers irregularities in proceedings during a trial, and every step to be taken in such proceedings is so exhaustively prescribed by mandatory sections of the Cr. P. C. that it would be difficult to imagine any irregularity which would not be an infringement of one of such sections. Almost the most conspicuous illegality which a Magistrate could commit in the trial of a warrant case would be to omit to frame a charge; yet s. 535 declares that the final finding or sentence shall not be deemed invalid merely by reason of such an omission.

Nevertheless if the Legislature has conferred upon an accused person the privilege that ordinarily after being charged with an offence, he shall have a period of not less than twenty-four hours to consider the method in which he will meet the charge, it is difficult to say that he has not been prejudiced if the Magistrate, without assigning any reason for departing from the normal procedure and probably because he overlooked or was unaware of the recent change in the law, has not allowed him that privilege. In the present case it is true that the accused told the Magistrate on the day on which the charge was framed that they did not wish to cross-examine the prosecution witnesses again, and that they did not on the next and final hearing apply for an opportunity to do so, but on the other hand they were not represented by Counsel, and it can be argued with a fair show of reason that in such circumstances an accused person is more in need of the privilege designed by the Legislature to be granted ordinarily to all accused persons than he would be if his case were in the hands of a Pleader.

The cross-examination of the prosecution witnesses before the charge was framed was very meagre and the learned Counsel for the petitioners had detailed several questions which he says his client

would have put to the witnesses after the charge had been framed if they had been given the proper opportunity provided by law for doing so. I accept this petition, to oppose which there has been no appearance on behalf of the Crown, and I set aside all proceedings subsequent to the framing of the charge. The Magistrate must recommence the trial as being held on the next day of hearing after the date of the charge, and, when he has secured the presence before him of the petitioners, he should ask them whether they wish to cross-examine again any of the witnesses for the prosecution and, if they say that they do, he should proceed in accordance with s. 256, bearing in mind that the accused are not to be called upon to enter upon their defence and produce their evidence until after such cross-examination of the prosecution witnesses, if any, and after they have been given an opportunity under s. 312 of explaining anything further that may be elicited from the prosecution witnesses in the second cross-examination. In the meantime the fines imposed upon the petitioners, if paid, must be refunded.

Z. K. *Petition accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 134, 135 AND 136 OF 1925.

April 15, 1925.

Present:—Mr. Dalal, J. C.

HAR PRASAD SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 304, 323—Cattle trespass—Beating given to owners of cattle—Intention to cause death or grievous hurt, absence of—Chance blow by one accused resulting in death of person assaulted—Liability of other accused—Culpable homicide—Hurt.

The party of the accused, into whose field cattle belonging to the party of the complainants had trespassed, beat some of the owners of the cattle with the intention of chastising them. There was no intention to cause death or grievous hurt but one of the owners of the cattle was hit by one of the accused on the temple and died as a result of the injury:

Held, (1) that the particular accused who hit the deceased on the temple with a *lathi* must be taken to have intended to cause such hurt as would in the ordinary course of nature cause death and that he was consequently guilty of an offence under s. 304 of the Penal Code;

(2) that the other accused could not be held liable for the blow which had caused the death of the deceased and that they were, therefore, only guilty of an offence under s. 323 of the Penal Code.

Appeal against an order of the Additional Sessions Judge, Gonda, dated the 16th February 1925.

St. *G. Jackson*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—These are three appeals by Har Prasad Thakur and Hanuman and Avadh Behari Brahmans from their convictions under s. 304 read with s. 149, Indian Penal Code. The appeal of Har Prasad was argued by Mr. St. George Jackson. In his case at the worst the charge can be only one of hurt and the matter is soon disposed of. There was the usual quarrel and fight over cattle trespass and the party of Sangam Chamar in whose field trespass was committed appears to have disposed of the party of the owners of the cattle as the supporters of the owners came up one by one. It is said that when Ram Adhin deceased came up Har Prasad caught his hands and Hanuman, Avadh Behari, Sangam and Ram Das hit him with *lathis*. There is no allegation whatever made that there was any intention on the part of Sangam's partisans of causing the death of or grievous injury to the owners of the cattle. The desire appears to be to chastise the owners of the cattle which caused damage. Har Prasad must have expected that simple injuries would be caused and he could not be held liable for one of his party hitting a blow on the temple and causing Ram Adhin's death. I alter the conviction of Har Prasad to one under s. 323, Indian Penal Code, reduce the sentence to the amount undergone by him up to the present and direct him to be released at once.

As regards Hanuman he was mentioned in the two reports one made by Dalganjan cousin of Ram Adhin and the other by Partap another cousin of Ram Adhin. All the assessors agreed in holding him guilty. It is clear that in their opinion he gave the blow on the temple. It is true that his intention was not to cause death or grievous hurt but when he hit on the temple with a *lathi* he intended to cause such hurt as would in the ordinary course

of nature cause death. In my opinion he was rightly convicted under s. 304 and I dismiss his appeal.

As to Avadh Behari one assessor held him to be guilty while the other three held him to be not guilty. The medical evidence shows that besides the fatal injury there were contusions on the right and left shoulder, an abrasion on the left shoulder and a cut wound on the left little finger. Those are all simple injuries. I alter the conviction of Avadh Behari to one under s. 323 and reduce the sentence to rigorous imprisonment for six months.

Z. K. *Conviction altered.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 621 OF 1924.
(CRIMINAL REVISION PETITION No. 521 OF 1924).
March 6, 1925.
Present:—Mr. Justice Devadoss.
MUNIGADU—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Madras Panchayat Courts Act (II of 1920), s. 76—Penal Code (Act XLV of 1860), s. 426—Conviction by Panchayat—Mischief—Value of property damaged not mentioned in judgment—Interference by High Court—Revision—Criminal Procedure Code (Act V of 1898), ss. 435, 439—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107.

The provisions of the Cr. P. C. are not made applicable to Panchayat Courts under the Madras Panchayat Courts Act. The High Court cannot, therefore, interfere with an order of a Panchayat Court under ss. 435 and 439 of the Code. But under s. 107 of the Government of India Act, the High Court has powers of supervision over all Criminal and Civil Courts in the Presidency and when a grave error of a Panchayat Court, which is not governed by the provisions of the Cr. P. C., appears on the face of the record, the powers given by s. 107 of the Government of India Act could be invoked to correct such error.

Under s. 76 of the Madras Panchayat Courts Act a Panchayat Court is empowered to try, among other offences, one under s. 426, Penal Code, when the loss or damage caused thereby does not exceed Rs. 10, and under the same section, the Court is bound to mention the amount of loss or damage caused by mischief.

Where the judgment of a Panchayat Court convicting a person of an offence under s. 426 of the Penal Code, does not mention the value of the amount of loss or damage by mischief alleged to have been caused by the accused, the judgment is liable to be set aside by the High Court in the exercise of its powers of superintendence under s. 107 of the Government of India Act.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Panchayat of Gonuguru (North Arcot District), in C. C. No. 12 of 1924, dated the 5th May 1925.

Mr. *B Somayya*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to revise the order of the Panchayat Court, convicting the petitioner and sentencing him to pay a fine of Rs. 2. The contention of Mr. Somayya for the petitioner is, that the jurisdiction of the Panchayat Court depends upon the amount of loss or damage caused by mischief. If the loss or damage exceeds Rs. 10, that Court would have no jurisdiction. Under s. 76 of the Madras Act II of 1920 a Panchayat Court is empowered to try among other offences, one under s. 426, Indian Penal Code when the loss or damage caused thereby does not exceed Rs. 10 and under the same section, the Court is bound to mention the amount of loss or damage caused by mischief. In this case, there is no mention of the value of the amount of loss or damage by mischief, alleged to have been committed by the petitioner. The Public Prosecutor contends that the provisions of the Cr. P. C. ought not to be made applicable in revising the proceedings before the Panchayat Court. No doubt the provisions of the Cr. P. C. are not made applicable to Panchayat Courts. I do not think the High Court can interfere with the order of the Panchayat Court under ss. 435 and 439 of the Code. But under s. 107 of the Government of India Act, the High Court has powers of supervision over all Criminal and Civil Courts in the Presidency and when a grave error of a Panchayat Court which is not governed by the provisions of the Cr. P. C. appears on the face of the record the powers given by s. 107 of the Government of India Act could be invoked to correct such error. In this case, as the value of the loss or damage caused by mischief affects the jurisdiction of the Court, I think, the High Court ought to interfere for the purpose of correcting the error committed by the Panchayat Court. As no Vakil is allowed to appear in the Panchayat Court, this point was not specifically raised in that Court. I think that is one of the reasons for the High Court not hesitating to correct the errors of Panchayat Courts;

otherwise the Panchayat Courts might convict persons or pass orders in a way not sanctioned by the law. I set aside the conviction and direct the Panchayat Court to re-try the case having regard to the remarks made in this judgment

Z. K. *Conviction set aside.*

PATNA HIGH COURT,

CRIMINAL REVISION No. 477 OF 1924.

November 5, 1924.

Present:—Mr. Justice Foster.

MEWA LAL JHA—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 122—"Unlawful entry," what is—Intending passenger entering platform without ticket—Offence—Interpretation of Statutes—Penal provision in special Statute.

Unless a person has made an "unlawful" entry upon Railway premises he cannot be brought within the provision of s. 122 (2) of the Railways Act. [p. 522, col. 2.]

The word "unlawful" in s. 122 of the Railways Act means contrary to the law laid down in the Act. [*ibid.*]

An intending passenger who enters upon a Railway platform in anticipation of purchasing a ticket, enters lawfully upon the platform. If the Railway staff, however, orders him to leave the platform, his refusal to do so would possibly make him a trespasser, and he could be expelled by force, but he cannot be held to have committed an offence under s. 122 of the Railways Act. [p. 523, col. 2.]

A penal provision in a Statute which is of a special nature and not a penal Statute in itself, should be interpreted with great caution. [p. 522, col. 2.]

Criminal revision from an order of the Sessions Judge, Bhagalpur, affirming a decision of the Deputy Magistrate, Bhagalpur, dated the 20th May 1924.

Messrs. *Sambhu Saran* and *B. P. Singh*, for the Petitioner.

JUDGMENT.—The petitioner has been convicted under s. 122 (2) of the Indian Railways Act (IX of 1890) in the following circumstances. On the 28th March last the petitioner entered upon the platfrom of the Bhagalpur Railway Station when the 9 Up Passenger was about to arrive. The Ticket Collector went up to the petitioner and asked to see his ticket, but the petitioner had no ticket to show. The Ticket Collector is at disagreement with the petitioner in his account of what happened after this; the former saying that the petitioner admitted that he had no ticket and had also no intention of travelling on the Railway, whereas the petitioner states that he told the Ticket Collector that he was going to Nathnagar and that his ticket was being purchased for him. The Ticket Collector also deposes that he told the petitioner to get a platform ticket, but the petitioner refused. Thereupon the Ticket Collector told the petitioner to leave the platfrom and when the petitioner refused, the Ticket Collector informed the District Inspector who had come up. The petitioner refused to obey the Inspector's order to leave the platform. On these facts the prosecution has been instituted. The petitioner's case is that he had entered on the platform with the intention of travelling to Nathnagar and that a fellow traveller was at that moment securing his ticket, and the ticket was in fact brought to him by his companion at the time when the Inspector was speaking to him.

The section under which the petitioner has been convicted reads as follows:

"122 (1) If a person unlawfully enters upon a Railway, he shall be punished with fine which may extend to Rs. 20.

2. If a person so entering refuses to leave the Railway on being requested to do so by any Railway servant, or by any other person on behalf of the Railway Administration, he shall be punished with fine which may extend to Rs. 50, and may be removed from the Railway by such servant or other person."

It is manifest that the most important words in this section are the words "unlawfully enters," for unless and until a person has made an unlawful entry upon the Railway premises he cannot be brought within this penal provision. It appears to me that a provision in a Statute which is of a special nature and not a penal Statute in itself should be interpreted with great caution and that the most reasonable construction to be put on any such general term as "unlawful" would be with reference to the general provisions of the Statute. In other words, I am inclined to take the word "unlawful" to mean "contrary to the law laid down in the Statute." Now, there is one form of unlawful entry for which a special punishment is provided in s. 112 read with s. 68 of the Act, namely, entry upon a Railway carriage without the permission of a Railway servant and without a proper pass or ticket, for the pur-

pose of travelling thereon as a passenger. Another form of entry made unlawful under the Act might be such as is made in contravention of the rules and bye-laws promulgated under s. 47 (1) of the Act. If the Railway made a general rule under the Act that nobody should enter upon Railway platforms except passengers with tickets, no doubt any other persons entering upon the platform might be guilty of unlawful entry. The learned Vakil who has appeared for the petitioner has put before me a rule of the East Indian Railway which reads as follows:—"84, Platform Tickets. As a rule passengers only are admitted to the station platform but Station Masters have discretion to admit a limited number of persons who are not passengers. At the following stations platform tickets are issued on payment of one anna each and these may be had on application to the booking clerk—Howrah, Allahabad, Jubbulpore, Cawnpore and Delhi".

A third form of unlawful entry which occurs to me is where the Railway Station Master or some subordinate of his closes the platform gate or excludes passage through the gates of passengers who have not tickets. A person entering in resistance of such exclusion would no doubt make an unlawful entry upon Railway premises. But there are numerous cases where entry upon the platform can be perfectly lawful. If the Station Master leaves the platform gate open, those who enter upon the platform can hardly be considered to be other than licensees. It is absurd to think of them as trespassers. No doubt a person who enters in this manner may be quite lawfully ordered to leave the Railway premises, but the point is that he has not entered unlawfully and he can never be brought within the mischief of s. 122 of the Railways Act. As was pointed out by the learned Vakil, it may happen that an intending passenger proceeds on to the platform, leaving a man to obtain his ticket. The Trial Court has made an error in law in two respects; in the first place there is no finding that the entry upon the platform was unlawful within the meaning of the Act. In the second place the learned Magistrate goes so far as to say—"even granting that the accused was an intending passenger he should not have entered on the platform without taking a ticket and when found without a ticket he had no right to remain on the platform when he was asked by the Railway servant to leave it". I am not disputing the second part of this sentence. But his statement amounts to this, that an intending passenger entering upon a Railway platform makes an unlawful entry unless he has a ticket in his possession. My opinion is the exact contrary. He enters lawfully, but if the Railway staff orders him to leave, and he has no ticket, his refusal to go would possibly make him a trespasser and he could be expelled by force. But as I have said before, he could not be made guilty under s. 122 of the Railways Act; both sub-sections require as a necessary preliminary that the person upon whom the penalty is imposed has entered unlawfully.

For these reasons I consider that the conviction is not in accordance with law. The Rule is made absolute. The conviction and sentence are set aside and the fine, if paid, shall be refunded.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1189 OF 1924.
December 10, 1924.
Present:—Justice Sir Shadi Lal, KT., Chief Justice.

JAWAHAR LAL—ACCUSED—PETITIONER
versus
JAGGU MAL—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute obtained before amendment of Code—Complaint instituted after coming into force of amended Code, whether can be entertained.

No prosecution in respect of an offence specified in s. 195 of the Cr. P. C. can, since the amendment of the Code, be instituted except on the complaint of the authority concerned, and a complaint made by a private individual in respect of an offence alleged to have been committed in or in relation to any proceeding in a Court must be dismissed if it is instituted after the first of September 1923, that is to say, the date on which the amended Code came into force. [p. 524, col. 2.]

Criminal revision from an order of the District Magistrate, Jullundur, dated the 19th May 1924.

Messrs. *Jai Gopal Sethi* and *Charan Singh*, for the Petitioner.

Mr. *Badri Das*, for the Respondent.

JUDGMENT.—The facts of this case,

so far as they are relevant to the question of law requiring determination, are simple and do not admit of any dispute. The respondent Jaggu Mal obtained, on the 11th of May 1923, sanction to prosecute the petitioner Jawahar Lal for perjury alleged to have been committed in relation to a judicial proceeding: but it was not until the 6th November 1923 that he preferred a complaint under s. 193, Indian Penal Code, on the strength of that sanction. In the meanwhile the Cr. P. C. Amendment Act, XVIII of 1923, had come into force on the 1st of September 1923, which repealed the law empowering a Court to grant sanction to a private individual to prosecute an offender in respect of an offence connected with the administration of justice. Section 195 of the Cr. P. C. as amended by the aforesaid Act, now lays down that no Court shall take cognizance of any offence punishable under any of the sections enumerated therein, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

The question arises whether a person, who had obtained sanction prior to the date of the enforcement of the Act, could lawfully institute after that date a complaint in respect of an offence covered by the sanction. Now, it is common ground that, apart from the sanction, such a complaint must be dismissed under the present law; and I do not think that the sanction which was not availed of before the enforcement of the Act, improves the position of the complainant. It is contended by the learned Vakil for the respondent that the sanction conferred upon his client a right which, in the absence of a provision to the contrary, remained unaffected by the new legislation and could be enforced in the same way as if the law had not been amended. It seems to me that the grant of sanction operated only to remove an obstacle which the law had placed in the way of a private individual desiring to start criminal proceedings in respect of certain offences, and was a matter affecting only the procedure of the Courts. Before the amendment of the Code the Courts were enjoined not to entertain a complaint by a private person in respect of any of the offences enumerated in s. 195, Cr. P. C., unless the complaint was accompanied with a sanction granted by the public servant or the Court concerned. The present law has abolished the method of starting criminal proceedings after obtaining sanction, and insists upon a complaint in writing being filed by the public servant or the presiding officer of the Court concerned.

I consider that the alteration made by the new enactment affects only the procedure to be adopted for setting the law in motion and does not deprive the respondent of any substantive right alleged to have been acquired by him under the old law. Though he himself cannot now make a complaint, he can still set the law in motion by asking the authority concerned to prefer a complaint. It is, however, clear that no prosecution in respect of the offences specified in s. 195, Cr. P. C., can now be instituted except on the complaint of the authority concerned, and that a complaint made by a private individual in respect of an offence alleged to have been committed in, or in relation to, any proceeding in a Court must be dismissed if it is instituted after the 1st of September 1923. Accordingly, I accept the application for revision and dismiss the complaint preferred by the respondent.

Z. K. *Revision allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 56 OF 1925.

May 13, 1925.

Present :—Mr. Simpson, A. J. C.

RAM DAYAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 420—Railways Act (IX of 1890), ss. 68, 112 (a)—Railway employee obtaining pass for relative—Pass handed over to stranger—Cheating—Travelling without ticket.

Accused who was a Railway employee obtained a free pass for his wife and mother and handed it over to a woman who was neither his wife nor his mother and the latter used the pass:

Held, that the accused was guilty of an offence under s. 420 of the Penal Code and not of an offence under s. 112 (*a*) of the Railways Act.

Revision against an order of the Fourth Additional Sessions Judge, Lucknow, dated the 16th March 1925, modifying that of the Magistrate, First Class, Lucknow, dated the 11th February 1925.

Mr. *R. F. Bahadurji*, for the Applicant.

The Government Pleader, for the Crown.

ORDER.—This is a criminal revision. The applicant was a shunting porter at Charbagh Station Lucknow. He applied for and obtained a free pass for his wife and mother. He handed over this pass to an other woman, who was neither his wife nor his mother, and she used it. He was convicted under s. 420, Indian Penal Code, and the Magistrate sentenced him to 9 months' rigorous imprisonment. On appeal the learned Sessions Judge reduced the sentence to one of 3 months' rigorous imprisonment. I am informed that the sentence has now been served out, so the revision has lost a great part of its importance. However, his Counsel says that a conviction under the Penal Code carries with it a stigma, which does not attach to a conviction under the Railways Act, and he maintains that his client ought to have been convicted, not under s. 420 but under s. 112 of the Railways Act. The matter has already been discussed by the learned Sessions Judge, and I agree with what he said. I am asked to record a conviction under s. 112 (*a*) which subjects to punishment a person who enters, in contravention of s. 68, any carriage on a Railway. Section 68 prohibits the entering of a carriage as a passenger unless with a proper pass or ticket. But the applicant is not charged with anything of this kind. He is charged with handing over the pass he obtained for his wife or mother to somebody who was not authorized to use it. The application is dismissed.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 960 OF 1924.

October 24, 1924.

Present:—Justice Sir Henry Scott-Smith, KT.

ABDUL GHAFUR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 211—False charge, what amounts to—Just or lawful grounds, absence of—Suspicion, whether amounts to charge.

In order to bring home a charge under s. 211 of the Penal Code the prosecution must establish that there were no just and lawful ground for the action taken and that the accused was aware of this.

Mathura Prasad v. *Emperor*, 42 Ind. Cas. 761; 39 A. 715; 15 A. L. J. 767; 18 Cr. L. J. 1017, referred to.

The mere communication of a suspicion to the Police does not amount to making a charge of a criminal offence within the meaning of s. 211 of the Penal Code.

Swaminatha Theran v. *Emperor*, 14 Ind. Cas. 767; (1912) M. W. N. 1125; 13 Cr. L. J. 303, relied on.

Criminal revision from an order of the Sessions Judge, Jhelum, dated the 11th June 1924.

Mr. *Muhammad Moneir*, for the Petitioner.

JUDGMENT.—The petitioner Abdul Ghafur made a report to the Police that his buffalo had been poisoned and that he suspected Ghulam Rasul and Abdul Rauf of having administered poison. The Police made an inquiry and some grains of wheat found in the *dung* of the buffalo were sent to the Chemical Examiner who reported that no poison had been detected in them. The Police reported that there was no case of poisoning and the charge was struck out. Ghulam Rasul then brought a complaint against Abdul Ghafur under s. 211 of the Indian Penal Code. The Magistrate convicted him and sentenced him to three months' rigorous imprisonment, and his appeal has been dismissed by the Sessions Judge. He has come up to this Court on the revision side.

It is contended on his behalf that no criminal proceedings were actually started against Ghulam Rasul and that the report made to the Police did not contain a definite charge to the effect that he had committed any offence but merely stated the reporter's suspicions. I have perused the evidence on the record. No attempt was made to prove that the facts stated by the petitioner to the Police upon which he based his suspicions were false. If they were true it is quite possible that he honestly suspected the persons named by him in his report. Counsel has referred to the case of *Mathura Prasad* v. *Emperor* (1). There the report made to the Police was as follows:—"I find there has been a theft: I suspect the persons named, and I want an inquiry to be made." Walsh, J., held that that report did not amount to a charge under s. 211 of the Indian Penal Code and that if it was false, then it was a false report under s. 182 of the Code. In order to bring home a charge under

(1) 42 Ind. Cas. 761; 39 A. 715; 15 A. L. J. 767; 18 Cr. L. J. 1017.

s. 211 the prosecution must establish that there are no just and lawful grounds for the action taken and that the accused knew this. Now, as already stated, it has not been proved that there was no just or lawful ground for the report which the petitioner made to the Police and that he knew this. The evidence merely shows that the Police reported that no case of poisoning had been made out, and there is also the evidence of the two persons reported against who state that their names had been taken out of enmity. In *Swaminatha Thevan* v. *Emperor* (2) it was held that the mere communication of a suspicion to the Police did not amount to a charge of a criminal offence. In the present case no criminal proceedings were instituted against any person and it cannot be said that any person was charged with having committed any offence.

I, therefore, allow the revision and setting aside the conviction and sentence acquit Abdul Ghafur and direct that he be released from his bail.

Z. K. *Revision allowed.*

(2) 14 Ind. Cas. 767; (1912) M. W. N. 1125; 13 Cr. L. J. 303.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 65 OF 1925.

April 29, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose.

ESERUDDI HOWALDAR AND OTHERS—SECOND PARTY—PETITIONERS

versus

OTARUDDI AKON AND OTHERS—FIRST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 438—Dispute relating to immoveable property—Order by Magistrate—District Magistrate, power of, to set aside order—Reference—Procedure.

A District Magistrate has no power to set aside an order made by a Magistrate under s. 145 of the Cr. P. C. If the District Magistrate is of opinion that the order is erroneous he should refer the matter to the High Court under s. 438 of the Code.

Babu *Suresh Chandra Taluqdar*, for the Petitioners.

Babu *Probodh Chandra Kar*, for the Opposite Party.

JUDGMENT.—We make this Rule absolute.

In the case proceedings were instituted under the provisions of s. 145 of the Cr. P. C.; and the Honorary Magistrate to whom the case was made over disposed of it in favour of the second party.

The first party then made an application to the Additional District Magistrate with the prayer that he should refer the case to this Court for setting aside the Trying Magistrate's order. The learned Additional District Magistrate, instead of referring the case to this Court set aside the decision of the lower Court and sent the case back with directions to the learned Magistrate to hear the evidence of both parties, and to try to determine the question of possession in accordance with law.

It is conceded by the learned Pleader, who appears on behalf of the first party, that this order cannot stand and that it ought to be set aside.

Accordingly, the Rule is made absolute and the order of the Additional District Magistrate passed on the 16th of December, 1924, setting aside the order of the Honorary Magistrate passed on the 15th of November, 1924, is set aside, with the result that the latter order the one passed by the Honorary Magistrate stands.

With regard to the death of Sonamuddi Bepari, opposite party No. 4, it took place after the order passed by the Honorary Magistrate: and, with regard to the application for substitution it is not necessary for us to pass any order.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

MISCELLANEOUS APPLICATION No. 606 OF 1924

IN

CIVIL APPEAL No. 2577 OF 1924.

December 7, 1924.

Present:—Mr. Justice Zafar Ali.

HARNAM SINGH AND ANOTHER—DEFENDANTS—PETITIONERS

versus

Musammat ATRI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 476—Civil Procedure Code (Act V of 1908), s. 151—Forgery—Finding by Trial Court—Appeal pending in High Court—Proceeding under s. 476, Cr. P. C., whether can be started—Stay of proceedings—Inherent power of Court.

Petitioners who were defendants in a civil suit for the recovery of money pleaded payment and produced a receipt which was held by the Trial Court to be a forgery. The suit was decreed and the Court issued a notice to the petitioners to show cause why they should not be prosecuted for producing a forged document in evidence. Petitioners lodged an appeal to the High Court against the decree and the appeal was admitted. They then made an application under s. 151 of the C. P. C. to the High Court to stay the proceedings pending in the Trial Court under s. 476 of the Cr. P. C.:

Held, (1) that inasmuch as the question whether the receipt was a forged one or not had to be finally decided by the High Court, it was not proper that proceedings under s. 476 of the Cr. P. C. should be taken against the petitioners before the decision of the appeal;

(2) that as the proceedings under s. 476 of the Cr. P. C. were pending in a Civil Court the High Court had jurisdiction in the exercise of its inherent power under s. 151 of the C. P. C. to stay the proceedings.

Kirpalban v. *Ram Dei*, 7 Ind. Cas. 260; 7 A. L. J. 647; 11 C. L. J. 445, relied on.

Mr. *Moti Sagar*, for the Petitioners.

Mr. *Jiwan Lal Kapur*, for the Respondents.

ORDER.—This is an application for stay of the proceedings that have been started against the petitioners by the Senior Subordinate Judge, Lyallpur, under s. 476, Cr. P. C. The petitioners as defendants in a money suit pleaded payment of Rs. 3,000, and produced a receipt for that amount. The Senior Subordinate Judge found that the receipt was a forgery and decreed the plaintiff's suit in part and then issued a notice to the defendants to show cause why they should not be prosecuted for producing a forged document in evidence. But the defendants have lodged an appeal to the High Court against the judgment and decree of the Senior Subordinate Judge and the appeal has been admitted. The question whether the receipt is a forged one or not has, therefore, to be finally decided by the High Court and it does not seem proper that the proceeding under s. 476, Cr. P. C., should be taken against the defendants at this stage.

The learned Counsel for the respondents urges that proceedings under s. 476 being of *quasi* criminal nature no application for stay thereof could be made under the C. P. C., but as stated by the learned Counsel for the petitioners the application is under s. 151, C. P. C., and as the proceedings are pending in a Civil Court, this Court can in exercise of its inherent powers stay those proceedings: see *Kirpalban* v. *Ram Dei* (1).

(1) 7 Ind. Cas. 260; 7 A. L. J. 647; 11 Cr. L. J. 445.

I, therefore, order that the proceedings be stayed pending the decision of the appeal which has been lodged by the defendants-petitioners.

Z. K. *Proceedings stayed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 772 OF 1924.

November 28, 1924

Present:—Mr. Justice Zafar Ali.

NUR KHAN AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 235, 239—Offences committed in separate transactions—Joint trial, legality of.

Certain accused were charged with an offence under s. 307 of the Penal Code and one of them was also charged with an offence under s. 20 of the Arms Act. The offence under the Arms Act was not committed in the course of the same transaction as that in which the alleged attempt to murder took place, but the accused were tried jointly in respect of both the offences:

Held, that the joint trial was illegal.

Criminal appeal from an order of the Magistrate, Sargodha.

Dr. *Nand Lal*, for the Appellant.

Mr. *Beni Parshad Khosla*, for the Crown.

JUDGMENT.—The learned Counsel for the appellants raises two contentions, (1) that the trial was illegal, and (2) that the evidence against one of the appellants, *i. e.*, Muhammad Khan was not worthy of the credit.

The learned Counsel, who appears on behalf of the Crown, admits that both the contentions are well-founded.

As regards (1), the charges against Nur Khan appellant were under s. 307, Indian Penal Code, and also under s. 20 of the Arms Act, whilst against the other appellant there was a charge under s. 115, Indian Penal Code. As the offence under the Arms Act was not committed in the same transaction as that in which the alleged attempts to murder took place, the joint trial of the two appellants on all these charges was illegal as held in *Subramania Ayyar* v. *Emperor* (1) which was followed in *Jai Singh* v. *Emperor* (2).

(1) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

(2) 43 Ind. Cas. 324; 44 P. R. 1917 Cr.; 19 Cr. L. J. 100.

As regards (2) the evidence against Muhammad Khan was that as the Policemen were surrounding the building in which Nur Khan appellant was, he (Muhammad Khan), who had already been arrested and pinioned, abetted him (Nur Khan) to fire at the Policemen. But in the detailed account of the event given in the document which constitutes the First Information Report this abetment on the part of Muhammad Khan was not even hinted at, and it is hardly credible that the omission was due to oversight. I, therefore, acquit Muhammad Khan and order that he be released from Jail forthwith, and as regards Nur Khan, appellant, I set aside his conviction and sentence and order his re-trial in accordance with law. Pending the trial he will be transferred to the Judicial lock-up.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 26 OF 1925.

March 13, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice B. B. Ghose.

Sheikh SADIR AND OTHERS—2ND PARTY—PETITIONERS

versus

SABARALI—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 137, 138, 139A—Obstruction to public way—Objection to existence of public right, taken at late stage—Duty of Magistrate—Procedure.

Under the provisions of s. 139A of the Cr. P. C. on the appearance before him of the person against whom an order is made, a Magistrate is bound to question him as to whether he denies the existence of a public right of the way, river, channel or place, and if he does so, the Magistrate must, before proceedings under s. 137 or s. 138, enquire into the matter. The Magistrate cannot refuse to enquire into the matter merely because objection was not taken until a late stage of the case.

Rule against an order of the Sub-Divisional Magistrate, Naraingunj.

Babu *Prafulla Chandra Chakravarti*, for the Petitioners.

Babus *Probodh Chandra Chatterji* and *Asitaranjan Ghosh*, for the Opposite Party.

JUDGMENT.—Under the Cr. P. C. now amended it is the duty of a Magistrate to proceed in accordance with the provisions of s. 139A without waiting for the objection to be raised by one of the parties to the proceeding. Under that section, on the appearance before him of the person against whom the order is made, the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way, river channel or place and if he does so the Magistrate shall before proceeding under s. 137 or s. 138 inquire into the matter. The Magistrate could not refuse to inquire into the matter because the objection was not taken until a late stage of the case.

We accordingly make this Rule absolute to this extent that we direct the Magistrate to follow the procedure of s. 139A, Cr. P. C., before taking any further step in this matter.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 232 OF 1924.

October 24, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

MAHOMED IDRIS—ACCUSED—APPELLANT

versus

EMPEROR AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 476, 476-A, 476-B—Subordinate Court, refusal of, to make complaint—Order of appellate Court making complaint—Appeal, whether lies.

Section 476-B of the Cr. P. C. gives a right of appeal only when a Court has made or refused to make a complaint under s. 476 or 476-A of the Code and neither of those sections relates to a complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint. From such an order, therefore, no appeal lies.

Criminal appeal from an order of the District Judge, Delhi, dated the 18th February 1924.

Mr. *Abdul Rashid*, for the Appellant.

Messrs. *Sagar Chand* and *J. L. Kapur*, for the Respondents.

JUDGMENT.—The question referred to us in this appeal and in Appeals Nos. 233 and 286 of 1924 is whether an appeal lies to this Court from an appellate order of the District Judge making a complaint which the Subordinate Judge might himself have made under s. 476 of the Cr. P. C. Section 476-B of the Code gives a right of appeal only when a Court has made or refused to make a complaint under s. 476 or s. 476-A, and neither of those sections relates to a complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint. We, therefore, answer the question referred to us in the negative. The appeals will be laid before the referring Judge for disposal.

Z. K. *Reference answered in the negative.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 16 OF 1924.

April 6, 1925.

Present:—Mr. Daniels, J. C., and Mr. Dalal, A. J. C.

MOHAMMAD SHER KHAN—PLAINTIFF—APPELLANT

versus

Seth BISHESHUR DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Waste by mortgagee, question of, determination of—Restitution—Separate suit, whether lies—Civil Procedure Code (Act V of 1908), s. 144.

The question of the liability of a mortgagee in a redemption suit for alleged waste committed by him while he was in possession of the mortgaged property must be settled at the time of the preparation of the decree for redemption. After the final decree in the suit has been passed, the question cannot be gone into in an application under s. 144 of the C. P. C. Nor does a separate suit lie for the recovery of the amount of the alleged waste from the mortgagee. [p. 530, cols. 1 & 2.]

Appeal against the judgment and decree of the Officiating First Subordinate Judge, Kheri, dated the 1st March 1924.

Mr. *Ghulam Hasan*, for the Appellant.

Messrs. *Chhail Behari Lal* and *A. P. Sen*, for the Respondents.

JUDGMENT.—An application by Mohammad Sher Khan purporting to be one under s. 144, C. P. C., for restitution was dismissed by the learned Subordinate Judge of Kheri and he has appealed to this Court.

The appellant had mortgaged his property to Seth Raghubar Dayal predecessor-in-interest of the respondents. The mortgage at its inception was simple for a sum of Rs. 82,000 re-payable at the end of 5 years, during which time interest was to run at a certain rate per cent. with 6 monthly rests. If the principal and interest were not paid at the end of 5 years the mortgagee was given the option to take possession of the mortgaged property for a period of 12 years from the date of his entering into possession, during which time the mortgagor was deprived under another condition of the mortgage of the right of redemption. The original mortgagee's son Seth Swami Dayal exercised his option and sued for possession of the property on 14th July 1913. In the written statement the appellant who was defendant to the suit expressed his intention to redeem the property. The suit was decreed by the Court of the Subordinate Judge and the decree was upheld by this Court. After the decree was upheld by this Court Mohammad Sher Khan brought a suit for redemption on 18th June 1915. This suit was dismissed both by the Trial Court and this Court on the ground that under one of the conditions of the mortgage the mortgagee was entitled to remain in possession for 12 years after entering into possession.

Special leave was obtained by Mohammad Sher Khan to appeal to the Privy Council from both the decrees of this Court. The judgment of the Privy Council is reported as *Mohammad Sher Khan* v. *Swami Dayal* (1). Their Lordships considered both the suits together, discharged the decrees of the Courts in India and directed the preparation of one preliminary decree for redemption in both suits in accordance with O. XXXIV, r. 7, C P. C. Their Lordships further directed that in taking accounts the period during which the mortgagee may have been in possession under the decree in suit of the mortgagee for possession should be excluded and during this period neither the mortgagee will be accountable for profits nor the mortgagor for interest, in accordance with one of the terms of the mortgage.

When the suit was remitted by this Court to the Trial Court for the preparation of a preliminary decree the Trial Court put Mohammad Sher Khan in possession at once. This order was set aside by a Bench of this Court on 25th May 1922. The mortgagee was restored to possession and the Trial Court ordered to prepare a preliminary decree for redemption as directed by their Lordships of the Privy Council. In that judgment this Court explained the nature of the Privy Council decree. It was observed in that judgment "We construe the judgment of their Lordships to mean not that the provision in the mortgage whereby the mortgagee was to get possession for default of payment of interest or payment of the mortgage-money at due date was altogether void but merely that it could not be used to prevent redemption by the mortgagor". We agree with this opinion. Their Lordships held the possession of the mortgagee on breach of a condition of the

(1) 66 Ind. Cas. 853; 25 O. C. 8; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; 44 A. 185; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79; 49 I. A. 60 (P. C.).

mortgage to be legal but held that a condition directed towards enforcing such possession for 12 years was invalid and that the mortgagor can obtain redemption at any time even within that period.

A preliminary decree for redemption as well as a final decree were prepared by the lower Court fixing a certain amount as payable by the mortgagor to the mortgagee.

Appeals were brought by both parties to this Court as regards the amount of redemption money fixed by the Trial Court and all these appeals were dismissed by a Bench of this Court on 22nd October 1923.

On 22nd February 1923 Mohammad Sher Khan applied for restitution on the ground that the mortgagee has committed waste during the period of his possession. By that application he desired to recover compensation for such waste.

We are of opinion that this application was rightly dismissed by the lower Court. As pointed out by us above the possession of the mortgagee was legal and this matter of waste ought to have been decided at the time when the preliminary decree for redemption was passed. In fact Mohammad Sher Khan did apply for its decision at the time of the preparation of the final decree but withdrew his application. It is provided by s. 76 (*e*) of the Transfer of Property Act that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property he must not commit any act which is destructive or permanently injurious to the property. It is further provided that if the mortgagee fails to perform this duty imposed upon him he may, when accounts are taken in pursuance of a decree for redemption, be debited with the loss, if any, occasioned by such failure. In effect what the appellant desires by his application is to disturb the decree for redemption which fixed the amount of the redemption money.

No question of restitution arises here. The decree of their Lordships of the Privy Council maintained the mortgagee's possession until he was redeemed, so there is no direction therein to put the mortgagor in the same position in which he was at the time he was dispossessed by the mortgagee. His prayer that his application may be treated as a plaint will be of no benefit to him because a separate suit cannot lie for the recovery of the alleged waste committed by the mortgagee; the matter ought to have been settled at the time of the preparation of the decrees for redemption.

We dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 69 OF 1925.

April 9, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

Pandit GIRDHARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHARE PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Agra Tenancy Act (II of 1901), s. 163, Sch. IV—Suit for profits filed on day on which profits for last year have become payable—Claim with regard to profits of last year not included—Subsequent suit for recovery of profits, whether barred.

The cause of action for a suit to recover a share of the profits accrues on the day on which the profits become payable or divisible. Where, therefore, a suit is brought to recover the plaintiff's share of the profits in respect of certain years on a date on which the profits for the last year have also become payable, but a claim with regard to those profits is not included in the suit, a subsequent suit for the recovery of such profits would be barred under the provisions of O. II, r. 2, of the C. P. C.

Second appeal against a decree of the District Judge, Cawnpore, dated the 22nd of July 1924.

Mr. *Haribans Sahai*, for the Appellants.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for profits which has been dismissed on account of the provisions of O. II, r. 2, C. P. C.

On the 1st of August 1916 the plaintiffs first instituted a suit for arrears of profits for the years 1321 and 1322 *Faslis*. That suit was decreed and we are not now concerned with its merits. Subsequent to the 1st of August 1916, the present suit was instituted for arrears of profits for the year 1323 *Fasli*. The plaintiffs themselves in the plaint alleged their cause of action to have arisen on the 1st of August 1916. The Courts below have held that, as the right to sue had accrued on the 1st of August 1916, it was the duty of the plaintiffs to include their present claim in the previous claim and that they, not having done so, have rendered their subsequent suit liable to be dismissed under O. II, r. 2, C. P. C.

Under the Fourth Schedule, group (*b*) of the Agra Tenancy Act, the time from which limitaiton begins to run for a suit for arrears of profits is "when the share of the profits becomes payable." Under s. 163 of the Act, profits are divisible on dates notified by the Local Government. In the present case it is not disputed that the date so notified was the 1st of August 1916 and that the profits for the year 1323 *Fasli* became divisible on the 1st of August 1916. But the learned Vakil for the plaintiffs contends that, inasmuch as it would have beeen open to the *lambardar* to pay up the profits in the course of the day, in fact, up till the end of that day, the plaintiffs' right to sue had not accrued on that day and that it must be deemed to have accrued on the second day, namely, the 2nd of August 1916. It is impossible to accept this contention. All that we have to consider is the date when the profits became payable or when they became divisible. As soon as the 1st of August 1916 commenced the profits became divisible. It must, therefore, be held that they became divisible even in the early part of the morning. Had the plaintiffs brought a suit for year 1323 *Fasli*, on the 1st of August 1916, it would have been impossible to throw it out on the ground that it was premature. It is clear, therefore, that they could very easily have included the present claim in the former claim and they, not having done so, have rendered their suit liable to be dismissed on the technical ground of O. II, r. 2, C. P. C. The result, therefore, is that we dismiss the appeal under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 574 OF 1924.

January 10, 1925.

Present:—Mr. Justice Zafar Ali.

Pandit SHIV DATT AND OTHERS—PETITIONERS

versus

Pandit MOTIRAM AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 22—Transfer of suit—Application not made at earliest possible opportunity, whether must be rejected.

The language of s. 22 of the C. P. C. is mandatory and an application made under that section must be rejected unless it is made at the earliest possible opportunity as detailed in the section.

Application against an order of the Senior Subordinate Judge, Attock at Campbellpur.

Messrs. *Jiwan Lal Kapur* and *M. S. Bhagat*, for the Petitioners.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—This is an application under ss. 22 and 23 of the C. P. C. for the transfer of a civil suit from the Court of the Senior Sub-Judge, Attock, at Campbellpur, where it was instituted and is now pending, "to the Court of competent jurisdiction at Abbottabad" in the North West Frontier Province.

Mr. Nand Lal, who appears on behalf of the respondents, raises a preliminary objection that the application does not lie as it was not made, at the earliest possible opportunity, or before the settlement of issues as required by s. 22 of the C. P. C. The facts are briefly as below:—

The suit is for dissolution of partnership and rendition of accounts. The partnership was entered into at Abbottabad and the business thereof was also carried on there. But two of the partners, *i. e.*, defendants Nos. 1 and 2 resided in the Attock District and so the suit was instituted at Campbellpore with the previous permission of the Court granted under s. 20 (*b*) of the C. P. C. At the first hearing of the suit defendants Nos. 2 and 3 raised the plea that the Court had no jurisdiction and thereupon two issues were framed to the following effect:—

1. Whether the permission granted under s. 20 (*b*) was contrary to law?
2. Whether the Court had no jurisdiction to try the suit?

Both these issues were decided against the plaintiff and the plaint was returned for presentation to the proper Court. This order was set aside on appeal by the District Judge on the ground that the permission granted could not be revoked.

Thus, it is clear that the applicants instead of making an application to this Court at the earliest possible opportunity as required by s. 22 adopted a wrong course by raising the erroneous plea that the Court at Campbellpore had no jurisdiction and they did not appear in this Court till after that objection had been disallowed. The language of s. 22 being mandatory,

as held in *Gulab Chand* v. *Sher Singh* (1), this application must be rejected as it was not made at the earliest possible opportunity and I reject it accordingly. The applicants would pay the respondents' costs in this Court.

Z. K. *Application rejected.*

(1) 35 Ind. Cas. 616; 11 P. R. 1917; 150 P. W. R. 1916; 16 P. L. R. 1917.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 3 OF 1925.

February 27, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Babu SITAPAT RAM—APPLICANT—APPELLANT

versus

Lala MAHABIR PRASAD—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale—Application to notify encumbrance, rejection of—Encumbrance proclaimed by Sale Officer—Property sold at inadequate price—Irregularity—Substantial injury—Injunction staying sale, effect of—Sale held after injunction, whether nullity.

An injunction issued by a Court of competent jurisdiction directing that a sale about to be held in execution of a decree should be stayed during the pendency of the suit in which the injunction is issued has the effect of stopping the sale altogether during the pendency of the suit, and if the sale takes place in spite of the injunction it is a mere nullity and cannot be allowed to stand.

A decree-holder made an application that a certain encumbrance should be shown in the sale proclamation relating to certain property which was about to be sold in execution. The application was rejected but the decree-holder prevailed upon the Sale Officer to proclaim the encumbrance at the time of the sale. As a consequence of this proclamation the property was sold at a grossly inadequate price:

Held, that there was material irregularity in the conduct of the sale which had resulted in substantial injury to the judgment-debtor and that the sale must consequently be set aside.

Appeal against an order of the Subordinate Judge, Fyzabad, dated the 23rd December 1924.

Messrs. *Ali Mohammad*, *Ram Bharosay Lal* and *Raj Narain Shukla*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is the judgment-debtor's appeal from the order of the Subordinate Judge of Fyzabad, dated the 23rd December 1924. The order under appeal was passed in relation to an application made by the judgment-debtor under O. XXI, r. 90 of the C. P. C., for setting aside the sale of his property in execution of a decree held by the opposite party. The Subordinate Judge dismissed the application. Hence this appeal.

We are of opinion, that the order of the learned Subordinate Judge cannot be mentioned and must be set aside. Amongst other grounds two need be stated for the purposes of this judgment on which the sale was sought to be set aside :—

1. An encumbrance of Rs. 27,000 was announced at the time of the sale by the Sale Officer at the instance of the decree-holder. Previous to this the decree-holder had applied to the Court seized of the execution proceedings for an order of the encumbrance being shown in the sale proclamation. The application was rejected. Without informing the Sale Officer of the fate that the application had met, the decree-holder prevailed upon him to proclaim the encumbrance under consideration.

2. The property in question was the subject matter of a declaratory suit pending in the Court of the Additional Subordinate Judge of Fyzabad. The plaintiff of that suit asked that Court for an injunction staying the sale in execution of the decree now under appeal. The prayer was accepted and an order was issued on the 18th April 1923 containing the term of the injunction staying the sale which was to come off on the 20th April. When that injunction reached the Court executing the decree that Court refused to stay the sale but added that the sale would not be confirmed till the decision of the declaratory suit. The sale was, therefore, held on the 20th April 1923.

The learned Subordinate Judge is of opinion that both these grounds constitute material irregularities in publishing and conducting the sale but the judgment-debtor had failed to show that he suffered any substantial injury or loss for the person of either of the two irregularities. We are unable to agree in this opinion of the learned Subordinate Judge.

As to the first ground the sale proclamation showed the estimated value of the property to be Rs. 5,831-6-4 and there was no encumbrance entered in the sale proclamation. As soon as the encumbrance of Rs. 27,000 was announced the value of

the property was reduced to zero point. The result was that the decree-holder himself purchased the property for a sum of Rs. 100. It is impossible to resist the inference that the loss which the judgment-debtor suffered was due to the irregularity in proclaiming the encumbrance of the sum of Rs. 27,000.

As to the second ground the question raised thereby establishes much more than a mere irregularity.

We think the injunction granted by the Additional Subordinate Judge had the effect of stopping the sale altogether during the pendency of the declaratory suit. It was granted by a Court of competent jurisdiction, and was, therefore, binding. If the sale did take place inspite of that injunction, as it has taken place, we think it amounts to a nullity.

We, therefore, accept this appeal, set aside the order of the lower Court and set aside the sale. The decree-holder is, of course, at liberty to take any other step for executing his decree which he may be advised to take. The appellant will have his costs of this Court as well as of the lower Court of this proceeding from the respondent.

Z. K. *Appeal accepted.*

LAHORE HIGH COURT.

CIVIL REVISION No. 360 OF 1924.

February 2, 1925.

Present :—Sir Shadi Lal, KT., Chief Justice.

FIRM SHANKAR DAS-NAND LAL —DEFENDANTS—PETITIONERS

versus

FIRM AMIR CHAND-LAKHMI DAS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (1) (f), Sch. II, paras. 20, 21—Arbitration without intervention of Court—Application to file award—Objections overruled—Decree in accordance with award—Appeal, whether lies.

An appeal is competent under s. 104 (1) (*f*) of the C. P. C. from an order filing an award, though there is no appeal from a decree passed in accordance with the award. This right of appeal conferred by the Legislature cannot be defeated by the mere fact that no express order filing the award is made.

In a proceeding to file an award made by arbitrators without the intervention of the Court, the Court dismissed the objections preferred by the defendant and passed a decree in accordance with the award ; *Held*, that the decision of the Court dismissing the objections amounted to an order filing the award and was subject to appeal under the provisions of s. 104 (1) (*f*) of the C. P. C.

Revision from a decree of the Senior Sub-Judge, Rawalpindi, dated the 26th February 1924.

Dr. *Nand Lal*, for the Petitioners.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—The plaintiff applied to the Subordinate Judge under para. 20 of the Second Schedule to the C. P. C. praying that an award made by the arbitrators without the intervention of the Court might be filed in Court. The defendant on receiving notice preferred objections to the award which were, however, overruled by the Trial Court which ultimately passed a decree in accordance with the award. The defendant preferred an appeal to the Senior Subordinate Judge, who has, however, dismissed the appeal on the ground that "there is no distinct order of the lower Court for filing the award in Court", and that consequently the appeal was incompetent.

Now, it is not disputed that an appeal is competent under s. 104, sub s. (1) cl. (*f*), of the C. P. C. from an order filing an award, though there is no appeal from a decree in accordance with the award. A perusal of the record shows that the Trial Court dismissed the objections preferred by the defendant and then passed a decree in accordance with the award. It is true that there is no order in so many words that the award be filed, but there can be no doubt that the decision of the Court dismissing the objection amounted to an order filing an award. The right conferred by the Legislature cannot be defeated by the mere fact that no express order filing the award was made.

Accordingly, I hold that the order of the Trial Court was appealable, and accepting the application for revision I remit the case to the Senior Subordinate Judge for decision in accordance with law. Costs in this Court shall abide the event.

Z. K. *Revision accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 157 OF 1923.

February 6, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SATINDRA MOHUN TAGORE—PLAINTIFF—APPELLANT

versus

RAM SUNDAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 105—Tank, lease of—Assessment of rent.

A tank can be leased for agricultural purposes, *e.g.*, for irrigating adjacent lands or watering the cattle used for cultivation. A tank so leased can be assessed to rent under s. 105, Bengal Tenancy Act.

Appeal against a decree of the Special Judge, dated the 10th of June 1922, modifying that of the Assistant Settlement Officer, Hajigunj, dated the 21st of August 1920.

Babu *Hira Lal Chuckerburty*, for the Appellant.

Babus *Mohendra Nath Roy* and *Upendra Kumar Roy*, for the Respondents.

JUDGMENT.

Cuming, J.—This is an appeal by the landlord against an order of the Special Judge dismissing his application under s. 105, Bengal Tenancy Act, for assessment of fair and equitable rent for a certain tank. The case of the defendant was that in the finally published Record of Rights it was noted that the holding was liable to be assessed but that no rent was actually being paid. The holding in question in this case was a tank which was recorded in *Khatian* No. 14. The case of the defendants-respondents was that this tank was included in a *jama* which they held under a service tenure granted by the appellant. The Assistant Settlement Officer came to the finding that this tank formed part and parcel of the *jama* which the defendants held for more than 30 years under the *chakrandar*. On appeal the learned Special Judge has held that this tank was not included in the *jama* which the defendants held under the *chakrandar*; and he has held that as it has been in the possession of the respondents for a much longer time, it could not be said that it was included in the *jama* held directly under the appellant. He then went to say that as the tank was not included in the *chakran* and as no rent was being paid for it, he was entitled to have the rent assessed. He, however, finds that an application for assessing rent on a tank only is not maintainable under s. 105 as a tank is not leased for agricultural purposes. From this I take the learned Judge to mean not that this particular tank was not leased for agricultural purposes but that in no case can a tank be leased for agricultural purposes. This view appears to me to be not well-founded. Obviously a tank can be leased for agricultural purposes; for instance for irrigating adjacent lands or watering the cattle used for cultivation. The learned Special Judge, therefore, was not correct in holding that a tank can in no instance be leased for agricultural purposes.

The result, therefore, is that this appeal is allowed, the decree of the lower Appellate Court set aside and the case sent back to that Court to determine whether the lease of this tank was or was not for agricultural purposes. If it was for agricultural purposes, the case is clearly one governed by s. 105 and in that case the learned Judge will have to consider whether rent can be assessed on it and if so, how much. If, on the other hand, he finds that the tank was not leased for agricultural purposes, then there can be no application of s. 105. Costs will abide ths final result. We assess the hearing-fee at two gold *mohurs*.

The cross-objection is not pressed and is, therefore, dismissed without costs.

Suhrawardy, J.—I agree.

N. H. *Appeal allowed: Cross-objection dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND EXECUTION OF DECREE APPEAL No. 61 OF 1924.

March 19, 1924.

Present:—Mr. Daniels, J. C.

BADAL SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

GUR PRASAD SINGH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, whether can be set aside by compromise between judgment-debtor and decree-holder.

The rights of an auction-purchaser cannot be affected by any agreement between the judgment-debtor and the decree-holder. An auction-sale cannot, there-

fore, be set aside as the result of a compromise between the decree-holder and the judgment-debtor.

Appeal against the decision of the Subordinate Judge, District Fyzabad, dated the 24th July 1924, reversing that of the Munsif, Hawali, Fyzabad, dated the 10th May 1924.

Mr. *S. M. Ahmad*, for the Appellant.

Mr. *R. D. Sinha*, for the Respondents.

JUDGMENT.—The order of the Court below setting aside the sale is correct. No ground entitling him to have the sale set aside under O. XXI, r. 90 was alleged in the judgment-debtor's application. It is true that the decree-holder consented to the sale being set aside. Respondent is not the decree-holder but an independent purchaser, and his rights could not be affected by any agreement of the judgment-debtor and the decree-holder. I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1218 OF 1923.

April 8, 1925.

Present:—Mr. Justice Mukerji.

JAI NARAIN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MANDHAI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Suit brought by two plaintiffs, dismissal of—Appeal by one—Suit decreed by Appellate Court in favour of appealing plaintiff—Non-appealing plaintiff, whether entitled to decree—Discretion of Court—Appeal, second, whether lies.

A suit to recover certain property was brought by two plaintiffs, but was dismissed by the Trial Court. Only one of the plaintiffs appealed describing his appeal as being one under O. XLI, r. 4 of the C. P. C. The Appellate Court decreed the suit so far as the appellant was concerned but did not pass a decree in favour of the plaintiff who had not appealed:

Held, that the matter was within the discretion of the Appellate Court and that that Court having exercised its discretion in refusing to pass a decree in favour of the non-appealing plaintiff, no second appeal lay against that decree at the instance of the latter, inasmuch as the lower Appellate Court was not bound to pass a decree in his favour simply because his title had been made out.

Second appeal against a decree of the First Additional District Judge, Gorakhpur, dated the 17th of May, 1923.

Mr. *Shiva Prasad Sinha*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—Two of the plaintiffs are the appellants before this Court. Originally there were three plaintiffs—the appellants and one Ori. Ori withdrew from the claim at an early stage of the suit which was dismissed by the Court of first instance. Ori and the father of the appellant No. 2 Bhagwati claimed to be the sons of Gaya Singh and on foot of that right claimed the property. The appellant No. 1 Jai Narain is a transferee from them and is a party as such. The suit having been dismissed, Jai Narain alone appealed to the lower Appellate Court and he did not make Bhagwati a party. In the ground of appeal no doubt Jai Narain stated that he was appealing under O. XLI, r. 4 of the C. P. C. The learned District Judge considered the question whether he should pass a decree (the appeal succeeding) in favour of Jai Narain alone or also in favour of Bhagwati. Considering the point, he came to the conclusion that he should pass a decree in favour of only Jai Narain.

In this Court the sole ground taken is that the lower Court ought to have made a decree in favour of Bhagwati as well.

So far as Jai Narain himself is concerned, he got all the property that he had purchased decreed in his favour. He had, therefore, no right of appeal. As regards Bhagwati the question is whether the Court below was wrong in not making a decree in his favour as well. The matter was within the discretion of the lower Appellate Court and it having exercised that discretion in my opinion, no appeal lies on behalf of Bhagwati. The Court was not bound to make a decree in favour of Bhagwati simply because his title had been made out. Ori abandoned his suit. Bhagwati was only a nephew of Ori and according to the statement in the plaint Ori and Bhagwati formed a joint Hindu family. It is possible that Bhagwati too did not wish to prosecute the suit. He preferred not to appeal. In *Narain Dikshit* v. *Benaik Bhat* (1), it was held that a Court is not bound to exercise its discretion in favour of a party under O. XLI, r. 4 of the C. P. C. The appeal, therefore, must fail in its entirety.

Cross-objections have been filed on be-

(1) 24 Ind. Cas. 439; 56 A. 510; 12 A. L. J. 883.

half of the respondents. It is urged on their behalf that the lower Appellate Court did not consider any plea other than the legitimacy of Ori and Aughu that had been raised on their behalf. The learned Judge, however, clearly mentions that the defendants had raised all conceivable pleas to resist the suit and it is clear, therefore, that the Judge was not unaware of the fact that pleas other than that of legitimacy had been raised in the suit. But the learned Judge goes on to say that the only question that he had to decide in the appeal was the question of legitimacy. This shows that the respondents never put forward, in support of the decree, the other pleas that they had raised by way of defence in the suit, and had already been decided against them. I am not, therefore, prepared to accept the cross-objections and to call upon the Court below to decide the other points raised by the respondents in the Court of first instance.

In the circumstances the appeal and the cross-objections are both dismissed with costs, the costs including Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 24 OF 1924.
April 20, 1925.

Present:—Mr. Ashworth, A. J. C.

LACHMI NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMANUJ SINGH—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 127—Ejectment suit—Trespasser—Arrears of rent, whether can be claimed.

A person entitled to eject another person who is a trespasser on a holding can claim under s. 127 of the Oudh Rent Act arrears of rent from such person, as if he were his tenant, and such a claim is not inconsistent with the position that the defendant is otherwise merely a trespasser. [p. 536, col. 2.]

Appeal against a decree of the District Judge, Fyzabad, dated the 10th September 1924, reversing that of the Assistant Collector, First Class, Fyzabad, dated the 31st October 1923.

Mr. *R. D. Sinha*, for the Appellants.

Mr. *Wasi Hasan*, for the Respondent.

JUDGMENT.—This second rent appeal arises out of a suit brought by the plaintiffs-appellants Lachhmi Narain, etc., against one Ramanuj Singh under s. 127 of the Oudh Rent Act for arrears of rent. The suit was decreed and under sub-s. (2) of s. 127 a decree for ejectment was passed. The judgment of the Assistant Collector is dated 31st October 1923.

The defence set up by the defendant-respondent Ramanuj Singh was *inter alia* that he had got the plaintiffs' permission to retain the land and alternatively that he held the land from one Ram Sewak who was the tenant-in-chief. On these two pleas Issues Nos. 4 and 5 were framed but they were both decided against the defendant-respondent Ramanuj.

In first appeal to the District Judge of Fyazabad the defendant-respondent urged that both these findings of the First Court were wrong. The District Judge did not come to any decision on these two findings of the First Court but he allowed the appeal on the ground that the plaintiffs in their plaint had described the defendant as a sub-tenant and he held that s. 127 could not be invoked against a person who was admittedly a sub-tenant. In second appeal to this Court it was pointed out that a person entitled to eject another person, who was a trespasser on a holding, could claim under s. 127 arrears of rent against that person as if he were his tenant and that such a claim was not inconsistent with the position that the defendant was otherwise merely a trespasser. The appeal was remanded by this Court by an order dated 9th July 1924 and the District Judge was directed to re-admit the appeal and proceed to decide it.

The District Judge has again failed to decide the grounds of appeal raised by the defendant-respondent in this case. In effect the District Judge has stated that on the defendant's pleadings it appeared that the defendant believed that Ram Sewak was the tenant-in-chief of land and it also appeared that he the defendant had taken a mortgage from Ram Sewak. The District Judge has held, that there being no evidence of the relation of land lord and tenant existing between the plaintiff and the defendant, a suit would not lie under s. 127. He also has said that the pleadings of the defendant raised the question of the validity of a mortgage

As to the first decision it is curious that the District Judge in his first judgment threw out the suit on the ground that s. 127 would not apply where the plaintiff admitted the defendant to be his tenant. He has now held that s. 127 will not apply where no relationship of landlord and tenant exists between the plaintiff and the defendant. The proper view is that s. 127 applies to a case where a plaintiff alleges a person to be a trespasser but agrees that in order to get a decree for rent from him he will treat him as a tenant, in the way that s. 127 permits. The question whether a mortgage by a tenant is legal or not did not arise in the case, at any rate at the stage that the case was in when the appeal was preferred to the District Judge. The defendant stated that he had a mortgage from Ram Sewak. The plaintiffs denied that Ram Sewak was tenant of the land and consequently they denied by implication that any mortgage by Ram Sewak could assist the defendant to resist the suit. If the District Judge were to find as against the Assistant Collector who tried the case that Ram Sewak was tenant-in-chief, and not the plaintiffs, then the suit would fail because the plaintiffs would have failed to prove as required by s. 127 that they were the persons entitled to eject the defendant as trespasser and it would not be necessary to enter into the question of mortgage by Ram Sewak.

The finding of the District Judge that on the pleadings of the defendant no suit will lie under s. 127 is set aside and the case is remanded again to the District Judge for decision of the questions raised by the defendant's appeal to him. The costs of this appeal will abide the result.

Z. K. *Case remanded.*

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 125 AND 118 OF 1924.

March 5, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

SHAM NARAYAN SINGH—APPELLANT

versus

BASDEO PRASAD SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 91—Execution of decree—Sale, whether can be set aside by compromise.

The only ground upon which a decree-holder can apply to have a sale set aside is that the judgment-debtor has no saleable interest in the property. There is no provision in the C. P. C. for allowing an adjustment between the parties after a sale has been held. The sale is a solemn act and the Court is not competent to set it aside merely at the request of the parties. [p. 538, col. 1.]

Appeal from an order of the Subordinate Judge, First Court, Saran, dated the 10th May 1924.

Mr. *S. K. Mitra*, for the Appellant.

Messrs. *N. N. Sinha*, *B. P. Sinha*, *S. S. P. Singh* and *U. N. Singh*, for the Respondent.

JUDGMENT.

Mullick, J.—These two appeals arise out of the execution of two decrees for Rs. 7,161-2-0 and Rs. 1,070 obtained by the respondent Basdeo Prasad Singh against the appellant Sham Narain Singh. In execution of the former decree the properties of the judgment-debtor and his sons, who with him were members of a joint Mitakshara family were attached and sold and purchased by the decree-holder on the 15th March 1924. On the 31st March the decree-holder is alleged to have filed a petition stating that he had made a compromise with the judgment-debtor and praying that the sale should be set aside. On the 10th May 1924, the application was disallowed and the sale was confirmed. This order was made in the Execution Case No. 221 of 1923. The other execution case, namely, No. 3 of 1924 which was for the other decree, was disposed of by transferring a sum of Rs. 237 from the sale-proceeds in Case No. 221 of 1923 to the credit of Basdeo Narain for the satisfaction of the other decree.

Appeal No. 118 of 1924 is preferred against the final order in Execution Case No. 221 of 1923 and Appeal No. 125 of 1924 is preferred against the final order in Execution Case No. 3 of 1924.

It is contended before us that the Subordinate Judge should be directed to set aside the sale in Execution Case No. 221 and his final order in Execution Case No. 3 and refund to the decree-holder the deposit made by him on account of part of the purchase-money, or, at any rate, he should be directed to make further inquiry into the question whether the decree-holder had, in fact, filed the application of the 31st March 1924. It appears that on the 2nd April 1924 the decree-holder appeared in Court and repudiated the peti-

tion that had been made on the 31st March. He said that he had not compromised with the judgment-debtor and that he had never filed any petition to set aside the sale. The learned Judge held that the C. P. C., did not authorize him to entertain any application to set aside the sale by arrangement between the decree-holder and the judgment-debtor and he dismissed the application. In my opinion this decision was correct. The only ground upon which a decree-holder can set aside his own sale is that the judgment-debtor has no saleable interest in the property. There is no provision in the Code for allowing adjustments between the parties after the sale has been held. The sale is a solemn act and the Court is not competent to review it merely at the request of the parties. The Subordinate Judge was, therefore, right in confirming the sale.

There were allegations made by the decree-holder that he had been wrongfully confined and had been coerced by the judgment-debtor Sham Narayan into signing certain documents and that the application of the 31st March had been made by some one who had falsely impersonated him (the decree-holder). The Subordinate Judge declined to go into this allegation as a criminal case was pending in regard to that matter. We understand that since then Sham Narayan after conviction by the Court of first instance has been acquitted in appeal.

In Appeal No. 118 of 1924 nothing further remains to be done except to affirm the Subordinate Judge's order and to dismiss the appeal with costs.

In Appeal No. 125 the same result follows. The Subordinate Judge's final order in Execution Case No. 3 of 1924 will be affirmed and the appeal dismissed. There will be no separate costs in this case.

Ross, J.—I agree.

Z. K. *Appeals dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 199 OF 1924.

April 9, 1925.

Present:—Mr. Dalal, J. C.

Babu MANOHAR LAL—PLAINTIFF—APPELLANT

versus

RAM RATTAN PATHAK AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Oudh Rent Act (I of 1923), s. 17 (3)—Landlord and tenant—Payment in addition to rent, whether can be claimed through Court.

All that cl. (3) of s. 17 of the Oudh Rent Act of 1923 lays down is that if a landlord recovers a sum from a tenant in addition to the rent, the sum recovered would be considered as a payment illegally enforced and can be claimed back by the tenant. This does not mean that prior to the addition of cl. (3) to s. 17, a landlord was entitled to recover through Court any sum in excess of the rent due. A demand for such a payment was illegal before the addition of cl. (3) to s. 17 and is illegal even after such addition and cannot be enforced in a Court of Law.

Application against a decree of the Munsif, Sultanpur, dated the 26th September 1924.

Mr. *N. C. Dutt* for Mr. *R. D. Sinha*, for the Appellant.

JUDGMENT.—The plaintiff sued in the Court of Small Causes for recovery of Rs. 55 from tenant Ram Rattan Pathak and from his own late *karinda* Jit Bahadur under the following circumstances. In August 1921 the plaintiff re-admitted Ram Rattan Pathak to a tenancy on Ram Rattan promising to pay him Rs. 60 for costs of litigation and other expenses. Ram Rattan admits this agreement. It was said that Ram Rattan paid Rs. 5 and Rs. 55 was due from him. The defence of Ram Rattan was that he had made payment to Jit Bahadur, who denied this. The Court of Small Causes definitely held that no such payment was made to Jit Bahadur; so this revision against Jit Bahadur does not lie under any circumstances and is liable to dismissal. As regards Ram Rattan it is argued that the recovery of *nazrana* was not illegal prior to the passing of the now amended Oudh Rent Act I of 1923. This argument misunderstands the addition of cl. (3) made to s. 17. The recovery of any sum in addition to rent could never be enforced through a Court before the passing of this Act just as much as it could not be subsequently. All that the Act laid down was that if any *nazrana* was recovered the sum recovered would be considered as a payment illegally enforced and could be obtained

back. This does not mean that prior to the addition of cl. (3) to s. 17 a *zemindar* was entitled to recover through Court any sum in excess of the rent due. After the passing of the amendment even if the *nazrana* is recovered amicably, it will be presumed that the payment was illegally enforced and the landlord would be liable to the penalty provided by s. 17. The demand, however, was illegal before and is illegal at present and cannot be enforced through a Court of Law.

I dismiss this application with costs.

Z. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 805 OF 1925.

June 15, 1925.

Present :—Mr. Justice Sulaiman.

RAJARAM DHAR DUBE AND OTHERS—DEFENDANTS—APPELLANTS

versus

JADUNANDAN DHAR DUBE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption suit—Mortgagee, whether can set up interest of third party—Estoppel—Landlord and tenant—Joint tenancy—Death of one tenant—Survivorship.

In a suit for redemption it is not open to the mortgagee to say that at the time when the mortgage was made any one, other than the mortgagor, had also an interest in the mortgaged property. He is estopped from setting up the interest of a third party in answer to a suit for redemption. So long as he has not handed over possession of the mortgaged property to the mortgagor or his representatives, it is not open to him to set up the interest of a third party.

In a case of joint tenancy if a joint tenant dies without any heir-at-law his interest survives to the surviving joint tenant. The death of a joint tenant without heirs does not in any way benefit the *zemindar* but the surviving tenant still remains the tenant of the whole holding.

Second appeal against a decree of the Second Additional Judge, Gorakhpur, dated the 21st January 1925.

Mr. *Harnandan Prasad*, for the Appellants.

JUDGMENT.—This is a defendants' appeal arising out of a suit for redemption.

It appears that Sribhukhan and *Musammat* Bahorna, the widow of his uncle Tanku, made a mortgage of certain ex-proprietary tenancies in favour of the defendants. Raghubir, the brother of Tanku was no party to that mortgage. The defendants obtained possession of the entire tenancies from their mortgagors Sribhukhan and *Musammat* Bahorna. The plaintiffs are the sons of Sribhukhan. The defence raised by the mortgagees was that Raghubir, the brother of Tanku also had an interest which he subsequently relinquished in favour of the *zemindar*, whose interest has devolved on the mortgagees; and they further urged that *Musammat* Bahorna died childless, and her interest in the holdings also lapsed to the *zemindar*. The lower Appellate Court has not allowed them to raise any such pleas. I am of opinion that the lower Appellate Court was right. It is not open to the mortgagees to say that at the time when the mortgage was made any one other than Sribhukhan and *Musammat* Bahorna had also an interest in the mortgaged property. They are estopped from setting up the interest of a third party. They cannot do so so long as they have not handed over possession to the representatives of their mortgagors. It, therefore, must be assumed in this case that for some reason or other Raghubir had no longer any interest left at the time when the mortgage was made and that the two persons, Sribhukhan and *Musammat* Bahorna, only were jointly entitled to make the mortgage in favour of the defendants.

The other plea that the interest of *Musammat* Bahorna has lapsed to the *zemindar* is also without any force. In case of joint tenancies if a joint tenant dies without any heir-at-law, her interest survives to the surviving joint tenant. The surviving joint tenant does not lose his right in half the tenancy. Holdings cannot be divided in that way. The death, therefore, of a joint tenant without heirs does not in any way benefit the *zemindar*, but the surviving tenant still remains a tenant of the whole holdings. That is a well-recognized principle underlying joint tenancies. The plaintiffs, therefore, as the representatives of Sribhukhan were, when the other co-mortgagor died childless, entitled to redeem the entire mortgaged property on payment of the entire sum.

The appeal is without any force and is dismissed under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 22 OF 1925.
March 27, 1925.
Present:—Mr. Wazir Hasan, A. J. C., and Mr. Dalal, A. J. C.
Thakurain DHIRAJ KUWAR—DEFENDANT—APPELLANT
versus
B. SARJU NARAIN SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VIII, rr. 1, 9, 10, O. IX, rr. 6, 13, O. XLIII, r. 1 (b)—Defendant not specifically required to file written statement—Absence of defendant on first hearing—Procedure—Judgment pronounced against defendant—Application to set aside decree, whether maintainable.

Rule 10 of O. VIII of the C. P. C. applies only to a specific requirement by the Court to the filing of a written statement and not to a general direction in the summons that a written statement may be filed.

Where a defendant who has not been specifically required either under r. 1 or under r. 9 of O. VIII, of the C. P. C., to file a written statement is not present on the first day of hearing, the Court ought to proceed under O. IX, r. 6, of the Code and not under O. VIII, r. 10. Where in such a case the Court proceeds under r. 10 of O. VIII and passes judgment against the defendant, the defendant is entitled to maintain an application under r. 13 of O. IX to set aside the decree passed against him.

Appeal against an order of the Subordinate Judge, Fyzabad, dated the 8th January 1925.

Messrs. *S. M. Ahmad* and *H. N. Dass*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—The plaintiff Sarju Narain Singh sued Thakurain Dhiraj Kuar for possession of a certain property and for mesne profits. A summons was issued to the defendant and purports to have been duly served on her agent Hira Singh. On the date fixed for hearing, the 25th September 1924, the learned Subordinate Judge proceeded under O. VIII, r. 10, C. P. C. He held that the defendant was required to file a written statement and as she had omitted to do so the Court was entitled to pronounce judgment against her and he passed judgment against her accordingly. The law under O. XLIII, r. 1 (*b*) allows an appeal from a judgment pronounced under O. VIII, r. 10.

Within the time allowed by law for an application under O. IX, r. 13, the defendant applied to have the order of the Court dated 25th September, 1924, set saide. She treated it as an *ex parte* decree. The learned Judge dismissed this application on the ground that no proceedings under O. IX, r. 13 were permissible because an appeal lay from a judgment pronounced under O. VIII, r. 10.

The defendant has appealed from the dismissal of her application. We are of opinion that the learned Judge of the lower Court took proceedings wrongly under O. VIII, r. 10. It is true that in the summons there is a direction to the defendant to file a written statement on 19th September 1924. This direction, however, was not given by the Court on a consideration of the facts of the case. Under O. VIII, r. 1, the defendant may file a written statement and it is imperative on him to file one if so required by the Court. Under O. VIII, r. 9 at the time of subsequent pleadings, the Court may require a written statement to be filed. In our opinion r. 10 of O. VIII, applies only to a specific requirement by the Court to the filing of a written statement and not to a general direction in the summons that such a written statement may be filed. The defendant was not present on the first date of hearing and she was never specifically required either under r. 1 or r. 9 of O. VIII, to file a written statement. We are, therefore, of opinion that proceedings ought to have been taken under O. IX, r. 6 and not under O. VIII, r. 10. We hold that an application under r. 13 of O. IX, did lie to the lower Court. We set aside the order of the lower Court, dated 8th January 1925, and direct that the application under O. IX, r. 13 shall be disposed of according to law. Costs here and heretofore shall abide the result.

Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1139 OF 1923.
March 6, 1925.
Present:—Mr. Justice Mukerjee.
LODAI RAM—PLAINTIFF—APPELLANT
versus
SUKHDEO KOERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 79—Grove, whether holding—Dispossession—Suit to recover possession—Limitation—Trees falling down—Grove-holder, whether loses title.

A grove is not a holding within the meaning of s. 79 of the Agra Tenancy Act, and, therefore, dispossession of a grove-holder by the *zemindar* from a portion of

the grove for six months cannot take away the grove-holder's right.

Kesho Prasad Singh v. *Sheo Pragash Ojha*, 82 Ind. Cas. 962; 46 A. 831; (1924) A. I. R. (P. C.) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 47 M. L. J. 824; 51 I. A. 381; 23 A. L. J. 168; 27 Bom. L. R. 130; 21 L. W. 295; 1 O. W. N. 640; L. R. 6 A. (P. C.) 1; 29 C. W. N. 606 (P. C.), followed.

Ordinarily a grove-holder does not lose his title as a grove-holder in respect of a portion of the land which was once occupied by trees simply because the trees have fallen down.

Har Sahai v. *Dhanpal Singh*, 32 Ind. Cas. 368; 2 O. L. J. 589 and *Chokhey Lal* v. *Behari Lal*, 60 Ind. Cas. 115; 42 A. 634 at p. 638; 18 A. L. J. 820; 2 U. P. L. R. (A.) 292, relied on.

Second appeal from a decree of the Subordinate Judge, Jaunpur, dated the 12th April 1923.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Manmohan Banerji*, for the Respondents.

JUDGMENT.—This appeal must be allowed. The plaintiff and the defendants Nos. 2 to 4 were the holders of a grove bearing number 311. The *zemindrs*, by a partition among themselves, divided the site of the grove, and a portion of it described in the *patwari's* papers as No. 311/2/2 was given to a co-sharer. He leased out this portion of the land to the defendant No. 1 who has since died and is now represented by his heirs. The plaintiff brought the suit, out of which this appeal has arisen, for recovery of possession from the lessee.

The Court of first instance decreed the suit. The lower Appellate Court held that although plot No. 311 was undoubtedly the grove of the plaintiff the trees had been, for a long time, falling down and ultimately only 14 trees were left standing on the land and that a portion of the grove having been leased out by the *zemindar* to the principal defendant and the principal defendant having occupied the land for more than six month, the plaintiff's right to the land had become extinguished. On this finding the learned Judge dismissed the suit.

The learned Judge's judgment goes counter to the Privy Council case of *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (1). A grove is not a holding within the meaning of s. 79 of the Tenancy Act and, therefore, dispossession of the grove-holder by the *zemindar* of a portion of the grove for six months cannot take away the grove-holder's right.

It is nobody's case that the grove-holder gave up his rights in that portion of the grove on which no tree any longer stands and a separate engagement came into existence between the grove-holder and the landlord. Ordinarily a grove-holder does not lose his title as a grove-holder on a portion of the land which was once occupied by trees simply because the trees have fallen down. This was held by me in Second Appeal No. 794 of 1923 [*Chedan* v. *Mahbub Ali*] following an Oudh case decided by Mr. Justice Kanhaiya Lal as Judicial Commissioner of Oudh, *vide Har Sahai* v. *Dhanpal Singh* (2). The same principle follows from the case of *Chokhey Lal* v. *Behari Lal* (3).

Assuming, therefore, that the principal defendant was in possession of the land in suit for nine years, the plaintiff-appellant's right had not been extinguished, the period being less than 12 years.

I allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The respondents must pay the appellant's costs in this Court and in the Court below.

Z. K.

Appeal allowed.

(1) 82 Ind. Cas. 962; 46 A. 831; (1924) A. I. R. (P. C.) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 47 M. L. J. 824; 51 I. A. 381; 23 A. L. J. 168; 27 Bom. L. R. 130; 21 L. W. 295; 1 O. W. N. 640; L. R. 6 A (P. C.) 1; 29 C. W. N. 606 (P. C.).

(2) 32 Ind. Cas. 368; 2 O. L. J. 589.

(3) 60 Ind. Cas. 115; 42 A. 634 at p. 638; 18 A. L. J. 820; 2 U. P. L. R. (A.) 292.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1701 OF 1924.

January 22, 1925.

Present :—Mr. Justice Campbell.

JIWAN LAL—PLAINTIFF—APPELLANT

versus

JIWAN—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 65—Copy of document admitted without objection—Appeal—Objection, whether can be taken in Appellate Court.

No objection should be allowed to be taken in an Appellate Court as to the admissibility of a copy of a document, which was admitted in the lower Appellate Court without any objection.

Second appeal from a decree of the District Judge, Jhelum, dated the 10th March 1924.

Dr. *Nand Lal*, for the Appellant.

Bakhshi *Sain Das*, for the Respondent.

JUDGMENT.—This second appeal

arises out of a suit by Jiwan Mal for possession as mortgagee of certain land. The question arose whether the plaintiff's mortgage was for consideration. The burden of proving necessity was laid upon the plaintiff. His case was that consideration for the mortgage in suit was provided by deductions from a sum due on a previous mortgage and in order to prove this he produced in the Trial Court certified copies of the previous mortgage-deed and of the plaint and written statement in a former suit of which that mortgage had been the subject-matter. These documents were not referred to in the judgment of the Trial Court which dismissed the suit. In appeal before the District Judge stress was laid by the appellant's Counsel upon these copies. and the learned District Judge held them to be inadmissible in evidence. He actually discussed only the case of the copy of the mortgage-deed and he found that it could not be brought under either cl. (*b*) or cl. (*c*) of s. 65 of the Indian Evidence Act, that the original document itself alone was admissible and that secondary evidence in the shape of a certified copy was not admissible.

All three documents, however, were formally endorsed by the Trial Court as having been admitted in evidence and there is nothing on the record to show that any objection to their being admitted was raised by or on behalf of the defendant. The rule is firmly established that no objection should be allowed to be taken in an Appellate Court as to the admissibility of a copy of a document, which was admitted in evidence in the Court below without any objection. This was laid down in *Kishori Lal Goswami* v. *Rakhal Das Banerjee* (1) a case directly in point. The same rule has been applied by their Lordships of the Privy Council in *Shahzadi Begam* v. *Secretary of State for India* (2) and *Padman* v. *Hanwanta* (3) and recent pronouncement to the same effect is contained in *Ramlochan Missra* v. *Hari Nath Missra* (4). In any case there is an affidavit by the plaintiff-appellant, which has not been contradicted, to the effect that he asked the Trial Court to summon the record in the previous suit containing the original mortgage deed and that the Court refused to do so and ordered him to put in a copy of the mortgage-deed. The order directing the plaintiff to put in a copy is in writing and is on the record dated the 2nd of February 1923, and it appears to me that the Trial Court considered at any rate in respect of this document, that the conditions of s. 65 (*c*) of the Evidence Act were fulfilled. I can see no other explanation of his directing the plaintiff to put in a copy. I hold that no objection could have been taken in the lower Appellate Court to the admissibility of these three copies and that the appeal must be decided again on the understanding that they are admissible in evidence. I accept the appeal, set aside the decree of the lower Appellate Court and remand the case accordingly, for a fresh decision. The stamp on second appeal will be refunded and costs throughout will abide the event.

Z. K.

Appeal accepted.

(1) 31 C. 155.

(2) 34 C. 1059; 34 I. A. 194; 6 C. L. J. 678; 9 Bom. L. R. 1192; 2 M. L. T. 439 (P. C.).

(3) 29 Ind. Cas. 807; 93 P. R. 1915; 18 M. L. T. 54; 19 C. W. N. 929; 13 A. L. J. 801; 17 Bom. L. R. 609; 2 L. W. 645; (1915) M. W. N. 500; 22 C. L. J. 172; 110 P. W. R. 1915; 29 M. L. J. 307; 11 P. L. R. 1916 (P. C.).

(4) 67 Ind. Cas. 628; (1922) A. I. R. (Pat.) 565; 1 Pat. 606; 3 Pat. L. T. 397.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 245 OF 1924.

April 20, 1925.

Present:—Mr. Ashworth, A. J. C.

SANTU CHAMAR—PLAINTIFF—APPELLANT

versus

ARJUN MISRA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Persons sued in representative capacity, whether party to suit—Execution of decree—Attachment—Objection by judgment-debtor, dismissal of—Title suit, whether maintainable.

A person against whom a decree is obtained in a representative capacity is a party to the suit within the meaning of s. 47 of the C. P. C. Where in execution of the decree obtained against such a person, he prefers an objection to the attachment of certain property and the objection is dismissed, he is not competent to maintain a regular suit to establish his title to the property.

Second appeal against the judgment and decree of the First Additional Subordinate Judge, Gonda, dated the 1st April 1924,

reversing that of the Munsif, Tarabgunj, dated the 22nd March 1923.

Mr. *S. M. Ahmed*, for the Appellant.

Mr. *S. N. Roy*, for the Respondents.

JUDGMENT.—In this case one Arjun filed a suit in the Small Cause Court against the assets of Mahabir deceased and impleaded as the persons alleged to be in possession of these assets *Musammat* Bhaganta and the present plaintiff-appellant Santu. Arjun Singh obtained a decree on the 28th March 1922 and in execution of that decree attached certain property. Santu plaintiff-appellant filed an objection against the attachment on the 11th September 1922 under O. XXI, r. 58. His objection was rejected. He then filed the present suit on the 1st October 1922. The learned Munsif dismissed the suit on the ground that it was barred by s. 47 of the C. P. C. This decision was upheld by the Subordinate Judge on appeal. It is contended before me that Santu was not a party to the suit in which the decree was obtained because although named as a party and apparently appearing as a party, the suit against him was not in his personal capacity but merely as the representative of Santu. As the appellant's Counsel puts it, Santu was merely a *pro forma* defendant. No authority is cited to support the proposition urged. The appeal is dismissed with costs.

I would add that I fail to understand how the Pleader Madho Prasad Saksena who certified the grounds of appeal as being good grounds for a second civil appeal could hold himself justified in doing so. He has not appeared in this Court. I think it desirable to issue warning that notice will have to be taken in future of false certificates to this effect.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1069 OF 1924.

February 2, 1925.

Present:—Mr. Justice Abdul Raoof.

SURAIN SINGH—DECREE-HOLDER—APPELLANT

versus

MULA SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (c)—*Agriculturist becoming* Akali, *whether ceases to be agriculturist.*

The mere fact that an agriculturist has turned an *Akali* does not necessarily show that he has ceased to be an agriculturist.

Second appeal from the decree of the District Judge, Amritsar, dated the 17th March, 1924.

Mr. *L. C. Mehra*, for the Appellant.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—The judgment of the learned Judge of the Court below is not as categorical and clear as it ought to have been, but I take his findings to be as follows:—

That Mula Singh, judgment-debtor, was admittedly an agriculturist and the mere fact that he had turned an *Akali* did not necessarily show that he had ceased to be an agriculturist.

Mr. L. C. Mehra has, however, contended that it ought to have been shown clearly that the house in question was occupied by the judgment-debtor. This point does not appear to have been raised in the lower Appellate Court and very probably the reason for not doing so was that the decree-holder himself in his statement dated the 11th of April 1923 had admitted that the house was occupied by the judgment-debtor. The real contention put forward in the Court below was that, because the judgment-debtor had turned an *Akali* it must necessarily follow that he had cut off all connections with his land and his house. This conclusion does not follow as a matter of law. The judgment-debtor was an agriculturist and is an agriculturist and, according to the evidence on the record, is occupying the house in question. The learned Counsel for the appellant-decree-holder contends vaguely that Mula Singh had mortgaged his entire holding and had no land left to be cultivated by him. This contention also does not appear to have been raised in the lower Appellate Court, otherwise the learned Judge would have dealt with this question. On the whole the judgment of the lower Appellate Court appears to be correct. I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1556 OF 1924.

June 19, 1925.

Present:—Mr. Justice Boys and Mr. Justice Ashworth.

Seth MUL CHAND—DECREE-HOLDER—APPELLANT

versus

RAJDHAR—JUDGMENT-DEBTOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 28, 78—Insolvency—Secured creditor—Leave to sue and execute—Leave not availed of—Annulment of adjudication—Execution of decree—Limitation—Period between adjudication and annulment, whether can be deducted.

Where permission is given to a secured creditor under s. 28 (2) of the Provincial Insolvency Act to sue and execute but the permission is subject to conditions which make it impossible for the creditor to execute the decree obtained by him, the permission is ineffectual to exclude the unfettered operation of s. 48 of the Act and the creditor is entitled under the provisions of that section to deduct from the period of limitation allowed for the execution of the decree the period between the adjudication and the annulment.

Appeal from a decree of the District Judge, Jhansi, dated the 29th of July 1924.

Dr. *K. N. Katju*, for the Appellant.

JUDGMENT.—The appellant before us is the decree-holder Mulchand. He is represented by Dr. Katju. The respondent Rajdhar is unrepresented. In this case the respondent on the 28th of June 1913, was declared an insolvent on his own petition. By the adjudication order Mulchand, the present appellant, was given permission to sue and to execute, but this was limited by the condition that the proceeds were to be deposited with the Receiver. In pursuance of this permission, Mulchand obtained a decree, on the 18th of February 1914. On the 10th of September 1914, he was entered in the schedule of creditors under s. 33; but he did not proceed to attempt to execute his decree, and it is indeed difficult to see how he could have proceeded, when the property of the insolvant was wholly vested in the Receiver. To execute the decree against the Receiver, obtain payment of his debt, and then to re-deposit it with the Receiver in pursuance of the conditions laid down in the order would have been a futile proceeding. During the subsequent years, certain dividends were paid by the Receiver in which Mulchand shared. The last dividend was paid on the 29th of July 1921. On the 30th of November 1921, an annulment order was passed apparently under s. 43 (1), as a result of which, nobody having been specially appointed under s. 37, the remaining property re-vested in the debtor Rajdhar. On the 7th of July 1923, Mulchand applied to execute his decree for the balance. His application has been dismissed by both Courts; both of which held that Mulchand having been granted permission to sue and execute under s. 28, cl. (2) was debarred from invoking s. 78 to extend limitation, that section being expressly inapplicable to a case where a party is permitted under s. 28, cl. (2) to take proceedings. With this finding we are unable to agree. The permission to execute was one that was not only not acted upon but on which it was (in the circumstances) impossible to act, and was, therefore, ineffectual to exclude the unfettered operation of s. 78. We hold, therefore, that the period between the adjudication and annulment should have been deducted from the period allowed for limitation.

We, therefore, set aside the orders of both the lower Courts and remit the case to the First Court for disposal according to law. The appellant here will have his costs in the lower Appellate Court and in this Court including in this Court Counsel's-fees on the higher scale. The costs in the First Court will abide the result.

Z. K. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 64 OF 1923.

February 27, 1925.

Present:—Mr. Dalal, A. J. C. and Mr. Wazir Hasan, A. J. C.

Mirza HAMID ALI BEG AND OTHERS—DEFENDANTS—APPELLANTS

versus

Pandit DULAREY LAL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 95—Mortgage—Lease in favour of mortgagor—Sale of portion of equity of redemption by co-mortgagor—Redemption by purchaser—Suit to eject lessee mortgagor, maintainability of.

Certain property was mortgaged by two mortgagors and on the same day a lease of the property was granted to one of them. The lease was to run for the same term of years which was fixed in the mortgage-deed for redemption. One of the conditions of the lease was that it would stand cancelled even before the expiry of the period fixed, if the mortgaged property

was redeemed during that period. The other mortgagor sold his share in the equity of redemption to the plaintiff who redeemed the entire property and obtained mutation of names in the revenue papers. He then brought a suit to recover possession from the lessee mortgagor:

Held, (1) that the plaintiff having redeemed the entire property and obtained constructive possession of it within the meaning of s. 95 of the Transfer of Property Act had a legal title to remain in possession until he was redeemed by the defendant and that the defendant's action in resisting him from the enjoyment of the full benefit of that right was unlawful; [p. 545, col. 2.]

(2) that the redemption of the property had put an end to the lease and that the defendant had no right to stay any longer on the mortgaged property and that the plaintiff's suit must, therefore, succeed. [*ibid.*]

Appeal from a decree of the Subordinate Judge, Unao, dated the 29th September 1923.

Messrs. *Zahur Ahmad* and *H. K. Ghose*, for the Appellants.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is the defendants' appeal from the decree of the Subordinate Judge of Unao, dated the 29th September 1923.

The facts of the case are few and simple. The property in suit is a 14-annas 8-pies *zemindari* share situate in *Mahal* Inait Ali Beg in *Mauza* Ismailpur Ambapara, *Pargana* Bangarmau, District Unao. This property was owned in equal shares by Mirza Inait Ali Beg and by Mirza Muhammad Ali Beg, Mirza Usman Ali Beg, Mirza Afaq Ali Beg and Mirza Siddiq Ali Beg, sons of Afzal Ali Beg. On the 9th December 1916 Mirza Inait Ali Beg and the four sons of Afzal Ali Beg executed a deed of usufructuary mortgage in respect of the property in suit in favour of one Sheo Gopal for a sum of Rs. 17,000. The mortgage was to subsist for a term of 15 years but under clause 4 of the deed provision was made for redemption within the said period on payment of Rs. 6,000 by Mirza Inait Ali Beg and of Rs. 11,000 by the sons of Afzal Ali Beg. On the 20th December 1916 the mortgagee, Sheo Gopal executed a lease in respect of the mortgaged property in favour of Inait Ali Beg. The lease also was to run for a term of 15 years. Both the documents, that is, the deed of mortgage and the lease, were registered on the same date, the 20th December 1916. The Trial Court has found that the mortgage and the lease were meant to form part of one and the same transaction. We agree with this finding. One of the conditions of the lease was that it "shall stand cancelled even before the expiry of the leased period at the time when the mortgaged property is redeemed."

On the 25th May 1920 Mirza Muhammad Ali Beg, Mirza Usman Ali Beg, Mirza Afaq Ali Beg and Mirza Siddiq Ali Beg, sons of Afzal Ali Beg, executed a sale-deed in favour of Pandit Dulare Lal in respect of their entire share in the property which they had mortgaged to Sheo Gopal along with Inait Ali Beg under the deed of the 9th December 1916. Pandit Dulare Lal subsequently redeemed the entire mortgage of the 9th December 1916 by payment of the whole of the mortgage-money to Sheo Gopal. On the 16th December 1920 Pandit Dulare Lal obtained the order of mutation of names in his favour in place of Sheo Gopal mortgagee (Ex. 4). The present suit is brought by Pandit Dulare Lal for possession and mesne profits of the mortgaged property against the heirs of Inait Ali Beg who had died on the 5th January 1922. The defendants Nos. 1 to 5 are his sons, the defendants Nos. 6 and 7 are his widows and the defendant No. 8 is his daughter. The other defendants Nos. 9 to 12 are the sons of Afzal Ali Beg. The suit was resisted by the heirs of Inait Ali Beg on more grounds than one but in appeal the learned Counsel for the defendants-appellants has confined his arguments to one of such grounds only. The argument is that the appellants are entitled to remain in possession of the property in suit by virtue of the lease of the 20th December 1916.

We are of opinion that the argument fails. It is admitted that the plaintiff redeemed the mortgage of the 9th December 1916 in its entirety and we are of opinion that he obtained such possession of it as was possible in the circumstances of the case. So far as the actual possession is concerned, it was with the lessee. All that the mortgagee has, was constructive possession and that possession he delivered to the plaintiff by allowing the entry of the plaintiff's name in place of his own in revenue register of the village. The plaintiff, therefore, on redeeming the entire property obtained possession of it within the meaning of s. 95 of the Transfer of Property Act. It follows that he has a legal title to remain in possession until redemption and the defendants-appellants' action in resisting him from the enjoyment

of the full benefit of that right is unlawful. Besides this, the redemption of the property put an end to the lease under the condition already mentioned and the defendants-appellants have no right to stay any longer on the mortgaged property. We are, therefore, of opinion that the decree of the Court below is right and should be maintained.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 1303 OF 1924.

January 13, 1925.

Present:—Mr. Justice Campbell.

MESSRS. ALLEN BROTHERS—PLAINTIFFS—APPELLANTS

versus

ARURI MAL KHANNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 20 (b), *105, O. III, r. 1, O. VI, rr. 14, 15, O. XXIX, r. 1—Leave to sue defendant outside jurisdiction, refusal of—Appeal, whether lies—Suit by Corporation—Plaint signed and verified by authorized agent, validity of.*

An order refusing permission under s. 20 (*b*) of the C. P. C. to sue a defendant outside jurisdiction is not open to appeal. [p. 546, col. 2.]

Quære.—Whether such an order can be attacked in an appeal against an order returning a plaint for presentation to the proper Court. [*ibid.*]

Rule 1 of O. XXIX of the C. P. C. does not contain a mandatory rule, and if a person who has signed and verified a plaint on behalf of a Corporation is the duly authorized agent of the Corporation and is acquainted with the facts of the case, there is no irregularity in the signature or the verification. [*ibid.*]

Miscellaneous civil appeal from an order of the Sub-Judge, Lahore, dated the 7th April 1924.

Mr. *Jai Gopal Sethi*, for the Appellants.

Mr. *Nanwa Mal* and Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—This was a suit by Messrs. Allen Brothers and Co. of the City of London against 1 Aruri Mal of Lahore and 2 Messrs. Thakur Das-Mohan Lal and Co. of Multan. The suit was instituted in the Sub-Judge's Court, Lahore, and the second defendants objected that the suit was not triable by that Court. As a result the learned Sub-Judge returned the plaint for presentation to the proper Court and the plaintiffs have appealed. The first point argued is that leave to institute the suit in the Lahore Court was asked under s. 20 (*b*), C. P. C., and that the learned Sub-Judge is wrong in saying that no application for leave had been presented to him. It appears that no formal written application was made, but that in a statement by the plaintiff's Counsel, which was recorded by the learned Sub-Judge, certain expressions were used which might be construed as an application for leave. In any case leave has been refused for I cannot read otherwise a subsequent sentence in the learned Sub-Judge's order "There are not sufficient reasons for granting leave to the plaintiff to bring this suit here" and no appeal against this order lies, *vide* s. 105 of the C. P. C. The sentence "No application for leave has been presented to me" evidently means that no formal stamped application had been made. The next point is that the cause of action partly arose in Lahore. This does not seem to have been argued before the learned Sub-Judge although certain evidence was led indicating a desire on the part of the plaintiff at that stage to demonstrate that the cause of action wholly or partly arose at Lahore. He examined Aruri Mal, the first defendant, whose statement I have read and do not believe. It is contradicted by the indent signed by him, Ex. P. 4, and though the plaint, which is loosely worded, says vaguely within the jurisdiction of the Court, it does not expressly assert that the cause of action arose 'within that jurisdiction and there is nothing else to indicate that it did in fact so arise.'

In replying to the arguments of the learned Advocate for the respondents-defendants No. 2, the plaintiff's learned Advocate has contended that the merits of an order refusing leave can be attacked in an appeal against an order returning a plaint for presentation to another Court and he quotes the authority of a Burma case. Even if this were so, I see no reason for interfering with the refusal of the Court below. The appeal fails and is dismssed with costs.

I may add that the learned Sub-Judge is wrong in holding that the plaint is not properly signed and verified because of the provisions of O. XXIX, r. 1, C. P. C. That is not a mandatory rule, and if the person who signed the plaint was the duly authorized agent of the plaintiff who was

acquainted with the facts of the case, there was no irregularity at all, *vide*, O. III, r. 1, and O. VI, rr. 14 and 15.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 16 OF 1925.

March 6, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

DHARMUN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SURAT SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 4—Reference to arbitration by Court—Award by majority of arbitrators, validity of.

The matter in dispute in a pending suit was referred to the arbitration of two arbitrators and an Umpire and the terms of the reference provided for a decision according to the opinion of the majority in the event of there being any dissent. The arbitrators took evidence and after a discussion among themselves arrived at certain conclusions, one of the arbitrators and the Umpire being of one opinion and the other arbitrator being of a contrary opinion. The dissenting arbitrator left the place after expressing his dissent from the opinion of the majority. Next day the award was reduced to writing and was dated and signed by the majority and they added a note that the other arbitrator did not agree with the view expressed in the award:

Held, that the award had been arrived at by the arbitrators and the Umpire and that the opinion of the majority having been reduced into writing, the award was in accord with the terms of the reference and was perfectly valid. [p. 547, col. 2.]

Application under s. 115, C. P. C., for revision of an order of the Subordinate Judge, Hardoi, in Civil Suit No. 137 of 1923, dated the 13th of October 1924.

Mr. *M. Wasim*, for the Applicant.

Mr. *A. P. Sen*, for the Opposite Party.

JUDGMENT.—This is an application in revision under s. 115, of the C. P. C. In a suit pending between the parties in the Court of the Subordinate Judge of Hardoi the matters in controversy were referred for decision to a Board of arbitrators. The application for such a reference was made on the 26th of March 1924. In that application one *Thakur* Jit Singh was appointed *sarpanch* and *Thakur* Rohan Singh and Munshi Singh as *panches*. Subsequently *Thakur* Jit Singh became incapable of acting by reason of his illness and with the consent of parties the Court substituted one Jagannath Singh in place of *Thakur* Jit Singh as a *sarpanch* in the Board. The award was delivered in writing by Jagannath Singh and Munshi Singh on the 30th of August 1924. The lower Court has framed its decree in pursuance of the terms of that award. This is an application impugning the legality of that decree on the ground that there was no award in law. The facts on which this ground is based are few and very simple in nature. According to the evidence, which the learned Subordinate Judge has accepted, all the three *panches* met together on the 29th of August 1924 and there is documentary evidence to show that it was agreed upon that the award will be made by 5 P. M. of the same date. They took evidence on that day, had a discussion among themselves and came to definite conclusions, two of the *panches* Jagannath Singh and Munshi Singh being of one opinion and the third Rohan Singh of the dissentient opinion. The result was that Rohan Singh left the place after expressing his dissent from the opinion of the majority of the arbitrators. Next day, as already stated, the award was reduced to writing, dated and signed by Jagannath Singh and Munshi Singh and they proceeded to add at the end of it that Rohan Singh had not agreed with the view expressed therein. The learned Subordinate Judge has accepted these facts as proved and we see no reason to disagree with him. On those facts we see no ground for entertaining this application at all. The learned Subordinate Judge is quite right in his opinion that there was no illegality in the award. The terms of the reference distinctly provided for a decision according to the opinion of the majority in the event of there being any dissent and the award filed is according to the opinion of the majority of the arbitrators. In support of the application it was said that the dissentient arbitrator had taken no part in the making of the award, and, therefore, the award was invalid. We are of opinion that the argument is not well-founded. As already stated the award, though orally, was made on the 29th by the majority of the arbitrators and Rohan Singh had taken part in the proceeding immediately preceding the making of the award. The fact that it was reduced to writing on the day following does not establish that Rohan Singh is no

party. For these reasons we dismiss this application with costs.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1031 TO 1038 OF 1922.

December 19, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

APTABUDDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sayed ALLA HAFIJ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 13—Landlord and tenant—Rent suit—Chittas, *whether admissible—Probative value.*

The *chittas* or the *zemindar's* private survey papers, although prepared by the *zemindar* in the absence of the tenants, are not wholly inadmissible in evidence in a rent suit by the *zemindar*; but according to the circumstances of each particular case, there may be a great deal of difference in their probative value, which may range from Zero to hundred. [p. 549, col. 2.]

Appeals against the decrees of the Special Judge, Tipperah, dated the 18th of November 1921, modifying those of the Assistant Settlement Officer, dated the 13th January 1920.

Dr. *Sarat Chandra Basak*, Babus *Bepin Chandra Basu* and *Manmatha Nath Ray*, for the Appellants.

Babu *Nagendra Nath Ghose* and Mr. *M. A. S. M. Akram*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—These 8 appeals arise out of applications by the plaintiff landlords under s. 105, Bengal Tenancy Act for settlement of fair and equitable rent on two grounds, first, additional rent in respect of additional area in possession of the defendants; and secondly, rise in the price of stapel food crops. As to the second ground both the Courts below have agreed in allowing a small enhancement on the ground of rise in the food crops. With regard to the first ground, they are in disagreement in respect of the question relating to the length of the *nal* or standard rod which was employed at the time of the original letting. The landlord's case was that the *nal* prevailing in the *pargana* was one of 15 or 16 cubits, whereas the defendants asserted that it was one of 18 or 20 cubits. The Revenue Officer accepted the defendants' version and decided the suits according to that standard of measurement. One of the grounds which the learned Revenue Officer gives in support of his judgment is that if the *khatians* are measured according to the standard alleged by the defendants in *Parganahs* Kasipur and Kasimnagar, in 201 cases *gujasta* area approaches the area converted by the rod of 20 cubits as contended by the defendants and only in 26 cases it approaches the area converted with the rod of 16 cubits as alleged by the plaintiffs. In *Parganas* Khijirpore and Rasulpur the present area, if measured by a rod of 18 cubits as alleged by the defendants, in 29 cases it approaches the *gujasta* area, and if measured by a rod of 16 cubits as alleged by the plaintiffs, in 10 cases it approaches the *gujasta* area. In 5 cases the *gujasta* areas exactly tally with the area found by conversion with a rod alleged by the defendants. The learned Revenue Officer then goes on to say that in the majority of cases the difference between the areas of the landlords' *sherista* and the area found by the application of the standard alleged by the defendants is very small and the difference may be ascribed to be due to closeness and accuracy of the present survey. In support of defendant's version of the case the Revenue Officer relied upon certain *kobalas* which were executed by the tenants in which the length of the *nal* is mentioned as alleged by the defendants, tenants. There was an appeal by the landlords and the learned Special Judge accepted the standard of measurement as alleged by the plaintiffs. In coming to the conclusion he has discarded as absolutely worthless the *kobalas* between the tenants to which the landlords were no parties. The learned Judge has, however, given effect to the *kabuliyts* which were executed by some of the tenants in favour of the landlords to which some of the appellants were no parties; and he finds that as the plaintiff's *chittas* are corroborated by the admissions in the *kabuliyats* there is no doubt that the plaintiffs' contention with regard to the length of the *nal* is correct. In order to explain away the increase of areas on a comparison of the *gujasta* areas and the areas now ascertained by measurement according to the standard alleged by the landlords the learned Judge observes as follows: "It is clear from the evidence that there were jungly areas in the past which

have now been brought under cultivation and this is the explanation of the increase." We may mention here that the increase in almost all cases is more than 50 per cent. and in some cases more than double the *gujasta* area.

With regard to the oral evidence as to the standard of the *nal* the learned Judge observes that the defendants' evidence is purely hearsay; but he has no observation to make with respect to the oral evidence adduced by the plaintiffs. The finding of the lower Appellate Court is that as the plaintiffs' *chittas* are corroborated by admissions in the *kabuliyats* and as there has been some encroachment by the tenants upon the jungle lands of the plaintiffs, there has been this difference between the *gujasta* area and the present area. It does not appear from the judgment of the learned Judge why he has preferred the *kabuliyats* produced by the plaintiffs to the *kobalas* on which the defendants relied. Both stand on the same fotting. If one piece of evidence has to be discarded on the ground that it is not effective against persons who are not parties to it, the same consideration also arises in the case of the other. Considering the circumstance under which these documents came into existence, namely, that there was a difference between the landlords and the tenants with regard to the length of the *nal* and each party was trying to create evidence to prove its case by means of statements in documents behind the back of the other party, it is desirable that both the documents should either be received or ignored. In our judgment the proper course would be to consider both the documents as worthless on the ground assigned by the Special Judge.

Then there remains on the side of the plaintiff the *chittas*. They are the *zemindar's* private survey papers. In the body of the *chittas* there is no mention of the length of the *nal* on which measurements were made but on the top there is inserted a remark that the measurement has been made with a *nal* of 20 cubits. The appellants argue that these *chittas* are not admissible and have relied on the case of *Ram Chunder Sao* v. *Bunseedhur Naik* (1). That case, however, is not in point as there the *chittas* had been admitted as evidence under s. 35 of the Evidence Act, as public documents having been prepared by the Government in respect of its *khas mehal*. Sir Richard Garth held that the position of the Government in respect of *khas mehals* being that of a private *zemindar* maps and papers of the *zemindar* should not be admitted in evidence as public documents. There are other *dicta* of Sir Richard Garth in some cases in reference to *chittas* but they proceeded on the ground that they were not public documents and should not be treated as such. Recently there have been some numerous cases in which *chittas* have been admitted in evidence for what they are worth under s. 13 of the Evidence Act though they were prepared by the *zemindar* in the absence of the tenants. It is difficult for us to say that the *chittas* are totally inadmissible; but according to the circumstances of each particular case there may be a great deal of difference in their probative value which may range from Zero to hundered. But this is a matter which is within the legitimate jurisdiction of the Court of fact to determine. In this case the learned Special Judge relied upon the *chittas* having been corroborated by the *kabuliyats*. But as we have held that the *kabuliyats* are valueless, it now remains with the learned Judge to determine whether there is sufficient evidence on the record to give effect to the plaintiffs' contention.

As to the explanation given by the learned Judge for increase in area by the tenants bringing under cultivation the jungle lands of the landlords, it is argued by the appellant that no such issue was framed before the Revenue Officer nor was evidence directed towards this point by the parties. There may have been some stray statements made by the witnesses in their evidence to which no effect was given by the Court of first instance. They, therefore, pray that if an enquiry is to be made into that question they should be afforded proper opportunity to adduce evidence on this point. As we are sending the case back to the lower Appellate Court, we leave it to the discretion of that Court to determine whether an enquiry should be made on this point and whether the appellants should be given an opportunity of adducing evidence to meet any case that the plaintiffs may choose to make on the ground.

In the result we allow the appeals, set aside the decrees of the lower Appellate Court and remit the cases to that Court for a re-hearing of the appeals in light of the

(1) 9 C. 741; 7 Ind. Jur. 653; 4 Ind. Dec. (N. S.) 1143.

observations we have made above. If the learned Judge thinks that the defendants should be allowed opportunity to adduce further evidence on the point of increase of area he would either himself receive such evidence or send the case back to the First Court. The plaintiffs will also be at liberty to adduce evidence on this point. It must be evident that this order of remand relates only to the *khatians* which are involved in these appeals and which are specified in the appendices to the petitions filed by the appellants to-day. The costs of these appeals will abide the result. We assess the hearing fee at one gold *mohur* in each case.

Cuming, J.—I agree.

N. H.

Appeals allowed;
Cases remanded.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 164 OF 1923.
December 12, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

GURBHAJ AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LACHHMAN—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (1), (b)—Custom—Right of reversioner to succeed after death of widow, nature of—Document relinquishing such right, whether requires registration.

The right of a reversioner under the Customary Law of the Punjab to succeed to the estate of the last male holder after the death of his widow is only a *spes successionis* and does not amount to an alienable interest in immoveable property. A document purporting to transfer or relinquish such right is not, therefore, compulsorily registrable. [p. 552, col. 1.]

Amrit Narayan Singh v. *Gaya Singh*, 44 Ind. Cas. 408; 45 C. 590; 45 I. A. 35; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546 (P. C.) and *Harnath Kuar* v. *Indar Bahadur Singh*, 71 Ind. Cas. 629; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 45 A. 179; 50 I. A. 69; 9 O. L. J. 652; 44 M. L. J. 489; 27 C. W. N. 949; 5 P. L. T. 281; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 2 Pat. L. R. 237; 37 C. L J. 346 (P. C.), followed.

Khaiti v. *Matab*, 11 Ind. Cas. 211; 214 P. L. R. 1911; 135 P. W. R. 1911 and *Hakam Singh* v. *Indar*, 27 Ind. Cas. 699; 12 P. L. R. 1915; 18 P. W. R. 1915, overruled.

Letters Patent Appeal from the judgment of Mr. Justice Abdul Raoof, in Second Civil Appeal No. 2470 of 1922, dated the 24th March 1923 and reported in 76 Ind. Cas. 35.

Mr. *Mehr Chand Mahajan*, for the Appellants.

Messrs. *Jagan Nath* and *Har Gopal*, for the Respondent.

JUDGMENT.

Shadi Lal, C. J.—On the 8th February 1906 one Khemadi, a Ghirth of the Kangra District, sold the land in dispute to the defendants for Rs. 400. The vendor died childless about ten years ago; and his widow, who succeeded him, re-married three or four years before the institution of the suit, and consequently forfeited her interest in the estate of her deceased husband. The plaintiff, Lachhman, who is the brother of the vendor, has brought the present action for the possession of the property on the usual ground that the alienation was without consideration and necessity. Now, the land has been held to be ancestral *qua* Lachhman, and the only question which has been debated before us is whether he is prevented from impeaching the alienation by reason of the contract which he entered into with the vendees on the 16th February 1916 A perusal of the deed, which embodies the contract, shows that the plaintiff on receipt of Rs. 100 from the vendees relinquished in their favour whatever right or interest he had in the property. The question arises whether this document required compulsory registration and was inadmissible in evidence for want of registration. *Ex facie*, the deed purports to be an assignment or relinquishment by the plaintiff of his interest in the estate but he had, at that time, only a right to succeed to the property on the death of the widow in the event of his surviving her, and I do not think that such a right can be held to be a "right, title or interest to or in immoveable property" within the meaning of cl. (*b*) of s. 17, sub-s. (1), of the Indian Registration Act.

The principle of law is now firmly established that a reversionary right under the Hindu Law is only a *spes successionis*, and that it does not amount to an alienable interest in immovable property. If there was any doubt on the subject, it has been set at rest by the recent pronouncement of the Judicial Committee of the Privy Council in *Amrit Narayan Singh* v. *Gaya Singh* (1). In that judgment their Lordships point out that "a Hindu reversioner has no right or interest *in præsenti* in the property which

(1) 44 Ind. Cas. 408; 45 C. 590; 45 I. A. 35; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546 (P. C.).

the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise until then it is a mere *spes successionis*. The same view has been affirmed by the Privy Council in a later judgment in *Harnath Kuar* v. *Indar Bahadur Singh* (2), in which the interest of the next reversioner who had obtained a decree declaring his right to succeed to the estate upon the death of the widow, was held to be a mere expectancy which was incapable of being transferred.

The learned Vakil for the plaintiff places his reliance upon the judgment of a Single Bench of the Punjab Chief Court in *Khaiti* v. *Matab* (3), which has been followed by another Single Bench of the same Court in *Hakam Singh* v. *Indar* (4). The judgment in *Khaiti's case* (3) is no doubt an authority for the proposition that the interest of a reversioner in an estate in the hands of a widow is not a mere *spes successionis* but is a contingent interest within cl. (*b*) of s. 17, sub-s. (1) of the Registration Act; and that a document relinquishing such an interest of the value of Rs. 100 or upwards requires compulsory registration. It is true that this judgment as well as the judgment in *Hakam Singh's case* (4) dealt with the interest of a reversioner under the Customary Law of the Punjab, but on principle I do not see any valid reason why, if the right of a reversioner expectant upon the death of a widow governed by the Hindu Law is a mere chance of succession, the right of a reversioner to succeed to an estate on the death of a widow governed by the Customary Law should be placed upon a higher level. We have not been referred to any authority which lays down that the estate of a widow under the Customary Law is subject to greater restrictions than that of a widow under the Hindu Law, or that the reversioner in the former case enjoys rights which are, in any way, superior to those of the reversioner in the latter case. Our attention has been invited to the following observations of Sir Meredyth Plowden in *Gujar* v. *Sham Das* (5) which have no bearing upon the nature of the reversioner's right in the estate held by a widow:—"In respect of ancestral immoveable property in the hands of any individual, there exists some sort of residuary interest in all the descendants of the first owner or body of owners, however remote and contingent may be the probability of some among such descendants ever having the enjoyment of the property. The owner in possession is not regarded as having the whole and sole interest in the property, and power to dispose of it, so as to defeat the expectations of those who are deemed to have a residuary interest, and who would take the property if the owner died without disposing of it." It must be borne in mind that these observations were mere deductions from the agnatic theory which was invoked in order to explain certain features of the Customary Law and which was subsequently utilised for the purpose of formulating other rules which were hardly warranted by the practice and usage of the people upon whom those rules were imposed. It appears that the only issue before the Court was whether in a case, where the power of a sonless *Jat* proprietor to alienate ancestral land without necessity is in dispute, it is the duty of the alienee to prove a custom authorising a transfer of the ancestral land in favour of a stranger; and an issue of this character should be determined upon the precedents and other evidence adduced by the parties, and not upon theoretical generalisations. At any rate, it is clear that the learned Judge was not called upon, nor did he profess, to make any pronouncement on the question whether the interest of a reversioner in the estate held by a widow could be the subject-matter of a valid transfer.

It can no longer be disputed that the interest of a Hindu reversioner in the estate held by a female heiress is a mere chance of succession; and as observed above, there does not appear to be any reason why the right of a reversioner to succeed to an estate upon the death of a widow governed by the Customary Law should be treated differently. In view of the clear and unequivocal pronouncement by the Privy Council, I am of the opinion that the contrary view expressed in the unreported judgments cited on

(2) 71 Ind. Cas. 629; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 45 A. 179; 50 I. A. 69; 9 O. L. J. 652; 44 M. L. J. 489; 27 C. W. N. 949; 5 P. L. T. 281; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 2 Pat. L. R. 237; 37 C. L. J. 346 (P. C.).

(3) 11 Ind. Cas. 211; 214 P. L. R. 1911; 135 P. W. R. 1911.

(4) 27 Ind. Cas. 699; 12 P. L. R. 1915; 18 P. W. R. 1915.

(5) 107 P. R. 1887.

behalf of the plaintiff should be taken as overruled ; and that the plaintiff, when he executed the instrument in question, had no interest in immoveable property which he could validly assign to any person. The transfer of a *spes successionis* does not carry with it any interest in immoveable property, and the deed evidencing such transfer does not stand in need of compulsory registration.

The document relied upon by the defendants is, therefore, admissible in evidence, and I think that it can be used by them for the purpose of showing that the plaintiff gave his assent to the sale which he now desires to impeach, or that, at any rate, he agreed not to challenge it. There can be no doubt that such an agreement need not be registered, *vide inter alia*, *Bhana* v. *Guman Singh* (6). Having recognised the defendants as proprietors of the land, he cannot now attack the alienation which alone was the foundation of their title.

I would accordingly accept the appeal and dismiss the suit with costs throughout.

LeRossignol, J.—The question for decision in this appeal is whether a reversioner's right under the Punjab Customary Law to succeed to ancestral land is a vested or a contingent right or a mere *spes successionis*.

A Bench of the Chief Court of the Punjab held in a decision reported as *Khaiti* v. *Matab* (3) that such a reversionary right was a contingent right and even a vested right and its conclusion was no doubt based upon certain *dicta* in *Gujar* v. *Sham Das* (5). Now, in that case the simple question before the Judges was, on whom lay the *onus* of proving that a sonless proprietor had power to dispose of ancestral land without necessity and their finding they based not on facts but on theory. Now, with all deference, I hold the opinion that theory and custom are antitheses, that custom can never be a matter of mere theory but must always be a matter of fact. The conclusion in *Gujar* v. *Sham Das* (5) is binding on us but the theories by which the learned Judges attempted to explain the custom have no such binding force. They justified the interference of collaterals who were not co-parceners on the ground that there "exists some sort of residuary interest in all the descendants of the first owner," but they also emphasised that "the sonless land-owner was in rarer circumstances than the Hindu widow subject to the control of others."

Now, their Lordships of the Privy Council have pronounced that a Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life until her demise all that he has is a mere *spes saccessionis*. If then a Hindu reversioner in respect of the estate of a female holding for life has a mere expectancy, I cannot see how the reversionary interest of a collateral in regard to the ancestral estate held by a male owner can be anything more substantial. However, that may be this is a matter of custom which should be determined not by theory but by practice, and I see no reason for holding that as a matter of fact there is a general and well-recognised custom of the transfer of reversionary rights in the Punjab.

For these reasons I concur in the learned Chief Justice's judgment accepting the appeal and dismissing the suit with costs throughout.

Z. K. *Appeal accepted.*

(6) 44 Ind. Cas. 629; 40 A. 384; 16 A. L. J. 191.

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL No. 7 OF 1925.

May 8, 1925.

Present :—Mr. Dalal, J. C., and Mr. Misra, A. J. C.

Konwar JANG BAHADUR—JUDGMENT-DEBTOR—APPELLANT—PETITIONER

versus

BANK OF UPPER INDIA, LD., LUCKNOW IN LIQUIDATION THROUGH MR. HUNTER—DECREE-HOLDER—RESPONDENT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110—Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Transfer of decree—Application for substitution made to Court to which decree transferred, whether according to law—Appeal to His Majesty in Council—Substantial question of law.

The question whether an application for substitution made in the course of execution proceedings to a Court to which execution was transferred is an application according to law within the meaning of cl. (5) of Art. 182 of Sch. I to the Limitation Act, is a substantial question of law within the meaning of s. 110 of the C. P. C.

Application for leave to appeal to His Majesty in Council under O. XLV, r. 2, C. P. C., in Execution of Decree Appeal No. 29 of 1924, decided by a Bench of this Court, dated the 6th January 1925.

Messrs. *Wasim* and *Konwar Krishn Bahadur*, for the Petitioner.

Mr. *Bisheshwar Nath*, for the Opposite Party.

ORDER.—This is an application for leave to appeal to His Majesty in Council. It satisfies the rule about valuation because the valuation is over Rs. 10,000. The decree of this Court, however, affirmed the decree of the Court of first instance and, therefore, it is necessary to inquire whether any point of law of general importance is involved or not. We are of opinion that such a point of law is involved. The question is whether an application made for substitution to a Court to which execution was transferred was according to law. It is urged on behalf of the appellant that the application should have been made to the Court which passed the decree. It appears from the judgment of the Bench of this Court that the appellant is trying to take advantage of a legal quibble to escape his liability to pay a decretal amount. At the same time, we think that an important question of law of the execution of a decree is involved in this appeal and that leave should be granted.

We, therefore, grant the leave applied for. No order is made as to costs.

Z. K. *Leave granted.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 391 OF 1922.

April 7, 1925.

Present:—Mr. Justice Kulwant Sahay.

Babu HARIHAR PRASAD SINGH—PLAINTIFF—APPELLANT

versus

GHARBHARAN KOERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 182—Tenancy of homestead land not forming part of holding, incidents of—Dwelling house, erection of, by tenant, effect of—Ejectment—Notice to quit—Appeal, second—Copy of judgment of suit decided during pendency of appeal, whether can be referred to.

Where an earlier suit between the parties is finally decided during the pendency of a second appeal arising out of a subsequent suit between the same parties and one of the matters in dispute in the earlier suit is also in dispute in the later suit, the final judgment in the earlier suit may be produced in second appeal in the later suit and it is open to the Court to refer to that judgment for the purpose of deciding the second appeal. [p. 554, col. 2; p. 555, col. 1.]

Where a person has got a tenancy right in homestead land which is not a part of any holding of his as a *raiyat* either in the village in which the land is situated or in any other village, the provisions of s. 182 of the Bengal Tenancy Act are not applicable to the case and the incidents of the tenancy are not governed by the provisions of the Act. The tenancy must be considered either as a tenancy-at-will or a tenancy from year to year and as such is liable to be terminated on a proper notice to quit. The mere fact that the tenant has constructed a dwelling house on the land in dispute and has been in possession thereof for any length of time will not give him a title to remain on the land permanently as a rent-free tenant. [p. 555, cols. 1 & 2.]

Appeal from a decision of the Additional Subordinate Judge, Shahabad, dated the 10th January 1922, reversing that of the Munsif, Arrah, dated the 11th April 1921.

Messrs. *L. N. Singh* and *Bhagwati Kumar Sinha*, for the Appellant.

Mr. *Mahabir Prasad*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the Additional Subordinate Judge of Shahabad, dated the 10th January 1922, whereby he reversed the decision of the Munsif and dismissed the suit of the plaintiff.

The suit was for ejectment of the defendants from 13 decimals of land in *Mouza* Bhelain on the allegation that the said land was the *gair mazrua parti* land of the proprietor. The plaintiff is admittedly the 16-annas *malik* of the *mouza*; and his case is that the 13 decimals of *gair mazrua* land were settled with the ancestor of the defendants over which they built a house and began to live therein. The condition of the tenancy as alleged by the plaintiff was that the defendants were to render service by ploughing the proprietors' land and doing transplantation work for four days in the year, and by drawing water from the well, and supplying vegetables at six pies per *paseri* on ceremonial occasions; that the defendants had refused to render the service and a notice was served upon them requiring them to quit the land; that the term of the notice having expired, and the defendants having refused to quit the land the present suit was brought by the plaintiff for ejectment of the defendants.

The defence was that the land in dispute was not a service tenure of the defendants but that it was a homestead land and formed a part of the ancestral *kasht* holding of the defendants. The conditions of the service alleged by the plaintiff were

denied; and it was further averred that no notice to quit was served upon them.

The learned Munsif held that the homestead land in dispute was not a part of any tenancy holding of the defendants and that the incidents of the tenancy as regards the land in dispute were as alleged by the plaintiff, and that the tenancy of the defendants will not be governed by the Bengal Tenancy Act. He held that the defendants had refused to render service and as such were liable to ejectment. He found that the notice to quit has been proved to have been served on the defendants: and he accordingly made a decree for ejectment.

On appeal by the defendants the learned Subordinate Judge held that the plaintiff had failed to prove that the tenancy of the defendants was on condition of rendering service. He held further that the entry of *belagan* in the Survey *khatian* as regards the land in dispute merely indicated that no rent was paid for the land and that snch an entry signified nothing more. The Munsif had held that the entry of *belagan* was only consistent with the allegation of the plaintiff that the tenancy was a service-tenure and, therefore, no rent in cash or kind was paid for the land and he drew an inference from such entry that the conditions of the tenancy being various and numerous and also unrestricted by the provisions of the Bengal Tenancy Act the Survey Authorities entered the land as *belagan*.

In second appeal by the plaintiff it has been contended that the learned Subordinate Judge has misconstrued the entry of *belagan* in the Survey *khatian* and has drawn erroneous presumption therefrom. It has further been contended that the learned Subordinate Judge was wrong in holding that the tenancy of the defendants was not a service-tenure.

It appears that in the *khatian* the defendants were recorded as *qaimi* tenants in respect of 5 *khasra* plots in *khata* No. 74. Four of these plots were agricultural lands and the fifth was plot No. 1014 which was the homestead land now in dispute. As regards the four plots other than the plot No. 1014 the case of the present plaintiff was that those plots were not the tenancy holding of the defendants but were the *zirait* land of landlord which were temporarily settled with tenants from time to time, and sometimes cultivated directly by the landlord. There was proceeding under s. 145 of the Cr. P. C. in respect of the four plots referred to above and the plaintiff was declared to be in possession thereof. The present defendants brought a title suit for a declaration of their title as *raiyats* of those four plots and the Munsif dismissed the suit on a finding that it had not been proved that the plaintiff of that case (the present defendants), had any *qaimi* or occupancy right therein. The Munsif further found that it had not been proved that the then plaintiffs were settled *raiyats* of the village and he further found that the plaintiffs of that suit were out of possession for more than two years and the suit was barred by limitation.

Now, this judgment of the Munsif in the title suit was passed on the 10th of April 1922 and an appeal was preferred against it and it was pending before the Subordinate Judge at the time the Munsif decided the suit out of which the present appeal arises. He referred to the finding of the Munsif in the title-suit and as the matter was pending to appeal and the decision had not become final he refrained from coming to any finding as regards the defendants being settled *raiyats* of the village. In this Court an affidavit has been filed on behalf of the appellant to the effect that the appeal of the present defendants in the title suit referred to above has been disposed of by the Subordinate Judge whereby the decision of the Munsif in that suit has been affirmed. A copy of the judgment of the Subordinate Judge dated the 28th March 1923 has been produced with the affidavit. In this judgment the Subordinate Judge has found that none of the four plots in dispute in that case had been in possession of the then plaintiffs (the present defendants) or their father for a period which would have given them a right of occupancy in the land and that the plaintiff had entirely failed to show that he had held any land or parcel of land as *raiyat* in the village for a period of 12 years. In the affidavit filed on behalf of the plaintiff it is further stated that this judgment of the Subordinate Judge has become final, no appeal having been preferred against it. It has also been stated in the affidavit that the defendants-respondents in the present case have no *kasht* land either in the village Bhelain or in any other village.

Objection has been taken on behalf of the respondents to the affidavit and the

copy of the judgment of the Subordinate Judge in the title suit filed with it being taken or referred to in this appeal. I am of opinion that having regard to the circumstances of the case it is open to the appellant to produce this judgment in this second appeal and that it is open to this Court to refer to it. As an authority for this view, I need only refer to the decisions of the Calcutta High Court in *Ram Ratan Sahu* v. *Mohant Sahu* (1), *Hazari Mull* v. *Janaki Prosad* (2) and *Ramyal Sahu* v. *Bindeshri Kumar Upadhya* (3). The facts stated in the affidavit have not been denied on behalf of the respondents. The position, therefore, is that the defendants are not *raiyats* of any land in village Bhelain or in any other village and the land in dispute is the only homestead land of which they are in possession.

As regards the nature of the defendants' tenancy although the Munsif on a consideration of the evidence found that the tenancy was on condition of rendering service as stated by the plaintiff yet on appeal the learned Subordinate Judge has come to a contrary conclusion. His finding that the tenancy is not a service-tenure is a finding based upon the evidence in the case and must be accepted as conclusive in the present appeal.

The position, however, of the defendants is that they have got a tenancy right in the 13 *kathas* of land which is not a part of any other holding of theirs as a *raiyat* and, therefore, such tenancy is not governed by the provisions of the Bengal Tenancy Act. Reference has been made by the learned Vakil for the respondents to s. 182 of the Bengal Tenancy Act. In the first place the learned Subordinate Judge does not base his decision upon s. 182. In the second place it has now been established by competent Court that the defendants have got no holding as a *raiyat* either in the village Bhelain or in any other village and, therefore, the provisions of s. 182 are not applicable and the incidents of the defendants' tenancy of the homestead land in dispute are not governed by the provisions of the Bengal Tenancy Act. This being so, it is clear that the defendants' tenancy must be considered either as a tenancy at-will or a tenancy from year to year and as such is liable to be terminated on a proper notice to quit. It has been found by the Munsif and this finding has not been displaced by the Subordinate Judge that a proper notice to quit was served on the defendants. It is clear, therefore, that the defendants have no right to remain on the land against the wishes of the plaintiff. I fail to understand upon what ground the defendants can claim a right to remain on the land without payment of any rent to the landlord. The mere fact of the defendants having constructed a dwelling house on the land in dispute and having been in possession thereof for any length of time will not give them a title to remain on the land permanently as rent-free tenants. Reference may in this connection be made to the decision in the case of *Prosunno Coomaree Debea* v. *Sheikh Rutton Bepary* (4).

I am, therefore, of opinion that the plaintiff-appellant is entitled to decree for possession. The decree of the Subordinate Judge will, therefore, be set aside and that of the Munsif restored. The appellants are entitled to their costs throughout.

Z. K. *Appeal allowed.*

(1) 6 C. L. J. 74.
(2) 6 C. L. J. 92.
(3) 6 C. L. J. 102.
(4) 3 C. 636; 1 C. L. R. 577; 1 Ind. Dec. (N. S.) 1026.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1393 OF 1924.

January 20, 1925.

Present:—Mr. Justice Campbell.

JAWALA DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOPAL LAL—PRE-EMPTOR, AND DES RAJ AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 22—Pre-emption suit—Vendees, several—Omission to implead one vendee till after expiry of period of limitation, effect of.

In a suit for pre-emption in respect of property which had been sold to *A*, *B*, *C*, *D* and *E*, the defendants were described as *A* son of *B*, *C*, *D* and *E*. The omission to implead *B* as a defendant was not discovered till after the expiry of the period of limitation and *B* was then impleaded as a defendant:

Held, that this was not a case merely of a misdescription of a defendant but of an entire omission to implead a necessary defendant and that *B* having been impleaded after the expiry of the period of limitation, the suit was barred as against him and was consequently barred as against other defendants also.

[p. 556, col. 2.]

Appeal from an order of the District Judge Gujranwala, dated the 11th March 1924.

Mr. *M. L. Puri*, for the Appellants.

Mr. *Mehr Chand*, for the Respondents.

JUDGMENT.—This second appeal arises out of a pre-emption suit which was instituted on the 9th August 1921. The sale, which was its subject, was dated the 10th August 1920 and was by Harbhajan Das and others in favour of (1) Tek Chand, (2) Bhagwan Das, (3) Diwan Chand, (4) Jawala Das, sons of Dhanpat Mal, and (5) Narain Singh proprietors of the firm Dhanpat Mal-Diwan Chand.

The plaintiff in the pre-emption suit was Gopal Lal and in his plaint he joined as vendee-defendants, "Tek Chand, son of Bhagwan Das," Jawala Das and Diwan Chand, sons of Dhanpat Mal, and Narain Singh.

When the defendants appeared they pleaded that one of the vendees, Bhagwan Das, had not been made a defendant. On the 30th June 1923 the plaintiff was directed by the Court to implead Bhagwan Das as a defendant and he did so on the 30th July 1923. The question then arose whether the suit was time-barred and the Trial Court held that since Bhagwan Das had been impleaded after the prescribed period for limitation, the suit was barred against him and also against all the other defendants. Consequently the suit was dismissed.

On appeal by the plaintiff the learned District Judge held, as he states, after a careful consideration of the facts, that the omission to implead Bhagwan Das as a defendant was due to a wrong copy of the sale-deed supplied to the plaintiff by the Registration Department, wherein the vendees were described as Tek Chand son of Bhagwan Das, Jawala Das and Diwan Chand sons of Dhanpat Mal, and Narain Singh. The learned District Judge proceeded to observe that there was no doubt that the plaintiff had been guilty of carelessness because, if he had carefully studied the written statement of the defendants in a previous suit relating to specific performance, he would have come to know that Bhagwan Das was one of the vendees. Nevertheless the District Judge held that the suit was not barred by time because there had been a mere misdescription of the defendants in the suit. He cited in support of this view a Calcutta judgment printed as *Jogendra Narain Roy* v. *Forbes* (1) and concluded as follows: "In the present case also the intention of the plaintiff was to implead all the vendees in the suit and the omission to implead Bhagwan Das was due to an error in the copy of the sale-deed supplied to him. Under these circumstances, I am of opinion that the plaintiff should not suffer for the mistake on the part of the copyist. The result is that I accept the appeal and hold that the suit is not time-barred and remand the case to the lower Court for decision on the merits."

In its own words the learned District Judge's decision amounts to this that, when a plaintiff can show that he intended to implead a certain party whom he did not implead and that he was misled by a mistake in some document, he may make that party a defendant at any stage in the suit and no plea of limitation can be effective.

The case reported as *Jogendra Narain Roy* v. *Forbes* (1) does not support this view. There was a suit against a certain Mr. P. J. Forbes and it was discovered subsequently that P. J. Forbes was a lady and not a man and it became necessary to alter the "Mr." into "Miss." P. J. Forbes, however, had been unmistakably a defendant from the very first. The High Court ruled that the use of "Mr." instead of "Miss." was but a clerical mistake and the case is one merely of misdescription. Consequently it reversed the order of the Court below dismissing the suit against Miss. Forbes as barred by limitation.

In the present case there was no misdescription of Bhagwan Das for no person of any name resembling Bhagwan Das was inserted in the record as a defendant before the 30th July 1923, "Bhagwan Das son of Tek Chand" instead of "Bhagwan Das son of Dhanpat Mal" might have been a clerical mistake and a case merely of misdescription. Tek Chand son of Bhagwan Das instead of Tek Chand son of Dhanpat Mal is also a misdescription but a misdescription of Tek. Chand and not of Bhagwan Das. I accept the appeal with costs, set aside the order of the lower Appellate Court and restore that of the Trial Court.

Z. K. *Appeal allowed.*

(1) 32 Ind. Cas. 872.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 1469 AND 1470 OF 1922.

January 20, 1925.

Present:—Mr. Justice Phillips.

AUMANCHI AURYAPRABAKARA RAU AND ANOTHER—PLAINTIFFS Nos. 1 AND 3—APPELLANTS

versus

GUMMUDU SANYASI AND OTHERS—DEFENDANTS Nos. 2, 5 AND 1—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6—Madras Hereditary Village Offices Act (III of 1895), s. 5—Contract Act (IX of 1872), ss. 23, 65—Limitation Act (IX of 1908), Sch. I, Art. 62—Karnam *service* inam *—Agreement to sell, validity of—Contract, whether enforceable—Refund of consideration money—Limitation, commencement of.*

Defendant who was in possession of certain *karnam* service *inams* agreed to sell the *inam* lands to the plaintiffs after they had been enfrenchised. Plaintiffs sued to enforce the contract for sale and in the alternative prayed for a return of the purchase-money paid by them to the defendant:

Held, (1) that at the time when the contract was entered into the defendant had merely an expectation that the lands would be enfrenchised in his favour and that the contract, therefore, being one to transfer an expectation offended against the provisions of s. 6 of the Transfer of Property Act and was not enforceable; [p. 557, col. 2.]

(2) that so far as it could be regarded as a contract to transfer *inam* lands it offended against the provisions of s. 5 of the Madras Hereditary Village Offices Act III of 1895 and was, therefore, void under s. 23 of the Contract Act; [*ibid.*]

(3) that under s. 65 of the Contract Act the plaintiff was entitled to the refund of the money advanced by him and that the limitation for the recovery of the money was three years under Art. 62 of Sch. I to the Limitation Act and began to run from the date of the agreement.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. Nos. 479 and 480 of 1921, preferred against that of the Court of the District Munsif, Vijanagaram, in O. S. Nos. 520 and 521 of 1916.

Mr. *B. Satyanarayana*, for the Appellant.

Mr. *Y. Suryanarayana*, for the Respondents.

JUDGMENT.—The appellants in this appeal obtained an agreement for the sale of certain *karnam* service *inams* from the 1st defendant. This *inam* undoubtedly formed the emoluments of the *karnam's* office and its transfer is forbidden by s. 5 of Madras Act III of 1895. *Prima facie*, it would appear that this contract was a contract to perform something which is forbidden by-law and would consequently be void under s. 23 of the Indian Contract Act. It is, however, contended, for the appellant that this agreement was not to transfer the *inam* when it constituted the emolument of the *karnam's* office, but to transfer this land after it had been enfranchised by the Inam Deputy Collector, and that consequently Madras Act III of 1895 does not apply. It is quite true that if the land had been enfranchised at the time of the contract, it could have been transferred without offending against Madras Act III of 1895, but when the parties entered into the contract, there was no certainty that the land would be enfranchised or even if so enfranchised, that it would be enfranchised in the name of the contracting party. He was no doubt expecting that it would be so done and agreed to transfer his interest in the property when the event had taken plac This cannot be said to be more than a t nsfer of his expectation and as such w ld offend against s. 6 of the Transfer of J coperty Act, and so the agreement would e void as held in *Sri Jagannada Raju Garu* v. *Sri Rajah Prasada Rao* (1), a case which was quoted with approval by the Privy Council in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2). On this point, I think it is perfectly clear that the contract is not enforceable.

It is argued, as far as I understand the agreement, that because the would-be vendor was in physical possession of the property and was merely subject to the disability to alienate, that that would make a difference to the case and that it must be deemed that such physical possession of one form of estate must be deemed to go some way towards possession of a different form of estate and, therefore, it is not a mere *spes successionis* that is being transferred, but rather a hope that one estate would be transformed into another estate. This appears to be equally a mere expectation and the mere fact that there is physical possession cannot affect the question at all. On this point I think the Subordinate Judge is right and that the contract is void and unenforceable.

The next contention is that under s. 65 of the Indian Contract Act, the plaintiff is entitled to the refund of the money advanced by him. If he had brought his suit within time, he would no doubt be entitled to the amount from the first defendant who

(1) 29 Ind. Cas. 241; 39 M. 554; 17 M. L. T. 419; 28 M. L. J. 650; (1915) M. W. N. 626.

(2) 74 Ind. Cas. 499; 50 I. A. 239; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L R. 1269; 33 M. L. T. 365; 50 C. 929; 28 C. W. N. 713; 40 C L J. 10 (P. C.).

received it. The period of limitation for such a suit is three years from the date when the contract is discovered to be void and as pointed out by the Privy Council in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2), ordinarily the time from which limitation would start is from the date of the agreement in the absence of special circumstances. The contract is one forbidden by law, and the appellants must be deemed to have been aware of the fact when they entered into it. It was, therefore, void from that date and appellants must be deemed to know that fact. If that is not the case, there is no allegation as to when they became aware of it. It is suggested that the plaintiffs were unaware of the illegality of the contract until the Subordinate Judge gave his decision in the suit. If that is so, the cause of action would only arise on the determination of that suit but assuming that to be so—I have no reason to think that it is—the cause of action would be based on the result of the suit and relief could not be claimed in the suit itself. His claim for refund of money must be disallowed, and the second appeal is dismissed with costs of the first and second respondents. Second Appeal No. 1470 of 1922 follows this decision and is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 36 OF 1924.

January 20, 1925.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

GOKAL SINGH—APPELLANT

versus

SHIV RAM AND OTHERS—RESPONDENTS.

Provincial Insolveney Act (V of 1920), s. 17—Death of insolvent, effect of—Vesting of property in Receiver, whether affected—Heirs of insolvent, rights of.

Under s. 17 of the Provincial Insolvency Act the death of a debtor does not interrupt the insolvency proceedings so far as may be necessary for the realisation and distribution of the property of the debtor. Consequently the vesting of the property of the insolvent in the Receiver on the making of an order of adjudication holds good even after the death of the insolvent and the latter's heirs have no remedy against the Receiver other than they would have had against the insolvent himself. In other words they are, if so advised, at liberty to bring a suit to show that the insolvent's debts were tainted with immorality or were otherwise not binding upon them. But in other respects the death of the insolvent does not affect the insolvency proceedings.

Letters Patent Appeal from the judgment of Harrison, J., in Civil Appeal No. 1406 of 1923, dated the 15th November 1923.

Mr. *Mukand Lal Puri*, for the Appellant.

JUDGMENT.—The question for decision in this appeal is whether on the death of an insolvent, whose property has vested in the Receiver is divested of that property.

The learned Judge in Chambers has held that in respect of the land conveyed from Nadir to him the Receiver stands in the shoes of Nadir and his powers cannot exceed those which Nadir could have exercised. So far we have no difficulty in agreeing with the learned Judge in Chambers. We cannot follow him in his further conclusion that the rights of the Receiver were extinguished on the death of Nadir and, therefore, the late Nadir's ancestral property cannot be proceeded against in insolvency for the satisfaction of the debts due to his creditors. By this adjudication and the transfer of his property to the Receiver Nadir's property vested in the Receiver. As under s. 17 of the Insolvency Act the death of a debtor does not interrupt the insolvency proceedings so far as may be necessary for the realization and distribution of the property of the debtor it follows that the conveyance to the Receiver holds good and that Nadir's heirs have no remedy against the Receiver other than they would have had against Nadir himself. In other words they are, if so advised, at liberty to bring a suit to show that Nadir's debts were tainted with immorality or were otherwise not binding upon them. But in other respects the death of Nadir does not affect the insolvency proceedings.

In this view of the case we are not called upon to state whether we accept the conclusions of *Jagdip Singh* v. *Narain Singh* (1) for at his death Nadir's ancestral property was not vested in him but in the Receiver.

For these reasons we accept the appeal, set aside the orders of the Courts below and direct that even the ancestral estate of Nadir be proceeded against in insolvency proceedings so far as may be necessary for the satisfaction of his creditors' claims. The appeal is accepted with costs.

Z. K. *Appeal accepted.*

(1) 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. R. 1912; 173 P. L. R. 1912.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND EXECUTION OF DECREE APPEAL No. 77 OF 1924.

March 19, 1925.

Present :—Mr. Daniels, J. C.

Syed IFTIKHAR HAIDAR—APPELLANT

versus

Musammat IKRAM FATIMA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (2), O. XXI, rr. 89, 92, O. XLIII, r. 1 (j)—Execution of decree—Sale set aside on deposit—Appeal, second, whether lies.

Where an execution sale is set aside under O. XXI, r. 92 of the C. P. C., on an application made under r. 89 of the order, the order setting aside the sale is not open to a second appeal.

Appeal against the judgment and decree of the Additional Subordinate Judge, Hardoi, dated the 24th September 1924, and confirming an order of the Munsif, Bilgram, dated the 28th January 1922.

Mr. *Ghulam Hasan*, for the Appellant.

Mr. *H. Husain*, for Respondents.

JUDGMENT.—This is a second appeal against an order setting aside a sale on an application, accompanied by a deposit, made jointly by the judgment-debtor and mortgagee from the judgment-debtor under O. XXI, r. 89, C. P. C. The mortgagee acquired his interest after the sale, but both the Courts below have held that as the application was a joint one and the judgment-debtor clearly was entitled to apply, the fact of his joining another person with him did not invalidate his application.

A preliminary objection is taken that no second appeal lies This objection is clearly well-founded and must prevail. The order was passed under O. XXI, r. 92, C. P. C. From this order one appeal is specially provided for by O. XLIII, r. 1 (*j*). By s. 104 (2) no second appeal is permitted in such a case. The appellant asks in the alternative that his application may be treated as one in revision, but the facts are not such as to bring the case within the provisions of s. 115 of the C. P. C. Holding that no second appeal lies I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 607 OF 1923.

March 27, 1925.

Present :—Mr. Justice Stuart and Mr. Justice Boys.

FIRM BALRAM DASS-FAKIR CHAND—PLAINTIFF—APPELLANT

versus

THE GREAT INDIAN PENINSULA RAILWAY COMPANY—DEFENDANT—RESPONDENT.

Railway Company—Carriage of goods—Risk Note Form "B"—Goods sent in waggon sealed with paper, string and wax—Loss of goods—Wilful neglect.

Where a Railway Company is aware that over a certain section of their line it is a common incident for seals of waggons to be broken and goods to be stolen therefrom, it is guilty of wilful neglect in sending a waggon over a long section of the line, where the train would have to travel at night and stop at all sorts of sidings sealed only with paper, string and wax. Where in such a case the seals are broken and the goods are lost, the loss must be ascribed to the wilful neglect of the Company. [p. 561, col. 1.]

B. N. W. Railway v. *Firm Manorath Bhagat-Dhian Ram*, 84 Ind. Cas. 794; 22 A. L. J. 1035; L. R. 6 A. 24 Civ.; (1925) A. I. R. (A.) 172 and *Bengal and North-Western Railway Company* v. *Haji Mutsaddi*, 7 Ind. Cas. 160; 7 A. L. J. 833, relied on.

Second appeal from a decree of the District Judge, Ghazipur, dated the 13th January 1923.

Dr. *M. L. Agarwala*, for the Appellant.

Mr. *Ladli Prasad Zutshi*, for the Respondent.

JUDGMENT.—In this case a firm called Balram Das-Fakir Chand carrying on business at Rasra in the District of Ballia sued the G. I. P. Railway Company for compensation to the amount of Rs. 1,271-8 on account of the price of two bales of yarn with interest thereon on the allegation that they delivered these goods to the G. I. P. Railway Company at Victoria Terminus at Bombay to be transported to and delivered at Rasra in the District of Ballia and that the Railway Company failed to deliver the goods in accordance with their contract.

It is admitted that the goods were sent under the owner's risk Note B. That risk note is no longer in current use but with that fact we are not concerned; nor with the question of what may be the effect of our interpretation of the old rules on any new risk notes that may now be in force.

It is clear that *prima facie* the plaintiff was entitled to recover damages against the Railway Company and the Railway Company

could only escape by proving that they are freed from responsibility by the Risk Note Form B. Next it is clear that it is for the Railway Company to establish "loss".

The First Court held that no loss was established. The lower Appellate Court held that the Railway had succeeded in proving loss. On this point we are inclined to agree with the lower Appellate Court though not for the reasons stated by it.

It appers established by the evidence of Mahadeo a Foreman at Victoria Terminus that he put these bales into a waggon No. 7552 and sealed it; that the waggon was sealed for transit to Allahabad City which means that it was a complete waggon which would not except under very exceptional circumstances be opened in the ordinary course of Railway business until it arrived at Allahabad City. The waggon was then sent to Wadi Junction and attached to a train which was there made up for Allahabad, Mahadeo the Foreman further states that in that waggon he placed 43 packages.

The next information we have is that at a station called Pachora on the G I. P. Railway the guard noticed that the doors of the waggon were open and of course the seals broken. As to the nature of these seals we shall have something to say presently. He drew to this the attention of a Railway servant Chintaman Gopal, who is described as a number taker. Apparently this was not the only waggon of which the seal had been broken because Chintaman received instructions from the guard to re-seal a number of waggons including this particular waggon. Chintaman says in his evidence that the ticket on the waggon indicated that there were only 38 packages in the waggon, but we think that there is no doubt that the evidence of Mahadeo the Loading Foreman at Victoria Terminus to the effect that he put in 43 packages, evidence which is supported by his registers, should be accepted.

Nothing further appears to have been done at Pachora at all, but later at Allahabad the packages were counted and it was found that there were only 38. They were re-counted at Allahabad because of the transhipment that was necessary if they were to go by the B. N. W Railway to Rasra. It is further established that at Allahabad amongst the 38 packages found in the waggon there were not to be found the two bales belonging to the plaintiff which Mahadeo had put in at Bombay.

The Railway's case, therefore, is a case of "loss"; that having established that they put the bales into a waggon that was sealed at Victoria Terminus for Allahabad and having established that those packages were not in the van at Allahabad and that the seals had been found to be broken at Pachora and the door open they have proved that the packages have been lost.

It was suggested to us at one time that there was nothing to show how the waggon might have been handled or the packages handled at Wadi Junction or anywhere else enroute; that the packages might have been taken out inadvertently and possibly sold by the Railway Company as unclaimed property in which case the price would still be in their hands but we do not think that this would be a justifiable assumption against the Railway. They could not be expected to produce a witness from every station to say that the packages had not been handled at the station or the seals broken.

We hold, therefore, that the inference which the Railway asks us to draw that they have established "loss" is an inference which we ought to draw, though, as we have said, for reasons other than those stated by the lower Appellate Court.

But we feel that we cannot and should not leave this part of the case without expressing the strongest disapproval of the way in which the Railway Company treated the claim of the plaintiff at the outset. The Company deliberately replied to the plaintiff that they had duly delivered his goods to the East Indian Railway and this statement they made not merely by inadvertence once but deliberately repeated a second and a third time. We have neither been shown nor have we found any evidence to justify these letters and even if the statement was not known by the Company's servants to be false, it was at least made without any proper inquiry and with the most reckless disregard of the truth. If the intention of it was not deliberately to direct the plaintiff on to the wrong track, it was almost certain to have that result. Such conduct of the negotiations upon a claim calls for the strongest condemnation.

The next question is whether the plaintiff has established wilful neglect by the Railway Administration or by its servants

so as to justify him in claiming that the Railway Company are not free even under the terms of the risk note from responsibility. This plea of wilful neglect has been taken all through and we may refer to clause 8 of the grounds of appeal to the lower Appellate Court. The lower Court appears not to have dealt with this plea at all but it is open to us to deal with it as we have all the materials before us.

It is in the evidence of the guard that some two or three days before as is shown by an entry in his journal the seals of waggons on his train were found to be broken in very similar circumstances. It is also clear from cases to which we will refer that the finding of broken seals is to put it at its lowest at least not an uncommon incident.

The question, therefore, arises whether the Railway were not guilty of wilful neglect in sending a waggon hundreds of miles during which the train would have to travel at night and stop at all sorts of sidings, sealed only, as we have it established in the evidence of Mahadeo, the Loading Foreman, with paper, string and wax.

Even if a finding in similar circumstances had not previously been arrived at by this Court we should have been inclined to hold that this was wilful neglect on the part of the Railway. In support of this view we need only refer to *B. N. W. Railway* v. *Firm Manorath Bhagat-Dhian Ram* (1) and *Bengal and North-Western Railway Company* v. *Haji Mutsaddi* (2). We hold therefore that there was "wilful neglect" by the Company and that this appeal should be allowed and we accordingly allow it with costs on the higher scale.

Appeal allowed.

Z. K.

(1) 84 Ind. Cas. 794; 22 A. L. J. 1035; L. R. 6 A. 24; (1925) A. I. R. (A.) 172.

(2) 7 Ind. Cas. 160; 7 A. L. J. 833.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 177-B OF 1922.

September 30, 1924.

Present:—Mr. Kotval, A. J. C.

SADASHEORAO—APPLICANT

versus

KALUSINGH—RESPONDENT.

Hindu Law—Damdupat, *rule of, applicability of*—*Bond*—*Debtor agreeing to re-pay principal and* sawai *with interest*—*Amount, maximum, recoverable.*

Defendant executed a bond in favour of the plaintiff stating as follows:—"I have borrowed from you a debt of Rs. 136 principal, Rs. 34 is *sawai* thereon, the total amounts to Rs. 170." The bond then went on to specify the mode of payment. In a suit to recover the principal and interest:

Held, that the principal amount borrowed under the bond was only Rs. 136 and that the sum of Rs. 34 was prospective interest and that the plaintiff was, therefore, entitled under the rule of *damdupat* to recover only double the amount of Rs. 136 and not double the amount of Rs. 170.

Civil revision from the decree of the Judge, Small Cause Court, Amraoti, dated the 12th September 1922.

Mr. *A. V. Zinzerde*, for the Applicant.

JUDGMENT.—The defendant executed a bond in favour of the plaintiff the terms whereof now material are as follows:—

"I have borrowed from you a debt of Rs. 136 principal; Rs. 34 is *sawai* thereon. The total amounts to Rs. 170—in words one hundred and seventy—Government currency. The amount is payable in five instalments, four yearly instalments of Rs. 35 each and the last instalment of Rs. 30. In all the five instalments are to be paid as follows.....I will pay the above instalments in due time every year. If an instalment is defaulted, I will pay interest on the defaulted instalment at 2 per cent. per mensem from the due date until full satisfaction of the amount. If two instalments are defaulted, I will satisfy the full amount with penal interest in a lump without putting forth a plea as regards instalments to fall due. I will raise no objection to this."

No payment was made by the defendant. The plaintiff states that Rs. 400-12-0 are now due on the bond but claims Rs. 340 only as the *damdupat* of Rs. 170. The Trial Court has awarded him Rs. 272, the double of Rs. 136.

The only question now is whether the plaintiff is entitled to Rs. 340 or to Rs. 272 only. The plaintiff relies upon *Sukalal* v. *Bapu Sakharam* (1) and contends that he is entitled to Rs. 340. This ruling does not help the plaintiff. It is authority only for the proposition that interest in arrear may be capitalized by subsequent agreement. Here the interest added to the principal is not already due. It is expressly stated that the amount of Rs. 136 is the principal and Rs. 34 the *sawai* or prospective interest fixed according to practice common among money-

(1) 24 B. 305; 2 Bom. L. R. 18; 12 Ind. Dec. (N. S.) 738.

lenders at a quarter of the principal. The amount of Rs. 34 is not capitalized. It is fixed as the total amount which is to be paid for interest provided the debt is discharged in a particular manner. The contract is in effect to pay definite portions of the principal and interest at certain intervals. In my opinion Rs. 136 is the principal and the plaintiff is entitled to *damdupat* of that sum only. The application is dismissed. No order as to costs.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2730 OF 1924.
December 11, 1924.
Present:—Mr. Justice Abdul Raoof and Mr. Justice Jai Lal.

SHAROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR, AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Mahant DHARAM DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of—Discretion of Court, how to be exercised—Appointment, when to be made.

The jurisdiction to appoint a Receiver must not be exercised lightly but should be exercised most cautiously. The relief by way of appointment of a Receiver is not one *ex debito justitiæ* but one which is purely within the judicial discretion of the Court. The power should not generally be exercised as a matter of course, and it is not a reason for allowing an applicatton for the appointment of a Receiver that it could do no harm to appoint a Receiver. The appointment of a Receiver is in many cases a matter for the most serious consideration, for the Court taking possession at the instance of a plaintiff may be doing wrong, in some cases, irreparable, to the defendant. For if the plaintiff were to fail in establishing his right the Court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. [p. 564, col. 2.]

Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver. [p. 565, col. 1.]

Kadir Bakhsh v. *Ghulam Mohammad*, 55 Ind. Cas. 50; 2 U. P. L. R. (L.) 56; 30 P. W. R. 1920, referred to.

First appeal from an order of the Senior Sub-Judge, Sheihkupura, dated the 23rd August 1924.

Messrs. *Moti Sagar, Dalip Singh, Kharak Singh* and *Amar Singh*, for the Appellants.

Bakhshi *Tek Chand*, Messrs. *Badri Das* and *Jagan Nath*, for the Respondents.

JUDGMENT.—This is an appeal under O. XLIII, r. 1, cl. (*s*) of the C. P. C., from an order appointing a Receiver, and it has come before us for decision under the following circumstances:—The appeal was admitted by the learned Chief Justice on the 31st of October 1924. An application was made to him on the same date with a prayer that the order appointing a Receiver should be suspended. Upon that application the learned Chief Justice made the following order:—

"Notice to show cause why the operation of the order appointing a Receiver should not be suspended pending the decision of the appeal. Let an *ad interim* order issue." After service of notice the matter came up for disposal before the learned Chief Justice on the 28th November 1924. The learned Chief Justice, being of opinion that the matter was of some importance and that there would most likely be a Letters Patent Appeal if he decided the case sitting singly, referred it to a Division Bench. When the miscellaneous matter came before us and certain arguments were addressed to us we thought it necessary to hear the appeal itself as some of those arguments necessarily related to the question raised in the appeal itself. We made an order accordingly and the appeal has come before us for hearing. Counsel on both sides have argued the case with ability and care, and we have now to give our opinion as to whether the order appointing a Receiver should be maintained or not. It is necessary to give the facts relating to this litigation with some minuteness.

There is a place called Nankana Sahib situated at a distance of about 50 miles from Lahore. There exists a *gurdwara* which is known by the name of *janam asthan*. It is an institution which has always been presided over by *mahants*. One Narain Das was the *mahant* or the manager of this institution in the year 1921. On the 20th of February 1921 a large number of Sikhs visited the *gurdwara* and in consequence of a dispute between the visitors and the *mahant* some of them were murdered. Next day, *i. e.*, the 21st of February 1921, Narain Das was arrested, soon after tried for offences under s. 302 of the Indian Penal Code and convicted. In connection

with what had occurred at the *gurdwara* the Commissioner of the Lahore Division happened to be in Nankana Sahib and he handed over the possession of the *gurdwara* to the Sharomani Gurdwara Parbandhak Committee. Ever since then the association just mentioned has continued in possession. It is admitted that the society was registered under the Societies Act in April 1921. On the 12th of November 1921 the present suit was instituted in which possession, declaration and injunction were claimed, and a prayer for the recovery of mesne profits was added. It appears that, while in jail, *Mahant* Narain Das executed a deed of trust by which Kartar Singh, Dharam Das and Lachhman Das were appointed trustees for the management of the *gurdwara*, Lachhman Das having declined to act the two remaining trustees elected one Nihal Das as a co-trustee.

Now, the plaintiffs in the present suit are Deva Das, Ralia Ram, Gopal Das, Ram Saran, Punjab Das, Ladha Ram and one Daya Ram in addition to the three trustees mentioned above. The last named plaintiff Daya Ram is stated to be a *chela* of Narain Das. On the same date on which the plaint was filed in Court an application for the appointment of a Receiver was made. This application was presented by Mr. Pindi Das as the Advocate of the plaintiffs. The application was not accompanied by an affidavit, but a number of affidavits were filed on the 6th of January 1922. Notice was issued upon that application and the defendants appeared to show cause. On the 4th of May 1922 Mr. Asad Jan. Senior Subordinate Judge, dismissed the application after considering the grounds upon which a prayer for the appointment of a Receiver had been made: but curiously enough he remarked in his judgment that the application was premature. On the face of the order it is quite clear that the learned Judge did not attach any importance to his opinion that the application was premature, because, as already observed, he dealt with the application on the merits, and being of opinion that there was no waste proved, held that it was not a case in which a Receiver should be appointed. On the 15th of February 1924 another application was made by Deva Das and Ralia Ram for the appointment of a Receiver. This application was not supported by any affidavit and no order appears to have been passed on this application. A third application was made on the 7th of June 1924 which was supported by an affidavit of Deva Das. The Court made the following order upon that application: "Case adjourned to 1st August 1924 for argument." Apparently no notice was ordered to be issued upon this application, and, though the Pleaders of the parties were present in Court and their presence was recorded on the file of the suit, it does not appear that any notice was given of this application to the Pleaders of the defendants or that they were present at the time the application was presented. Before any order could be passed upon this application a fourth application was presented on behalf of the plaintiffs on the 15th of July 1924. No affidavit, however, was filed in support of the allegations made in this petition. The Court recorded the following order upon this application:—

"Notice be served upon the Pleaders of the defendants for appearance on the date fixed in order that they may show cause why the application for the appointment of a Receiver should not be granted. Notice to the Pleaders to issue under O. III, r. 5 of the C. P. C."

The hearing of the case was fixed for the 1st and 2nd of August 1924. The application of the 7th of June 1924 was also ordered to come up for hearing on the first of these dates. Evidently, therefore, by the order of the 15th of July 1924 the Court meant the fourth application also to come up on the 1st and 2nd of August 1924, and the defendants were ordered to show cause then. Notice was served on Sant Singh on the 19th of July 1924 and that on Sardar Pritam Singh, Vakil, on the 20th of July 1924. On the 1st and 2nd of August 1924, however, the applications could not be taken up and disposed of. The hearing of the case was adjourned to the 16th of August 1924 but no order was made on the application itself. On the date fixed the defendants presented an application asking the Court to allow them an opportunity to produce their evidence of rebuttal. An affidavit was filed by the defendant Uttam Singh. Mr. Badri Das made a statement on behalf of the plaintiffs, while Sardar Pritam Singh made his statement on behalf of the defendants. As a great deal of argument has been advanced as regards this statement it is necessary to give it *in extenso* in this order. It is as follows:—

"The plaintiffs' application for appointment of Receiver is supported by an affidavit which alleges we are spending the income of the *dera* for other purposes, and that we are spending very little on the *dera* itself, and that we have not money enough to pay the plaintiffs in case of a decree. We wish to rebut these allegations by evidence and also to show that the mode of worship has not been changed. To-day we were required only to meet plaintiffs' application, so we have no evidence present and strongly urge that we should be given a date to produce our euidence. We wish to show by our accounts that the Committee is possessed of lakhs of rupees deposited in Banks, and could easily meet plaintiffs' decree if passed. We also wish to show the accounts of the income and expenditure at the *gurdwara*. We have spent a great deal on improvements to the *gurdawara*. I can't give an approximate figure as to the income of the *gurdwara* lands and other income. Some surplus from the income has been spent on purchasing lands at Nankana for the *gurdwara*. I can't say if there is any more surplus, and if there is where it is invested or deposited. Nothing from the *gurdwara* income has been spent on *jathas*. I do not know whether the *gurdwara* makes any contribution to the Committee. The accounts will clear all these points, but we have none of the accounts here to-day."

The Court below did not accept the application for postponement and made the following order:—

"The object of presentation of the application by the defendants at this stage of the case is that the month of September may expire in production of the evidence; but the plaintiffs state that this month is considered as important for appointment of a Receiver because the contracts are renewed in this month. No opportunity is given for production of evidence. If a Receiver is appointed the defendants will be at liberty and will have ample time to prove the invalidity of the appointment of the Receiver by means of evidence. Thus they will have sufficient time to have the appointment of the Receiver cancelled if any is made.

On the same date a further application was made to the Court to postpone the case to enable the defendants to make an application to the High Court for the transfer of the case from the Court of the learned Senior Subordinate Judge. Upon this application the Court made the following order:—

"If a Receiver is appointed he will not be able to do anything as regards collecting dues from tenants till November or December, and no immediate harm to the defendants will accrue. The High Court will open early in October, and they may seek their remedy then."

The reasons stated in the two orders appear to be somewhat inconsistent, though they were passed on the same date. The result was that the Court proceeded to hear arguments of the parties and made the order appealed against.

In argument before us both the parties have relied upon a large number of authorities for the purpose of showing under what circumstances and on what grounds the Courts should appoint a Receiver. It is not necessary to refer to each of those cases because they are numerous. The principles are so well-recognized that it is not necessary to consider or repeat the reasons which are stated in the various cases. It is enough to refer to a passage in the well-known work "Woodroffe on Receivers." At page 89 the law on the subject is thus stated:—

"In the first place, the jurisdiction thus given must not be lightly but most cautiously exercised. The relief is not one *ex debito justitiæ*, but one which is purely within the judicial discretion of the Court. The power to appoint a Receiver is not to be generally exercised as a matter of course, and it is not a reason for allowing an application that it can do no harm to appoint a Receiver. The appointment of a Receiver is in many cases a matter for the most serious consideration, for the Court by taking possession at the instance of a plaintiff may be doing a wrong, in some cases irreparable, to the defendant. For if the plaintiff should eventually fail in establishing his right the Court may, by its *interim* interference, have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation."

Having these principles before us we have to examine the circumstances of this case and give our opinion as to whether the order appointing a Receiver passed by the learned Judge of the Court below on the grounds mentioned in his order can be sustained.

Mr. Tek Chand in his argument relied

upon the decision in the case of *Kadir Bakhsh* v. *Ghulam Mohammad* (1), and urged that, where a Court, after considering all the circumstances of the case, has thought it fit to appoint a Receiver an Appellate Court should not ordinarily interfere with the order. But this decision also points out the grounds upon which alone a Court can grant injunction. The rule is thus summed up in the head-note :—

"Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver."

It has been contended by Mr. Moti Sagar that in this case the Court below refused to take into consideration the whole of the circumstances of the case, inasmuch as it refused to allow the defendants to produce their documentary and oral evidence to rebut the case put forward by the plaintiffs. Mr. Tek Chand has contended that the defendants had sufficient opportunity for producing evidence and, if they did not do so, they were themselves to blame. In the light of the arguments addressed to us by Counsel of both the parties on this particular point we have carefully examined the proceedings before the lower Court and have come to the conclusion that under the peculiar circumstances of this case the Court below would have exercised a better discretion if it had allowed the defendants to produce their evidence in order to rebut the case of the plaintiffs. The examination of the record discloses to us a lamentable state of affairs. As we have already pointed out Mr. Asad Jan, while dismissing the first application, described it to be premature and yet went into the facts of the case, considered all the allegations and dismissed the application on the merits. The second application that was made on the 15th of February 1924 admittedly remained on the record without any final order being made upon it. The application of the 7th of June 1924 bears an order by the Court which, to say the least, is as vague as it could be. The order is that "the case to come on the 1st of August 1924 for argument."

It is contended by Mr. Dalip Singh with some force that, inasmuch as the first application for the appointment of a Receiver had been dismissed on the merits by Mr. Asad Jan, the Court had probably fixed the date to enable the plaintiffs to satisfy the Court by argument that a second application could be made for the appointment of a Receiver upon the same facts. It is very difficult to understand what really the learned Senior Subordinate Judge meant; but it is possible that on account of the vagueness in the order the defendants were misled. It is also contended on behalf of the defendants that no notice of this petition was given to either of the defendants or their Pleaders. Then again it is argued with some force that, although the 1st of August 1924 was fixed for argument, the application was not heard on that date and the 16th of August was fixad for the hearing of the suit as well as the application. Now, having regard to this state of affairs the defendants, in our opinion, were quite justified in asking the Court to allow them an opportunity to produce evidence to rebut the allegations of the plaintiffs. The statement of the Pleader before the Court made it quite clear that the defendants wanted to produce both documentary and oral evidence to rebut all the allegations made by the plaintiffs in support of their application for the appoinment of a Receiver. In this Court further affidavits have been filed both on behalf of the appellants and the respondents. On behalf of the appellants an affidavit has been filed and sworn to by Buta Singh in which the material allegations made on behalf of the plaintiffs are denied, and it is positively stated that accounts of the income and disbursement relating to the institution in question are separately kept and the defendants are possessed of sufficient funds. It is stated before us on behalf of the appellants that if an opportunity be given to them now they will produce all the account books which are regularly kept. It is also stated that the accounts have been regularly audited. We have not the least doubt that if the learned Judge of the Court below had allowed the defendants to produce their accounts and other evidence he would have been in a better position to record an order to which possibly no exception could be taken on the strength of the rulings which have been cited at the bar by both the parties. Because the defendants were not allowed to bring before the Court all the materials upon which they wanted to rely, it has been contended that the Court did not enquire into all the circumstances before recording this order.

(1) 55 Ind. Cas. 50: 2 U. P. L. R. (L.) 56; 30 P. W. R. 1920.

Mr. Tek Chand, however, has contended that, even admitting that sufficient opportunity was not afforded to the defendants to produce their evidence and that the order upon that ground is defective, it will not serve any useful purpose to remand the case because on account of a certain notification of Government the defendants cannot legally manage the affairs of the *gurdawara*. He has referred to Punjab Government Notification No. 23772, dated the 12th of October 1923 issued under the Criminal Law Amendment Act of 1908 and has contended that the effect of this notification is that it has become impossible for the defendants to carry on the work of the management of this institution. He, therefore, argues that to allow the management of the institution to remain in the hands of the Sharomani Gurdwara Parbandhak Committee will not be wise or proper. The solution of the question whether the defendants can carry on the work of management will very much depend upon the result of the investigation which may be made on the strength of the evidence to be produced by the defendants. We are not prepared on the materials before us to hold that merely by reason of the notification of the Government they have become incapable of managing the affairs of this religious institution. In fact by a *communique* of the 15th of October 1923 the Government removed any doubt that might have arisen. It is stated in that *communique* that "at the same time the Parbandhak Committee and Akali Dal with their subordinate organization have been declared to be unlawful associations within the meaning of the Criminal Law Amendment Act of 1908. It is not proposed to proceed under that Act against any persons who confine themselves to purely religious activities, but action will be taken against persons covered by the declaration who continue to act in a manner dangerous to the maintenance of law and order and to the public peace. The action taken is in no way directed against the movement for the reform of Sikh shrines so long as that movement is conducted according to law." If any doubt existed on this point, it must have been dispelled from the minds of the defendants by this *communique*. It is definitely stated before us on behalf of the appellants that the affairs of the institution are satisfactorily managed, and the accounts regularly kept and audited. If the defendants are in a position to show all this, the Court will be in a position to judge whether the affairs of the institution are properly managed, and whether the income is properly kept and accounted for. We are, therefore, of opinion that further opportunity should be allowed to the parties to produce evidence in support of their allegations. The order, as it stands at present, has not been made after the consideration of all the circumstances and must be set aside.

We accordingly accept this appeal and setting aside the order of the Court below remand the case for decision upon the merits with due regard to the observations made in our judgment. Costs to abide the result.

At the close of his argument Mr. Tek Chand put forward a number of alternative considerations and asked us to either order the defendants to deposit in Court Rs. 65,000 which they allege they have collected after the order of the learned Chief Justice of the 28th of November 1924, or take sufficient security from them for the income of the estate or appoint an *ad interim* Receiver during the pendency of the proceedings in the Court below. We are not prepared to accept any of these suggestions because we are not possessed of sufficient materials upon which we may be persuaded to make an order with respect to any of these prayers. The defendants, as mentioned in the judgment, did not take possession of the property by force or fraud. They were peacefully put in possession by the Commissioner of the Lahore Division, and unless a good case is made out to oust them either permanently or temporarily they must be allowed to remain in possession. As this very question is going to be tried by the Court below, we do not think it will be advisable for us to make an *ad interim* order of the kind suggested by Mr. Tek Chand. As matters at present stand we are unable to express any opinion one way or the other.

Z. K. *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 190 OF 1924.
March 16, 1925.
Present:—Mr. Daniels, J. C.
FATEH BAHADUR SINGH—
DEFENDANT—APPELLANT
versus
Thakur SHEO DARSHAN SINGH—
PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Partition—Compromise regarding allotment of plots—Compromise not given effect to in final allotment—Confirmation of partition—Title based on compromise, whether can be recognised.

During the course of certain partition proceedings a compromise was arrived at between the parties according to which the plot in dispute was to go to the defendant in place of two other plots which were to go to the plaintiff. At the final allotment of the land in the partition which was subsequently confirmed the plot in dispute was allotted to the plaintiff. Plaintiff sued for possession of the plot allotted to him and defendant resisted the suit on the ground that under the compromise he was entitled to retain possession of the plot :

Held, that the defendant's claim was barred by the provisions of s. 233 (*k*) of the U. P. Land Revenue Act.

Appeal against the judgment and decree of the Subordinate Judge, Barabanki, dated the 6th February 1924, confirming that of the Munsif, Ramsanehighat, dated the 27th October 1923.

Mr. *Moti Lal Saksena*, for Mr. *Bhawani Shankar*, for the Appellant.

Mr. *Ram Bharose Lal*, for the Respondent.

JUDGMENT.—This appeal arises a question of the applicability of s. 233 (*k*) of the Land Revenue Act. The facts are quite clear. At the final allotments of land in the partition which was confirmed on 3rd November 1916, the plot in dispute, No. 528/2, was allotted to the plaintiff-respondent. Prior to this in the course of the partition proceedings a compromise had been entered into between the parties according to which this plot was to go to the defendant-appellant in place of two other plots which were to go to the plaintiff. The learned Munsif came to the conclusion that this compromise was not given effect to by the parties and remained a dead letter. However, that might be it is quite certain that it was not given effect to in the partition record, and that the final allotment of land, which was confirmed by the Collector, gave this plot to the plaintiff. Under these circumstances s. 233 (*k*) clearly bars the claim, and I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1978 OF 1922.
March 11, 1925.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.
PANCHANON SARKAR AND OTHERS—
DEFENDANTS—APPELLANTS
versus
Rani BASANTA KUMARI DASI
AND OTHERS—RESPONDENTS.

Limitatian Act (IX of 1908), Sch. I, Art. 142—Alluvion and diluvion—Suit for possession after dispossession—Plaintiff, what must prove—Submerged lands—Constructive possession.

A suit for recovery of possession after dispossession is governed by Art. 142 of Sch. I to the Limitation Act, and the plaintiff must show that he was in possession within 12 years of the date of the suit. The rule is equally applicable to suits in respect of diluviated lands. [p. 568, col. 2.]

Rakhal Chandra Ghose v. *Durga Das Samanta*, 67 Ind. Cas. 673; 25 C. W. N. 724; (1922) A. I. R. (C.) 557 and *Rani Hamanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy Bahadur*, 10 C. W. N. 630; 3 A. L. J. 363; 8 Bom. L. R. 400; 1 M. L. T. 135; 16 M. L. J. 272 (P. C.), followed.

On dispossession of a trespasser by flood the constructive possession of the land reverts to the true owner. The true owner means a person who has a subsisting title to the land even though he may be out of possession. [p. 569, col. 1.]

Therefore the mere fact that diluviated lands have emerged within 12 years of the suit would not entitle a plaintiff, who merely proves his title to them at some remote period, to a decree for possession. The plaintiff must further prove that his title subsisted at the time of the diluvion. [*ibid.*]

Appeal against a decree of the District Judge, Jessore, dated the 18th April 1922, modifying that of the Subordinate Judge of that District, dated the 20th of April 1921.

Babus *Surendra Nath Guha* and *M. Nuruddin Ahmed*, for the Appellants.

Babus *Joges Chandra Roy*, *Ramani Mohan Chatterji*, for the Respondents.

JUDGMENT.

Cuming, J.—The facts of this appeal are as follows:—

The plaintiff in the suit sued for recovery of possession of certain *chur* lands. His case was that the land in dispute formed part of his *zemindari Mouza* Arara. The land had been washed away sometime

after the Revenue Survey and from the year 1310 (October 1903) began to reform and the plaintiff took possession and remained in possession through a tenant. This tenant's holding was sold in execution of a decree for rent and purchased by the plaintiff. When he went to take possession in 1318 (1911) he was resisted by the defendants. Hence the suit which was instituted on the 6th October 1915. The defence was that the land in suit appertained to the defendants' *Mouza* Chur Lankar, that the plaintiff never possessed these lands. The land had reformed 30 years before the date of suit and the defendants had acquired a title by adverse possession.

The Trial Court found that the suit was barred by limitation. The plaintiff had failed to prove that the land had reformed in 1310; on the contrary they had reformed 30 years ago and defendants had been in possession all the time. The plaintiff had failed to prove that he had been in possession within 12 years of the date of suit and hence he dismissed the suit.

On appeal to the District Court the learned District Judge held that the plaintiff had established his right and title to 18 *bighas* of the disputed land which were a reformation *in situ* of his estate *Mouza* Arara. He held that the lands were reformed in 1903 and that it was not established by the evidence that the 18 *bighas* were reformed over 12 years before the date of suit. It was for the defendants to produce what evidence they could to show that they had been in possession for 12 years.

Further that in a case like this where the plaintiff proves his right and title by reference to ancient documents and the defendants are in possession it is the duty of both parties to produce all the relevant evidence which is in their power and it is the duty of the Court to balance the evidence finally and to give the award to the parties on whose side there is a fair preponderance of evidence. He finally allowed the appeal to the extent of 18 *bighas*.

The defendants have appealed to this Court. On their behalf Mr. Guha has contended shortly that the plaintiff sues in ejectment. The case is governed by Art. 142 of Sch. I of the Limitation Act and it is for the plaintiff first to prove that he was in possession within the statutory period. The learned Judge in the Court below had not approached the case from the point of view, but had wrongly placed the onus on the defendants. The plaintiff had failed to prove his possession within the statutory period and his suit should have been dismissed as barred by limitation. The respondent argues that if the land came above water less than 12 years before the date of suit he had discharged the onus. All he had then got to show is that he had at some period before the date of the suit a title to the land.

Now the plaintiff sues in ejectment. His case in his plaint is one of possession and dispossession and Art. 142 clearly applies and to succeed he must first of all prove that he had possession within the statutory period: see *Rakhal Chandra Ghose* v. *Durga Das Samanta* (1). In this case all the decisions on this point have been discussed and dealt with and it is unnecessary for me to go over the same ground. The learned Judges remarked that cases of diluviated land or jungle or waste lands are no exception to the general rule that a plaintiff who is dispossessed and brings a suit for recovery of possession must show he was in possession within twelve years of the date of suit. Their Lordships of the Privy Council affirm the same principle in the case of *Rani Hamanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy* (2). This was also a case of diluvion and alluvion. The point is now so well-settled that any further discussion of it would be idle.

The respondent then contends that it has been found that the land emerged within 12 years of the date of suit. He has title to the land and the title must be considered to be subsisting during the time that the land was under water and possession follows title. So his possession must be considered to have continued whilst the land was under water up to the time it emerged which was a point of time within the statutory period. Now no doubt if the plaintiff had possession at the time of submergence or had then a subsisting title he would be in constructive possession during the period of submergence. That is the principle which underlies the decision in *Secretary of State for India* v. *Krishnamani Gupta* (3), where it was point-

(1) 67 Ind. Cas. 673; 26 C. W. N. 724; (1922) A. I. R. (C.) 557.

(2) 10 C. W. N. 630; 3 A. L. J. 363; 8 Bom. L. R. 400; 1 M. L. T. 135; 16 M. L. J. 272 (P. C.).

(3) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 260 (P. C.).

ed out (page 535*) that if a person enter upon the land of another and hold possession for a time and then without having acquired a title under the Statute abandon possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place and further that on dispossession of the trespasser by the flood the constructive possession was with the true owner. see also *Basanta Kumar Roy* v. *Secretary of State for India* (4). But the true owner does not mean a person who at some more or less remote period had a title to the land. It means the person who has a subsisting title even though he be out of possession. The respondent argues that it is sufficient that he can show that sometime or other he had a title to throw the burden of proof on the other party to prove he lost that title and would rely on *Basanta Kumar Roy* v. *Secretary of State for India* (4). But in that case no question of the burden of proof arose or was decided. Respondent further argues that there is a presumption that possession went with the title [*Runjeet Ram Pandey* v. *Goburdhun Ram Pandey* (5).] But this principle has not been so broadly stated as the respondent would now put it. It would probably be more correct to say that where the evidence as to possession is conflicting the Courts may rely on the presumption that possession follows title. See the case of *Thakur Singh* v. *Bhogeraj Singh* (6), where it was pointed out that in cases where the evidence on both sides was equally balanced that preference should be given to the side with whom title was found.

I have found nothing in the numerous cases that I have considered which could lead me to any other conclusion but that in this case of alluvion and diluvion there is no departure from the ordinary rule that a plaintiff suing in ejectment must prove possession within 12 years. To do this he may rely on a variety of evidence. For instance if he could show that he was in possession up to the time of diluvion and that the land remained under water or incapable of being possessed up to a point of time within the statutory period or even though out of possession he might show that he had a subsisting title in which case possession would be considered to go back to him when the trespasser was evicted by *vis major* when the lands were washed away.

But this after all is only the manner in which he would prove his possession. The rule remains the same. He must prove possession within 12 years from the date of suit and it is from this standpoint that the case must be approached and from which unfortunately learned District Judge has not approached it. The case must, therefore, be sent back to him for a determination of the following point.

He will consider if the plaintiff has proved his possession within 12 years of the date of suit. If he decides this point against the plaintiff, he must dismiss the plaintiff's suit. If he decides it in favour of the plaintiff, he will make the decree which he made before and which is now on appeal before us. He will decide the appeal on the evidence now on the record. The appellant is entitled to his costs in this Court. With regard to costs in the Trial Court and Court of first appeal, they will abide the final result.

Greaves, J.—I agree.

Appeal allowed;
Case remanded.

N. H.

(4) 40 Ind. Cas. 337; 44 C. 858; 1 P. L. W. 393; 32 M. L. J. 505; 21 C. W. N. 612; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P. C.).

(5) 20 W. R. 25 (P. C.).

(6) 27 C. 25; 14 Ind. Ind. Dec. (N. S.) 17.

*Page of 29 C.—[*Ed.*]

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 121 OF 1923.
October 3, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Percival, A. J. C.

SHARAFDIN AND OTHERS—APPLICANTS
versus
ALLAHBUX AND OTHERS—OPPONENTS.

Contract Act (IX of 1872), ss. 51, 54—Transfer of Property Act (IV of 1882), s. 55—Contract for sale of immoveable property—Title, doubtful—Purchaser, whether bound to complete—Brokerage, liability of purchaser to pay.

Where in the case of a contract for the sale of immoveable property the state of the vendor's title is such that if the purchaser were to complete the purchase he would not be able to obtain possession of the property without further litigation with third parties, he is justified in not completing the purchase. In such a case the purchaser would not be liable to pay brokerage in connection with the intended purchase to the broker who proposed the sale, inasmuch as the broker may reasonably be held in effect to have committed a

breach of the contract by joining with the vendor in proposing a sale which could not in fact be carried out.

Application for revision under s. 115, C. P. C.

JUDGMENT.—This is a revisional application under s. 115 of the C. P. C. and this Court will interfere only when the lower Court has acted in the exercise of its jurisdiction illegally or with material irregularity, or for similar other reasons. The questions in this case are whether the purchaser is liable for brokerage in connection with the intended purchase of certain land, and who committed the breach of contract, which prevented the purchase from being completed. Now there is sufficient evidence to show that defendant No. 4, the person who intended to buy the property was willing to go on with the purchase, until she was advised by her lawyers that she ought not to complete the sale for want of a clear title. The reason why the title was not clear was that one Bachal Khatun gave defendant No. 4 a notice that she (Bachal) also had a claim to the property and also there was a probable claim by the minor heirs of one Mahomed Ibrahim.

In view of the doubtful character of the title of the property, we agree with the learned Small Cause Court Judge in holding, that if the purchaser had completed the purchase she would in fact have bought a law suit, and would not have obtained possession of the land without further litigation. Therefore, she was justified in not completing the purchase.

The second point that arises is whether the broker was in any event entitled to recover from the purchaser. On this point the learned Judge held that the broker had apparently been helping the vendor, and thus the broker and the vendor must be taken as being in the same boat.

In view of the fact the purchaser could not go on with the purchase and obtain possession of the property, it may reasonably be held that the broker in effect committed breach of the contract, by joining with the vendor in proposing a sale, which could not in fact be carried out.

This being a revisional application and the broker's conduct thus being open to considerable criticism, we do not see sufficient reason to interfere with the order of he learned Judge.

We dismiss the application with costs.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 176 OF 1923.

October 29, 1924.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

BULAQI SHAH AND ANOTHER—APPELLANTS

versus

THE COLLECTOR OF LAHORE—RESPONDENT.

Letters Patent (Lah.), cl. 10—Income Tax Act (XI of 1922), s. 66—Reference to High Court by Income Tax Commissioner—Decision, whether "judgment"—Appeal, whether lies.

The decision of the High Court given under s. 66 of the Income Tax Act does not amount to a "judgment" within the meaning of cl. 10 of the Letters Patent of the Lahore High Court and is not, therefore, appealable under that clause.

Letters Patent Appeal against the decision of Mr. Justice Harrison, dated the 12th April 1923.

Mr. *Tirath Ram*, for the Appellants.

Mr. *Jai Lal*, for the Respondent.

JUDGMENT.—This is an appeal from the decision of a Single Bench of this Court on points of law referred to it by the Commissioner of Income Tax, Punjab under s. 66 of the Income Tax Act of 1922, and the first matter for decision is whether an appeal under cl. 10 of the Letters Patent is competent, in other words whether the decision of the Single Bench is a "judgment" within the meaning of that word as used in the aforesaid cl. 10.

The matter seems to us to be concluded by the decision of their Lordships of the Privy Council in *Tata Iron and Steal Company Limited* v. *Chief Revenue Authority, Bombay* (1).

In that judgment their Lordships came to the conclusion that the decision of a High Court upon a case stated and referred to it by the Chief Revenue Authority under the Income Tax Act is not a "final judgment, decree or order" within the meaning of cl. 39 of the Letters Patent of the Bombay High Court but is merely advisory and not final.

On behalf of the appellant an attempt has been made to distinguish that ruling on the ground that the term employed in cl. 10 of the Letters Patent is not "final judgment" but merely "judgment." But if the *ratio decidendi* of their Lordships' ruling be considered it will be seen that no signi-

(1) 74 Ind. Cas. 469; 47 B. 724; 50 I. A. 212; (1923) M. W. N. 603; 25 Bom. L. R. 908; 21 A. L. J. 675; 45 M. L. J. 295; 18 L. W. 372; 39 C. L. J. 16; 28 C. W. N. 307; 33 M. L. T. 301; (1923) A. I. R. (P. C.) 148; 9 O. & A. L. R. 783 (P. C.).

ficance attaches to the absence of the adjective "final" from cl. 10 of the Letters Patent. After analysing the nature and the character of the acts which the Income Tax Act authorizes the High Court to do, their Lordships came to the conclusion that "the decision of the High Court does not in any way enforce the discharge of the tax-payers' liability. It would appear clear to their Lordships that the word 'judgment' is not here used in its strict legal and proper sense." It is merely the expression of the opinions of the Judges who heard the case and the final conclusion is in the following words:—"It would appear to their Lordships that the decision, judgment or order made by the Court under s. 51 of the Income Tax Act of 1918 (the equivalent of s. 66 of the Income Tax Act of 1922) was merely advisory".

If we apply in this case the same tests as were applied by their Lordships of the Privy Council to the case before them, we must hold that the decision by the Single Judge was merely advisory and could not be enforced by execution. The decision of a Court made under s. 66 of the Income Tax Act of 1922 does not, in our opinion, amount to a "judgment" within the meaning of cl. 10 of the Letters Patent. We accordingly hold that no appeal is competent from the decision of the learned Judge and we dismiss this appeal with costs.

Z. K. *Appeal rejected.*

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SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 27 OF 1923.

July 2, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Lobo, A. J. C.

FIRM OF GANGARAM—APPELLANTS

versus

KODOOMAL AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 107—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Contract for sale of ready goods, breach of—Re-sale two months after due date—Damages, on basis of re-sale, whether can be recovered—Appeal—Amendment of plaint, whether can be allowed.

Defendant agreed to purchase from the plaintiff a certain quantity of ready goods but failed to take delivery of the goods. Defendants served plaintiff with notice of re-sale and actually re-sold the goods by public auction nearly two months after the due date and then sued the defendant for the loss resulting from the re-sale. The suit was decreed but on appeal the District Judge dismissed the suit on the ground that the plaintiff was not entitled to recover damages on the basis of a re-sale which had taken place nearly two months after the due date of contract for the sale of ready goods. Plaintiff applied for leave to amend the plaint so as to be able to sue for damages on the basis of the difference between the contract price and the market price on the due date. This application was also rejected:

Held, (1) that the lower Appellate Court had rightly held that the plaintiff was under the circumstances not entitled to recover damages on the basis of a re-sale;

(2) but that under the circumstances of the case plaintiff should have been given leave to amend the plaint and to sue on the basis of the difference between the contract price and the market price on the due date.

Appeal against the decree of the District Judge, Sukker.

JUDGMENT.—On 2nd May 1919 the appellants entered into a contract with the respondent No. 2 for the sale of some 243 maunds of rape seed ready at Rs. 10-15-0 per maund. Respondent No. 2 failed to take delivery of the goods, in fact he repudiated the contract. On 18th June 1919 the appellants gave to the respondents notice of re-sale and actually re-sold the goods by public auction on the 30th of June 1919, the re-sale realizing Rs. 9-0-6 per maund. The appellants sued the respondents in the Court of the Subordinate Judge of Rohri for recovery of damages for breach of the contract, Rs. 6555-3 and claimed Rs. 49-4-9 as interest. Respondent No. 1 was joined as being the father of respondent No. 2 and joint with him. The Subordinate Judge held the contract proved, held both respondents liable thereon and decreed the appellants' suit for Rs. 700. The respondents appealed to the District Court, Sukker. The District Court while agreeing with the Subordinate Judge that the appellant had proved his contract held that respondent No. 2 alone was liable thereon. Without entering into the question as to whether the property in the goods had or had not passed he held that there had been undue and extraordinary delay in auctioning the goods and that appellant was, therefore, not entitled to damages on the basis of the re-sale. Before the learned District Judge signed the judgment the appellants' Pleader applied for leave to amend the plaint. The learned District Judge, however, refused such leave and allowed the appeal with costs. The appellants now come be-

fore us in a second appeal. We are of the opinion that while the District Judge was perfectly correct in holding that the appellant was not entitled to recover damages on the basis of a re-sale which had taken place nearly two months after the due date of the contract which was a contract for ready goods the appellant should, in the circumstances of the case, have been allowed to amend the plaint so as to claim damages on a proper basis. The appellants had succeeded in proving their contract. There was a clear breach thereof on the part of respondent No. 2 and the reason for this breach in all probability was that there had been a fall in the market after the contract had been entered into. In these circumstances the appellant was somewhat harshly dealt with in not being permitted to amend his plaint so as to claim damages on a basis other than that put forward by him in the Court of the Subordinate Judge. Our view is supported by the recent case of *Narsingiriji Manufacturing Co.* v. *Budansaheb Abdulsaheb Kaji* (1). In that case the High Court had before it materials upon which to determine damages on the basis of the difference between the contract price and the price ruling in the market of the due date for performance. Here we have no such materials before us. The case reported as *Shankrdas* v. *Tyebaji* (2) also supports our view that in the circumstances of this case the appellants should have been granted leave to apply to amend their plaint. We, therefore, think it proper to allow the appellants an opportunity to apply to this Court for leave to amend the plaint so as to claim damages upon a proper basis without prejudice to any plea as to limitation or otherwise that might be raised by the respondent. The application for leave to amend is to be made within a month and the matter will then be brought up for final disposal including the questions of costs.

Z. K. *Case remanded.*

(1) 80 Ind. Css. 430; (1924) A. I. R. (B.) 390; 26 Bom. L. R. 523.

(2) 1 S. L. R. 81.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2120 OF 1924.

February 6, 1925.

Present:—Mr. Justice Abdul Raoof.

BHAGAT SINGH—DEFENDANT —APPELLANT

versus

NIKKA—PLAINTIFF—RESPONDENT.

Fraud—Decree passed by consent—Suit to set aside decree—Agreement to recover smaller sum than that mentioned in decree, whether evidence of fraud.

Plaintiff was a defendant in a former suit in which a decree was passed against him for a certain sum by consent. He brought the present suit to set aside the decree on the ground that it was obtained by fraud. The fraud alleged was that the previous suit had been compromised on the plaintiff agreeing to pay a certain sum to the defendant and that the defendant induced the plaintiff to allow a decree to be passed against him for a larger sum on the representation that only the smaller sum which was the basis of the compromise would be actually recovered:

Held, that plaintiff having allowed a decree to be passed against him by consent with knowledge of all the facts, it could not be said that he had in any way been defrauded and that his suit was consequently liable to be dismissed. [p. 573, col. 1.]

Second appeal from a decree of the District Judge, Amritsar, dated the 17th July 1924.

Dr. *Nand Lal*, for the Appellant.

Mr. *Devi Dayal Kapur*, for Mr. *Anant Ram*, for the Respondent.

JUDGMENT.—The defendant sued the plaintiff for the recovery of Rs. 250 in the Court of the Subordinate Judge of Tarn Taran and obtained a decree for the amount on the 21st June 1923 on the admission of the plaintiff. The present suit was brought by the plaintiff for a declaration that the said decree was obtained by fraud. The following allegations are made in the plaint:—That on the 13th of *Jeth Sambat* 1980 a compromise was entered into between the plaintiff and the defendant under which the latter had agreed to take Rs. 85 only in full discharge of his claim. The compromise was written out and was left in the possession of Ishar Singh and it was arranged that on payment of Rs. 85 to Ishar Singh through one Chet Singh the said compromise would be handed over to the plaintiff. According to the plaint Rs. 85 were paid to Chet Singh on the 1st *Asar* 1980 and that when the parties appeared on the 21st June 1923 in Court the plaintiff was persuaded by the defendant to agree to a decree being passed for the full amount of Rs. 250 on the understanding that if the

amount of Rs. 85 had already been paid the defendant would not claim the balance of Rs. 250.

This was the fraud relied upon by the plaintiff on the basis of which he asked the Court to declare the decree of the 21st June 1923 to be ineffectual. The defendant denied the fact of the compromise and alleged that the plaintiff had himself admitted the entire claim and a decree had consequently been passed for the whole amount. The Trial Court dismissed the suit, holding that no fraud had been established. The lower Appellate Court took a different view and granted a decree in favour of the plaintiff declaring that the decee of the 21st June 1923 had been obtained by fraud. The defendant-decree-holder has come up in second appeal to this Court and it has been contended on his behalf that even if the facts alleged by the plaintiff be admitted, no fraud in law had been committed. It cannot be denied that the decree was passed by the Court on the admission of the claim by the plaintiff. The plaintiff, if his allegations are true, knew perfectly well that the claim had been compromised and the defendant had agreed to take only Rs. 85. If in spite of this knowledge he admitted the entire claim in Court and allowed a decree to be passed against him for Rs. 250 it cannot be said that a fraud had been practised upon him. The finding of the lower Appellate Court on the question of fraud is vague and indefinite. The learned Judge in the first place remarks: "It is difficult in fact to get direct evidence of fraud but the circumstances all point towards it. It is difficult to believe that a man who had settled on Rs. 85, would go to the Court and at once admit the full Rs. 250 without any such assurance as the plaintiff in this case says was given to him;" and then goes on to consider the circumstances and comes to the conclusion that Nikka had been defrauded and that he gave his *iqbal dawa* as a result of that fraud. In my opinion the conclusion drawn by the lower Appellate Court from the findings recorded by him is not justified. No fraud was practised upon the plaintiff and as already observed; if the plaintiff knew all the facts and in spite of that allowed a decree to be passed against him by consent, it cannot he said that he had in any way been defrauded. I, therefore, accept the appeal, and setting aside the decree of the lower Appellate Court, restore that of the Court of first instance, with costs.

Z. K. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 22 OF 1923.

October 1, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Percival, A. J. C.

Musammat CHATIBAI—PLAINTIFF—APPELLANT

versus

Shrimati KUNDIBAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Burden of proof—Presumption—Natural father, presence of, whether necessary—Handing over, whether must be done by natural father—Adoption by widow—Motive for adoption, whether can be enquired into.

It is for the person who asserts that an adoption has taken place to prove it. But if it is proved that an adoption was apparently valid as performed, then in so much as there is a presumption that all things are done as they should be done, it is necessary for the person contesting the adoption to demonstrate in what particular respects there has been a failure of ceremonial or ritual. [p. 574, col. 1.]

The natural father of the adopted child must be present at the time of the adoption and the handing over of the child to the adoptive parent must be done under his direction, inasmuch as there must be an intention in the mind of the father at the moment of adoption to give up his natural rights, but if that requirement is complied with it is not necessary that the actual physical handing over should be done by the hands of the natural father. [p. 574, col. 2.]

Where a Hindu widow has power to make an adoption it is not for the Court to ascertain the motives of the widow in making an adoption. All that the Court has to see is whether the adoption is a legal adoption or whether it is invalid. [p. 574, col. 1.]

Appeal against the decree of the District Judge, Hyderabad.

JUDGMENT.—In this case Chatibai the plaintiff was the daughter of Lachiram. Lachiram married as his second wife Kundibai the defendant No. 1, Kundibai the wife being younger than Chatibai the daughter. Lachiram died in 1902 leaving the family in that condition, and as may easily be supposed dissensions set in between the wife and the step-daughter. About 1919 the wife decided to adopt a son to Lachiram in order to redeem his soul from the perilous condition in which it must have been for over 17 years, and she, therefore, adopted one Kishinchand the son of Khemchand. The plaintiff, that is the daughter, who, had there been no son actual or adopted of Lachiram, would have

been the reversioner brought an action to have the adoption declared invalid. Her suit was, however, dismissed by the Joint Sub-Judge, Hyderabad and an appeal against that decision was dismissed by the District Judge of Hyderabad. She has now come here in second appeal.

It is not for us to ascertain the motives of the defendant who is clearly entitled to adopt if she wished. It is to be seen whether the adoption was a legal adoption or whether it was invalid. The plaintiff at first was content with resting her case on the failure of the defendant to comply with the custom of the caste which as plaintiff avers, requires the formally expressed sanction of the leaders of the community at the time of the adoption. And this was her principal case in the original suit where she wholly failed to establish that there existed any such custom.

On appeal, therefore, she altered her ground and dropped the question of custom and rested her objection to the adoption on the ground of alleged informalities in the adoption ritual. Now as regards the question of alleged informalities, it is no doubt the duty of the person who asserts that the adoption has been performed to prove it. But if it is proved that an adoption is apparently valid as performed, then in so much as there is a presumption that all things are done as they should be done it is necessary for the person attacking the adoption to demonstrate in what particular respects there has been a failure of ceremonial or ritual. Now in so much as the case of the plaintiff in the lower Court was not that there had been a failure of ceremonial or ritual sufficient to vitiate an ordinary Hindu adoption, but that something more was needed in the case of this caste than is needed by the ordinary Hindu and that that something has not been complied with, it is not to be wondered at that there is a failure of evidence to show precisely what the irregularity complained of was, and how far it is trivial or vital. It is to be observed that the officiating priest Shankerdas and the father Khemchand have not even been cross-examined in respect of the alleged defects. It would, therefore, be extremely difficult to find positively that any defect had been committed. There is a suggestion rather than an allegation and certainly no clear proof that the actual physical handing over of the boy and his seating in the lap of the adopted mother was not done by the father himself but was done by the officiating priest in the presence and at the request of the father who was then present. It is not established that this was the process adopted but even if it were so established, it is not, in our poinion, any where laid down that it is necessary that the actual physical handing over should be done, by the natural father. In such a case a paralysed or grievously wounded father would be incapable of giving his son in adoption and we are not aware any such disqualification is attached to persons so suffering. It is clear of course that, it is only the mechanical act of handing over and can be done vicariously. The natural father no doubt must be present at the time and he must direct that the handing over be done because there must be an intention in the mind of the father at the moment of adoption to give up his natural rights, but, if that requirement is complied with, it does not appear necessary that the actual physical handing over should be done by the hands of the natural father.

We think, therefore, the learned District Judge was right in his finding that the plaintiff has not been able to establish any ceremonial irregularity of a vital nature in this adoption and we think his decree was right and we, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 195 OF 1923.

October 29, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

ADU RAM—DEFENDANT—APPELLANT

versus

ASA RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—Suit to recover document affecting land, whether land suit—Appeal, second, whether lies.

A document though it may be evidence of an interest in land is not itself an interest in land and a suit for recovery of a document referring to or affecting land cannot be regarded as a land suit.

Where the value of such a suit is below Rs. 500 a

second appeal is not competent under the provisions of s. 102 of the C. P. C.

Letters Patent Appeal against the judgment of Mr. Justice Abdul Raoof, dated the 1st May 1923.

Mr. *Rama Nand*, for the Appellant.

Mr. *Hargopal*, for the Respondent.

JUDGMENT.—The sole question in this case is whether a second appeal lay by reason of the suit being other than a small cause. The learned Judge against whose judgment this appeal has been preferred, has held that the suit is a small cause and that no second appeal lay. Hence this Letters Patent Appeal.

The suit is one for recovery of documents, and it is urged on behalf of the appellant that inasmuch as the said documents referred to and affected land, the suit must be regarded as a land suit. We are unable to accept this contention, for a document, though it may be evidence of an interest in land, is not itself an interest in land. The learned Counsel for the appellant has also failed to show us that the suit falls within any of the Articles of the Schedule to the Small Cause Courts Act excluding the jurisdiction of the Court of Small Cause. We see no reason to doubt that the suit is a small cause, and we accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL No. 6 OF 1925.

March 20, 1925.

Present:—Mr. Daniels, J. C., and Mr. Wazir Hasan, A. J. C.

Musammat SUNDAR BAHU—PLAINTIFF—APPLICANT

versus

Musammat MAHANDEI AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), ss. 109, 110, O. XLIV, r. 1—Application for leave to appeal as pauper, rejection of—Order, whether final—Application for leave to appeal to His Majesty in Council—Substantial question of law.

An application for leave to appeal as a pauper was dismissed on the ground that the application did not satisfy the requirements of the proviso to r. 1 of O. XLIV of the C. P. C. The applicant failed to pay Court-fees on the appeal and the decree of the lower Court was consequently confirmed. The applicant then applied for leave to appeal to His Majesty in Council against the order rejecting his application for leave to appeal as a pauper:

Held, (1) that the order rejecting the application for leave to appeal as a pauper was not a final order inasmuch as it still left to the applicant the option to file an appeal on payment of Court-fees;

(2) that no substantial question of law arose on the application and that the decree of the lower Court having been affirmed leave to appeal to His Majesty in Council could not be granted.

Application for leave to appeal to His Majesty in Council under O. XLV, r. 2 and s. 190, cls. (*a*), (*c*) of the C. P. C., dated the 17th March 1925.

Kunwar *Sheo Dayal Singh*, for the Applicant.

ORDER.—This is an application for leave to appeal to the Privy Council against an order passed under O. XLIV, r. 1 refusing permission to the applicant to appeal as a pauper. This is not a case in which leave to appeal to the Privy Council could be given. Apart from other objections this Court acted strictly in accordance with the provisions of O. XLIV, r. 1 and merely did what it was bound by the proviso to that rule to do. The proviso to that rule requires the Court to reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or injust. This Court having perused the judgment and decree and the application found that the conditions of this proviso were not complied with and accordingly rejected the application, as it was bound by law to do under the circumstances. The order passed did not finally dispose of the appeal, because it was still open to the applicant to file an appeal on payment of Court-fees. He did not do this and the final result was that the decree of the lower Court was confirmed. No substantial question of law arises in this application. For all these reasons we reject the application.

Z. K. *Application rejected.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 25 OF 1925.

April 1, 1925.

Present:—Mr. Justice Stuart.

Lala SRI NIWAS—PLAINTIFF—APPLICANT

versus

THE EAST INDIAN RAILWAY COMPANY AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 20 (c)—

Breach of contract—Compensation, suit for—Place of suing—Cause of action, whether arises at place where contract was made.

A part of the cause of action in respect of a suit for compensation for breach of contract arises at the place where the contract was made and the suit can, therefore, under s. 20 (c) of the C. P. C., be instituted at such place. The mere fact that the defendant alleges that the suit really arises out of a tort committed at another place, does not affect the jurisdiction of the Court at the place where the contract was made to entertain the suit.

East Indian Railway Company v. *Binda*, 26 Ind. Cas. 620; 13 A. L. J. 66, followed.

Civil revision from an order of the Judge, Small Cause Court, Khurja, dated the 18th November 1924.

Mr. *Panna Lal*, for the Applicant.

Mr. *Ladli Prasad Zutshi*, for the Opposite Parties.

JUDGMENT.—The decision of the Full Bench in *Chuni Lal* v. *Nizam's Guaranteed State Railway Company Limited* (1) is authority for the proposition that there was one contract with the East Indian Railway Company who were liable for the overcharge (if any) wrongfully demanded from the consignees.

The next question is as to the interpretation of the words "within the local limits of whose jurisdiction the cause of action wholly or in part arises" (C. P. C. s. 20 (c). I adopt the interpretation adopted by Knox, J., in *East Indian Railway Company* v. *Binda* (2). I am of opinion that, if the suit be regarded as a suit for compensation for breach of contract, the cause of action arose in part at Khurja the place where the contract was made.

The plaintiff has come into Court demanding relief for a breach of contract and, such being the case, I consider that the Khurja Small Cause Court has jurisdiction. It will of course be open to the defendant Company to repel this plea, if they can, in the course of trial and to establish, if they can, that there was no breach of contract and that the cause of action, if any, is based upon an alleged tort committed in Bombay. If they succeed in this plea the question of jurisdiction will be affected. This point does not, however, arise at this stage. The plaintiff has chosen to go into Court alleging a cause of action founded upon a breach of contract. He is at perfect liberty to frame his plea in this manner and on a plea framed in this manner the Khurja Court has jurisdiction.

(1) 29 A. 228; A. W. N. (1907) 21; 4 A. L. J. 80; 2 M. L. T. 42 (F. B.).

(2) 26 Ind. Cas. 620; 13 A. L. J. 66.

I accordingly set aside the order of the Small Cause Court Judge and direct him to receive the plaint again, restore it to its orignal number and decide the suit according to law. Costs of this application will abide the result.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 2445 OF 1924.

December 8, 1924.

Present:—Mr. Justice Jai Lal.

MURARI LAL—PETITIONER

versus

Musammat SARASWATI AND ANOTHER —RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 22—Injunction, ad interim, restraining marriage of minor, whether can be passed—Powers of Court, extent of.

The powers of the High Court in the matter of protection of the person and property of a minor embrace a wide field and the Court has jurisdiction to pass such orders as it considers necessary and proper in the interests of a minor. [p. 577, cols. 1 & 2.]

Under the Guardians and Wards Act the Court has jurisdiction to grant an *ad interim* injunction restraining the marriage of the minor pending the decision of certain proceedings pending in the Court. [p. 577, col. 1.]

Appeal against the decree of the District Judge, Jullundhur.

Dr. *Nand Lal* and Mr. *Des Raj Sawhney*, for the Petitioner.

Messrs. *Badri Das* and *R. C. Soni*, for the Respondents.

ORDER.—Murari Lal was appointed guardian of person and property of two minor girls *Musammat* Ram Piyari and Durgi, daughters of his deceased brother. It appears that the two minors have inherited considerable property. The minors were living with their widowed step-sister *Musammat* Saraswati. It appears that *Musammat* Saraswati made preparations to marry *Musammat* Ram Piyari to a boy named Ram Rakha, but this match was not acceptable to Murari Lal and other paternal relations of the girl. Murari Lal filed a suit in the Court of the Subordinate Judge of Jullundhur praying for a perpetual injunction restraining *Musammat* Saraswati and others from marrying *Musammat* Ram Piyari without his consent. This suit was decreed on the 28th of August 1924 and an appeal from the decree is still pending in the Court of the District Judge of Jullundhur.

On the 30th of August 1924, on an application made on behalf of the minors, the Senior Subordinate Judge of Jullundhur *inter alia* removed Murari Lal from the guardianship of the persons of the minors. An appeal from this order was lodged in this Court on the 29th of September 1924 when the High Court was closed for the long vacation. Murari Lal, alleging that *Musammat* Saraswati and others were about to celebrate the marriage of *Musammat* Ram Piyari, obtained an order from the Additional District Magistrate of Jullundhur under s. 144, Cr. P. C., that the respondents to that petition, including the respondents here should not celebrate the marriage of *Musammat* Ram Piyari before the expiry of one month. This period of one month was fixed because the High Court was closed on account of the long vacation. The order is dated the 8th of September 1924. On the 14th of October an *ad interim* injunction was granted by the Hon'ble Mr. Justice Sayad Abdul Raoof staying the contemplated marriage. The only point before me now is whether this injunction should be made absolute.

Affidavits have been filed on behalf of the respondents that the marriage of *Musammat* Ram Piyari was celebrated on the 10th of October 1924, while a counter-affidavit has been filed on behalf of the appellant that no such marriage has been celebrated. It is not necessary for me to decide whether as a fact the alleged marriage has been celebrated or not, but one thing is quite clear that if the marriage has been celebrated this has been done in defiance of the decree of the Subordinate Judge and in anticipation of an injunction from this Court. Further if the marriage has actually been celebrated, the continuance of the injunction will do the respondents no harm. On the other hand, if the marriage has not actually been celebrated, the interests of the minor and the rights of her paternal relations may be injuriously affected if the *ad interim* injunction is discharged.

It was urged on behalf of the respondents that in proceedings under the Guardians and Wards Act this Court has no jurisdiction to issue an injunction such as is applied for by the appellant. I hold that this Court has jurisdiction to issue the injunction. The powers of this Court in the matter of protection of the person and property of the minors embrace a wide field and the Court has jurisdiction to pass all such orders as it considers necessary and proper in the interests of the minors.

Another point that was raised by the learned Counsel for the respondents was that according to the Hindu Law *Musammat* Ram Piyari, being over 15 years, had attained her age of majority for the purpose of marriage. She is a little over 15. Some authorities were quoted in support of this contention; but it is not necessary for me to express an opinion on this point as it may arise directly in the future litigation and I do not wish to make any observations here which may hereafter in any way prejudice the case of either party. In raising this point the learned Counsel was treading on contentious grounds.

I cannot ignore the fact that a Subordinate Judge has already passed a decree for perpetual injunction against the respondents and that the decree is threatened to be disobeyed. Having regard to all the facts placed before me I consider that the interests of the minor demand that an injunction such as is prayed for should be granted. I, therefore, make absolute the order of the 14th of October 1924.

The history of the case as disclosed above makes it highly desirable that the appeal out of which these proceedings have arisen should be heard at a very early date. This will be in the interests of all concerned, and I order that this should be done.

Z. K. *Injunction granted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 17 OF 1925.

April 9, 1925.

Present:—Mr. Dalal, J. C.

Lala JAGMOHAN DAS—AUCTION-PURCHASER—APPLICANT

versus

Nawab AHMAD RAZA—OBJECTOR, *Musammat* MOHAMMADI BEGAM—JUDGMENT-DEBTOR AND GIRDHARI LAL—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Want of expression in stating finding—Defect of jurisdiction.

Where the defect in the lower Court's judgment is only of expression and of want of experience it cannot be said that there is a defect of jurisdiction within the meaning of s. 115 of the C. P. C.

Civil revision against an order of the Munsif, South Lucknow, dated the 21st October 1924.

Messrs. *Hyder Husain*, *D. K. Seth* and *P. D. Rastogi*, for the Applicant.

Mr. *Ali Zaheer*, for Opposite Party No. 1.

JUDGMENT.—The judgment of the Munsif is exceedingly feeble but this is not an appeal but an application in revision. It cannot be said that he has failed to exercise a jurisdiction vested in him. What appears to me is that the Munsif is fond of writing a lot and ventilating his private opinions when they are not wanted. I expect he will learn better with experience. In fact, what he has decided is that, on a summary consideration of the matter, the resistance to the purchaser was occasioned by a person claiming in good faith to be in possession of the property on his own account and not an account of the judgment-debtor. It is certainly true that he could have said this in ten lines instead of covering eight sheets of foolscap. The applicant's learned Counsel rightly argued that a revision lay as no appeal is allowed; at the same time where the defect in the lower Court's judgment is only of expression and of want of experience it cannot be said that there is a defect of jurisdiction.

I dismiss this application but make no order as to costs.

Z. K. *Application dismissed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 26 OF 1924.

October 13, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Odgers.

KAMAKSHI AMMAL—DEFENDANT No. 2—APPELLANT

versus

POOCHAMMAL *alias* KAMAKSHI AMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 125—Suit by reversioner to declare mortgage by widow and decree thereon void—Limitation, commencement of.

A suit by a Hindu reversioner for a declaration that a mortgage by the widow of the last owner and a Court-sale in execution of the decree passed thereon are void and not operative after the death of the widow is governed by Art. 125 of Sch. I to the Limitation Act and limitation commences to run from the date of the mortgage and not from the date of the sale in execution of the decree. [p. 579, col. 1.]

Jaggi v. *Prithi Pal*, A. W. N. (1894) 134, *Rajindra Singh* v. *Abdul Ghani*, 40 Ind. Cas. 63; 25 P. R. 1917, and *Tukabai* v. *Lalasao*, 63 Ind. Cas. 417; 3 N. L. J. 335; 18 N. L. R. 42; (1922) A. I. R. (N.) 197, relied on.

Letters Patent Appeal against the judgment and order of Mr. Justice Spencer, Officiating Chief Justice, in Second Appeal No. 877 of 1921, published as 80 Ind. Cas. 554, preferred against the decree of the District Court, Trichinopoly, in Appeal Suit No. 203 of 1920, preferred against that of the Court of the Additional District Munsif, Kulitalai, in Original Suit No. 343 of 1919, (O. S. No. 10 of 1919 of the District Munsif's Court, Srirangam.)

Mr. *N. S. Rangaswamy Iyangar*, for the Appellant.

Mr. *M. S. Vaidya Mootha Iyar*, for the Respondents.

JUDGMENT.—The suit was brought by the plaintiff a Hindu reversioner for a declaration that a mortgage by the widow of the last male owner (1st defendant) and a Court-sale in execution of the decree obtained on the mortgage by the 2nd defendant (the mortgagee) are not operative after the death of the widow, so as to be binding on him.

The mortgage was dated 1905. The suit on it was filed in 1919. It is conceded on both sides that the suit is barred under Art. 125, if limitation commenced to run in 1905, (that is, from the date of the mortgage) and is not barred if it commenced in 1910 (that is, from the date of the sale)). The Courts below—the District Munsif and the District Judge—held that the alienation substantially was in 1905 and that the Court-sale in 1910 was merely consequential on the mortgage and that limitation began to run from 1905, and dismissed the suit.

In second appeal, it was contended before a learned Judge of this Court, that the mortgage was not intended to have any operation, that only in 1909 it was attempted to be put to any use and the only alienation in the case was in 1910 and not in 1905. This argument was accepted by the learned Judge and the suit was remanded for disposal according to law. The 2nd defendant's legal representatives file a Letters Patent appeal.

We are unable to agree with the view taken in the judgment appealed against.

Paragraph 8 of the plaint alleges that the mortgage was collusively effected in order to defeat the reversionary rights of the plaintiff and without any justifying necessity. In para. 9 he alleges that the mortgage is inoperative beyond the lifetime of the 1st defendant. This shows that he never meant to allege that the mortgage was not intended to be operative during the lifetime of the 1st defendant, even as against her. An apparent transfer, so as to ultimately deprive the plaintiff of his rights as reversioner was certainly intended to be alleged. Plaintiff tendered no evidence before the District Munsif to show that the mortgage had no operation of any kind till 1910. In the grounds of appeal before the District Judge, the point raised in the High Court was never suggested. We are of opinion that the construction of the plaint now suggested was raised for the first time in the High Court.

In this case, the real alienation by the widow was all in 1905. The events in 1910 are merely the result of it. It is true there may be cases where the widow may do something in the course of the suit itself, that it is possible to say the decree alone amounts to an alienation. In this case the alienation which has to be attacked before the plaintiff can succeed, is the mortgage of 1905. The present case is on all fours with the decision in 1894. *Jaggi* v. *Prithi Pal* (1). We agree with that decision and hold that the suit is barred. There are two other cases, *Rajindra Singh* v. *Abdul Ghani* (2) and *Tukabai* v. *Lalasao* (3) to the same effect, but neither of them is by a High Court.

The case in *Srinivasa* v. *Venkatramana Bhatta* (4) has been referred to by the respondent. That case has been complicated by an adoption. The view in that case as to the effect of adoption on the Limitation Acts of 1859 and 1871, was opposed to the later Privy Council rulings *Jagadamba Choodhrani* v. *Dakhina Mohun Roy Choodhri* (5) and it cannot help us.

It is true that the prayer was for declaring the sale not binding on the plaintiff. We must look at the substance and not the form. To say that the suit is barred or not according as the prayer is for a declaration that the mortgage or sale is not binding is to allow a quibble with words. The plaintiff cannot escape limitation by a mere device of this kind. The cases in *Sheo Singh* v. *Jeoni* (6) and *Ram Sarup* v. *Ram Dei* (7) have no bearing on this case.

The plaintiff has his remedy in a suit after the widow's death, if the mortgage is a collusive mortgage.

We allow the appeal and restore the decision of the District Judge. The appellant will have all his costs in the High Court.

V. N. V. *Appeal allowed.*

(1) A. W. N. (1894) 134.
(2) 40 Ind. Cas. 63; 25 P. R. 1917.
(3) 63 Ind. Cas. 417; 3 N. L. J. 335; 18 N. L. R. 42; (1922) A. I. R. (N.) 197.
(4) 5 M 121; 6 Ind. Jur. 354; 2 Ind. Doc. (N. S.) 85.
(5) 13 C. 308; 13 I. A. 84; 10 Ind. Jur. 307; 4 Sar. P C. J. 715; 6 Ind. Dec. (N. S.) 705 (P. C.).
(6) 19 A. 524; A. W. N. (1897) 141; 9 Ind. Dec. (N. S.) 339.
(7) 29 M. 239; A. W. N. (1907) 33; 4 A. L. J. 160; 3 M. L. T. 59.

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL NO. 2 OF 1925.
March 20, 1925.
Present:—Mr. Daniels, J. C., and Mr. Wazir Hasan, A. J. C.

Thakur SHIAM SUNDAR SINGH—DEFENDANT—APPELLANT—APPLICANT
versus
Thakur JAGANNATH SINGH—PLAINTIFF—RESPONDENT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110—Succession Act (X of 1865), s. 54—Will—Signature of legatee not made as attesting witness—Appeal to His Majesty in Council—Substantial question of law.

In the case of a Will to which the provisions of s. 54 of the Succession Act were applicable the Trial Court arrived at the finding that the signatures which certain legatees had made on the Will were not intended to attest the execution of the Will. On appeal, the Appellate Court agreed with this finding and affirmed the decree. On an application for leave to appeal to His Majesty in Council:

Held, that the matter did not involve any substantial question of law within the meaning of s. 110 of the C. P. C., and that consequently leave could not be granted. [p. 580, col. 1.]

Application for permission to appeal to Privy Council under ss. 109 and 110, C. P. C.

Mr. *Niam Ullah*, for the Applicant.
Mr. *Wasi Hasan*, for the Opposite Party.

JUDGMENT.—This is an application under ss. 109 and 110 of the C. P. C for leave to appeal to His Maiesty in Council from the decree of this Court dated the 25th November 1925. The value of the subject-matter in dispute is Rs. 25,625 but the decree of this Court affirmed

the decree of the Court of first instance. The sole question for determination, therefore, is whether the application under consideration discloses any substantial question of law involved in the appeal. We are of opinion that it does not.

Under a Will to which the provisions of s. 54 of the Indian Succession Act apply the four sons of the testator were recipients of certain legacies. They also signed as witnesses to the Will just now mentioned. To the suit founded on the legacies one of the defences raised was that the legatees forfeited the legacy for the reason that they had attested the Will in question. The Court of first instance found as a matter of fact that the signatures which the legatees made on the Will in question were not intended to attest the execution of the Will. With that finding this Court agreed. That is the only question which has been urged upon us as one which would justify a leave for appeal to the Privy Council. We do not think so. We are of opinion that that matter does not involve any substantial question of law.

We, therefore, reject this application with costs.

Z. K. *Application rejected.*

LAHORE HIGH COURT.

CIVIL APPEAL No. 126 OF 1925.

June 19, 1925.

Present:—Mr. Justice Jai Lal.

Musammat PARBATI—PLAINTIFF—APPELLANT

versus

EMPEROR THROUGH THE DISTRICT JUDGE OF DELHI—DEFENDANT—RESPONDENT.

Lunacy Act (IV of 1912), s. 82—Application for declaration of soundness of mind—Procedure—Duty of Court.

Where an application is made under s. 82 of the Lunacy Act to the District Judge for the purpose of declaring that a person who has been declared to be of unsound mind has ceased to be of unsound mind, and on the materials placed before the District Judge there is good reason to believe that the unsoundness of mind of the person to whom the application relates has ceased, it is the duty of the District Judge to proceed with the application without regard to the effect which the enquiry might have upon a matter in dispute in other proceedings pending in Court.

Appeal against an order of the District Judge, Delhi, dated the 31st October 1924.

Mr. *Shamair Chand*, for the Appellant.

JUDGMENT.—Jagdish Rai was found to be of unsound mind as a result of inquisition held by the District Judge of Delhi and his property was placed under management. *Musammat* Parbati, the wife of Jagdish Rai, who had been appointed as guardian of the lunatic's person presented an application to the District Judge on the 25th July 1924 alleging that the unsoundness of mind of Jagdish Rai had ceased and praying that enquiry be made whether he is still of unsound mind and incapable of managing himself and his affairs. This application was accompanied by copies of certain statements made by medical experts who were of opinion that Jagdish Rai had ceased to be of unsound mind. It was also accompanied by a certificate from the Civil Surgeon of Delhi. *Musammat* Parbati asked the Court to make an order authorising some respectable persons to have access to the alleged lunatic for the purpose of personal examination. This was granted by the learned Judge under s 41, cl. 2 of the Indian Lunacy Act, 1912. Two gentlemen nominated by the Judge reported that the alleged lunatic was of sound mind. The learned Judge has dismissed the application holding that a succession case was proceeding in the Court in respect of certain property and the main question in issue in that case was whether Jagdish Rai was capable of succeeding in view of his unsoundness of mind. He held that the application was made as a piece of *peshbandi* in order to strengthen Jagdish Rai's claim in that case. He, therefore, declined to proceed with the application.

In my opinion the order passed by the learned Judge cannot be supported. Under s. 82 (1) on the material placed before the District Judge there was very good reason to believe that the unsoundness of Jagdish Rai's mind had ceased and without regard to the effect of this enquiry on the matter in the other proceedings pending in the Courts it was the duty of the learned Judge to have proceeded with it. It would be most unfair to keep the lunatic's property under management or his person under guardianship if it could be established that he was no longer of unsound mind. It may be mentioned that another certificate by the Superintendent of the Punjab Mental Hospital was placed before me on behalf of Jagdish Rai. This certificate also supports the allagation of *Mussammat* Parbati.

I set aside the order of the learned Judge and direct him to proceed with the enquiry as provided in s. 82 of the Indian Lunacy Act.

Z. K. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST MISCELLANEOUS APPEAL No. 26 OF 1925.

April 17, 1925.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Ashworth, A. J. C.

AHMAD MUJTABA KHAN—PLAINTIFF—APPELLANT

versus

Bhaya PIRTHIPAL SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Temporary injunction, when can be granted.

Before a Court is asked to issue a temporary injunction the application must show that the requirements of O. XXXIX, r. 1, C. P. C., must be fulfilled, *viz.*, that there is a risk of the property being damaged or the creditors being defrauded.

Appeal against an order of the Subordinate Judge, Gonda, dated the 3rd February 1925.

Mr. *Mohammad Ayub*, for the Appellant.

Mr. *Hardhyanchandra*, for the Respondent.

JUDGMENT.—This is an appeal under O. XLIII, r. 1, cl. (2) against an order of the Subordinate Judge of Gonda dated 3rd February 1925 rejecting the applicant-appellant's request for a temporary injunction. The request was based on the allegation that the applicant had filed a declaratory suit in respect of the property for the sale of which a date had been fixed. It was stated that if the sale took place the plaintiff would be put to a great loss. We notice that the application asking for injunction does not show that the requirements of O. XXXIX, r. 1 were fulfilled, namely, that there was a risk of the property being damaged or that there was a risk of any creditors being defrauded. We, therefore, hold that the Subordinate Judge was justified in summarily rejecting the application for injunction but we think that he might have stated some reason for rejecting the application, for instance that the application failed to show sufficient cause for stay. Holding that the applicant-appellant had failed to show sufficient cause for stay we see no reason for allowing this appeal.

The appeal is, therefore, rejected with costs.

G. H. *Appeal rejected.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 21 OF 1925.

April 1, 1925.

Present:—Mr. Justice Stuart.

AZMATULLAH KHAN—PLAINTIFF—APPELLANT

versus

AHMAD ALI—DEFENDANT—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Ex parte decree, application to set aside—Full security given—Amount of decree stated incorrectly, effect of—Cash security, deposit of, effect of.

An *ex parte* decree was passed by a Small Cause Court against the defendant, the total amount of which was Rs. 540. Defendant applied under s. 17 of the Small Cause Courts Act to set aside the *ex parte* decree and at the time of presenting his application filed a bond by which he hypothecated a house which he asserted was worth Rs. 4,000 as security for the performance of the decree, but in his application he mentioned the decretal amount as Rs. 530 instead of Rs. 540. The Court made an order that the security should be verified but before steps were taken by the Court to verify it, the defendant paid in cash into Court the full decretal amount as security:

Held, that the defendant had complied with the provisions of s. 17 of the Provincial Small Cause Courts Act inasmuch as he gave full security for the decretal amount and the mere fact that he made a mistake in stating in his application that the amount of the decree was Rs. 530 instead Rs. 540 did not affect the fact that he had given security for more than what was due, and that by subsequently depositing the amount in Court, he merely saved the Court the trouble of further verification. [p. 582, col. 1.]

Civil revision from an order of the Judge, Small Cause Court, Shahjahanpur, dated the 22nd December 1924.

Mr. *Mukhtar Ahmad*, for the Applicant.

Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—The main point for decision in these two revisions is whether there has been substantial compliance with the provisions of s. 17 of Act IX of 1887. A decree had been passed by the Small Cause Court *ex parte* against Ahmed Ali for Rs. 483-9 and Rs. 56-11 costs. This decree was passed on the 6th September

1924. On the 14th October 1924 Ahmad Ali applied under s. 17 to set aside the *ex parte* decree and at the time of presenting his application filed a bond by which he hypothecated a house which he asserted was worth Rs. 4,000 as security for the performance of the decree, but in this application he estimated the decretal amount at Rs. 530 instead of Rs. 540-4. The explanation which he gives for this error is that he had miscalculated the costs. He thus professed himself ready to give security for more than seven times the decretal amount and actually had done so.

It was ordered that the security should be verified but before steps were taken by the Court to verify it Ahmad Ali paid in cash into Court Rs. 540-4 the full decretal amount as security. It is argued on behalf of the opposite side that Ahmad Ali did not comply with the provisions of s. 17. The leading case in this Court upon the point is *Jagan Nath* v. *Chet Ram* (1). Applying the principles laid down in that case I consider that there has been substantial compliance with the provisions of s. 17. The applicant was obliged to give full security. He gave full security. The circumstance that he made a genuine error by which he stated the amount for which the security had to be given at Rs. 10-4 less than it really was does not affect the fact that he gave security for more than what was due. His action in depositing the amount in cash later can only be taken as part of the same transaction as had gone before and not as a belated attempt to file security at a date when he was not permitted to file it. By depositing the amount in cash he saved the trouble of further verification. In these circumstances the application must fail. The application for restoring the *ex parte* decree fails. The application for setting aside the dismissal of the suit on merits has nothing to recommend it. I dismiss both applications with costs.

Z. K. *Applications dismissed.*

(1) 28 A. 470; 3 A. L. J. 318; A. W. N. (1906) 83.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 1 OF 1925.

March 26, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

Baba SHEO CHARAN DASS—DEFENDANT—APPLICANT

versus

Musammat JAGWANT KUAR—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLVII, r. 7—Review, application for, rejection of—Revision, whether lies.

An order rejecting an application for review made on the ground of discovery of new and important evidence does not fall within the scope of s. 115 of the C. P. C., and is not open to revision.

Revision against an order of the Additional Sub-Judge, Rae Barelli, dated the 23rd October 1924.

Mr. *Moti Lal Saksena*, for the Applicant.

ORDER.—This is an application under s. 115 of the C. P. C. It relates to an application for review of judgment delivered by the Additional Subordinate Judge of Rae Bareli in a suit in which the applicant was a defendant. The judgment was delivered on the 3[illegible]th July 1924. The application for review was made by the defendant on the 3rd September 1924. The main ground of the application was that a certain document had been discovered after the delivery of the judgment. The learned Additional Subordinate Judge has held that he was not satisfied that the applicant could not with due diligence have obtained a copy of the document which he now sought to be introduced by means of his application for review.

It is obvious that the order of the learned Additional Subordinate Judge in rejecting the application does not fall within the scope of s. 115 of the C. P. C. This application must, therefore, be rejected and I do so hereby.

It is open to the applicant to prefer an appeal from the decree of the learned Subordinate Judge and ask the Court of Appeal to admit the document in evidence which that Court has power to do if it considers proper and necessary.

Z. K. *Revision rejected.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1306 OF 1922.
March 3, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.

BAIKUNTHA CHANDRA DHUPI AND OTHERS—DEFENDANTS—APPELLANTS

versus

PRAHLAD CHANDRA DHUPI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Fraud—Decree, setting aside of.

It is not permissible to raise pleas of fraud and production of false evidence in a suit to set aside a decree passed on contest, or, in the case of an *ex parte* decree, where process was served and the proceedings were in fact watched by the defendant.

Nalinikanta Mukherji v. *Hari Nikari*, 86 Ind. Cas. 779; 29 C. W. N. 325; 41 C. L. J. 281; (1925) A. I. R. (C.) 663, followed.

Kedar Nath Das v. *Hemanta Kumari Dasi*, 22 Ind. Cas. 709; 18 C. W. N. 447, and *Lakshmi Charan Saha* v. *Nur Ali*, 11 Ind. Cas. 626;15 C. W. N. 1010; 38 C. 936, distinguished.

Appeal against a decree of the Subordinate Judge, Second Court, Backerganj, dated the 21st February 1922, affirming that of the Munsif, Third Court, Perojpur, dated the 22nd July 1920.

Messrs. *Satya Charan Singha* and *Jitendra Nath Roy*, for the Appellants.

Babu *Bhagirath Chandra Das*, for the Respondents.

JUDGMENT.

Cuming, J.—The facts of this appeal are as follows: The appellant obtained an *ex parte* decree against the respondents in a certain Title Suit No. 3 of 1917. The respondents then sued the appellant to set aside this *ex parte* decree on the ground that it was obtained by suppression of processes, by adducing false evidence and by wrongly including certain land within his tenancy which did not belong to the tenancy The Court of first instance found that there had been no suppression of processes and that the respondent was fully aware of the progress of the suit. He further found that the appellant's suit was wholly false and that the decree was obtained by the production of false evidence and by the practice of fraud on the Court and decreed the respondent's suit. On appeal to this District Court this decision was upheld. The learned Judge there held agreeing with the Court of first instance that the respondent was fully aware of the suit and that processes have been served upon him. He, however, found that it was fraud on the part of the appellant to falsely allege his own *Howla* right and to obtain a judgment by adducing false evidence. The defendant has appealed to this Court. I think that the facts as found by the lower Appellate Court would justify the Court in holding that the appeal succeeds and the plaintiff's suit should be entirely dismissed.

The learned Advocate for the appellant has referred us to the case of *Nalinikanta Mukherji* v. *Hari Nikari* (1) to the decision of which one of the members of this Bench was a party. The allegations in that suit were more or less the same as have been made in the present suit. In that suit it was urged that the summonses had not been served and that the claim was fraudulent. My learned brother in dealing with the second contention remarked that the balance of authority was that it was not open to a party to raise pleas of this nature if the suit had been decreed on contest or if the suit had been decreed *ex parte* and it was established that summonses had been served on the defendants. In the present case it has been found that the respondent who was the defendant in the original suit of which the decree is sought to be set aside had been served with summons and was at the time watching the suit. I see no reason to differ from the principle laid down in *Nalinikanta Mukherjee* v. *Hari Nikari* (1) with which I am in entire agreement. We have been referred to the case of *Kedar Nath Das* v. *Hemanta Kumari Dasi* (2). The facts of that case are, however, distinguishable because in that case it appears that no summonses had been served on the plaintiff and that the plaintiff was not aware of the suit and in those circumstances an *ex parte* decree had been obtained. We are also referred to the case of *Lakshmi Charan Saha* v *Nur Ali* (3). The facts of that case are also distinguishable because in that case the defendant although he was duly served with notice was unable to appear and defend the suit. In the present appeal the facts are entirely different. The respondents were all along aware of the case and were watching the case during the course of its prosecution.

In the circumstances we think that the appeal must succeed and the decree of the

(1) 86 Ind. Cas. 779; 29 C. W. N. 325; 41 C. L. J. 281; (1925) A. I R. (C.) 663.
(2) 22 Ind. Cas. 709; 18 C. W. N. 447.
(3) 11 Ind Cas. 626; 15 C. W. N. 1010; 38 C. 936.

lower Appellate Court be set aside and the plaintiff's suit entirely dismissed with costs in all Courts.

Greaves, J.—I agree.

N. H. *Appeal decreed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 7 OF 1925

March 4, 1925.

Present:—Mr. Dalal, A. J. C.

NEM CHAND—PLAINTIFF—APPLICANT

versus

GUR DAYAL—DEFENDANT—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 245—Name used in designation of firm, effect of—Person whose name used, whether becomes partner.

The mere use of a name in the designation of a firm should not lead any member of the public to presume that the person whose name is used is a partner in the firm. The mere fact, that the person whose name is so used does not repudiate the use of his name in the designation of the firm, does not render him liable as a partner under s. 245 of the Contract Act.

Revision against a decree of the Judge, Court of Small Causes, Lucknow, dated the 10th November 1924.

Mr. *B. N. Shargha*, for the Applicant.

Mr. *D. K. Seth*, for the Opposite Party.

JUDGMENT.—The plaintiff sued in the Court of Small Causes two brothers Ram Dayal and Gur Dayal for recovery of a certain amount. A decree was passed against Ram Dayal and hence this application is made against Gur Dayal under s. 25 of the Small Cause Courts Act.

The firm was known by the name of Ram Dayal-Gur Dayal. The lower Court has pointed out that this fact by itself does not prove that Gur Dayal was a partner. As a finding of fact the lower Court held that Gur Dayal was not a partner. In this Court it is argued that Gur Dayal was liable under the provisions of s. 245 of the Contract Act because by his conduct he had led the plaintiff to believe that he was a partner in the firm. No reference is made to any words spoken or written of Gur Dayal. The conduct resolves itself into this that Gur Dayal permitted his name to be used to designate the firm.

Such names are indiscriminately used by Indian firms and the mere use of a name would not lead any member of the public or any dealer to presume in India that the person whose name is used is also a partner in the firm. Whether on account of a more sonorous sound or to give greater dignity to the firm it is usual to employ two names, and often a man not being able to invent any other name uses the name of his own son, even if he be a minor. The mere use of the name of Gur Dayal ought not to have led the plaintiff to believe that Gur Dayal was a partner.

In fact he did not so believe because he actually led evidence to prove that Gur Dayal was a partner not only in name but actually. When he failed to prove the case of actual ownership he fell back on a belief of his which really did not exist. I think that the lower Court was correct in holding that the plaintiff was not led to believe that Gur Dayal was a partner of the firm. I dismiss this application with costs.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2341 OF 1921.

February 3, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SATINDRA MOHAN TAGORE—PLAINTIFF—APPELLANT

versus

KAMARADDI MIJI—DEFENDANT—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 50—Fixity of rent, presumption of—*Kabuliyat *providing for excess rent for excess area, effect of—Presumption, rebuttal of—Question of fact—Second appeal.*

The question whether a stipulation in a *kabuliyat* relating to a tenancy is or is not sufficient to rebut the presumption raised under s. 50 of the Bengal Tenancy Act, is for a Court of fact and is not properly a question for a Court of second appeal. [p. 586, col. 1.]

A stipulation in a *kabuliyat* by a tenant to pay rent at the prevailing rate for excess land found in his possession is perfectly consistent with s. 50, Bengal Tenancy Act, and cannot in any sense be said to rebut the presumption as to fixity of rent raised thereunder. [*ibid.*]

Upendra Nath Ghose v. *Gopi Charan Saha*, 44 Ind. Cas. 595; 22 C. W. N. 321, *Upendra Nath Ghose* v. *Dwarkanath Biswas*, 44 Ind. Cas. 593; 22 C. W. N. 322, and *Sarat Chandra Dey* v. *Taraprasanna Bhattacharyya*, 70 Ind. Cas. 437; 36 C. L. J. 333; (1923) A. I. R. (C.) 141, distinguished.

Obiter.—Under cl. (1) of s. 50, Bengal Tenancy Act, if the rent of a holding has not *in fact* been changed

since the time of the Permanent Settlement, then it is not liable to be increased. The mere fact that in an instrument executed 40 or 50 years later the rent is *expressed* to be variable will by itself make no difference. [p. 585, col. 2.]

Abhoy Sankar Mazumdar v. *Rajani Mandal*, 47 Ind. Cas. 359; 29 C. L. J. 371; 22 C. W. N. 904, followed.

Appeal against a decree of the Additional Special Judge, Tipperah, dated the 5th September 1921, modifying that of the Assistant Settlement Officer, Comilla, dated the 19th of March 1920.

Babu *Hira Lal Chakravarty*, for the Appellant.

Babu *Upendra Kumar Roy*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The one substantial question raised in this appeal is whether a particular stipulation in the *kabuliyat* rebuts the presumption of fixity of rent raised under s. 50, Bengal Tenancy Act. The Courts below have found that the defendant has succeeded in proving uniform payment of rent for more than 20 years, that the *kabuliyat* executed in 1868 was a conformatory settlement of the holding held by the predecessors of the defendant from before at a uniform rent of Rs. 65, that since the execution of the *kabuliat* there has been no variation in the rent and that, therefore, this *kabuliat* or the stipulation contained in it did not affect the presumption raised under s. 50, Bengal Tenancy Act. The *kabuliyat* recites that the *jama* was held by the tenant from before at a rent of Rs. 65 and the settlement was taken from the landlord in respect of the land covered by the *kabuliat* at the same *jama* of Rs. 65. Then there is a stipulation to the effect that if in future on measurement any excess or diminution in area is established the tenant will pay rent according to the prevailing rate current in the neighbourhood. It is argued that this stipulation rebuts the presumption raised under s. 50 of the Bengal Tenancy Act; and for this view reliance has been placed on the cases of *Upendra Nath Ghose* v. *Gopi Charan Saha* (1), *Upendra Nath Ghose* v. *Dwarkanath Biswas* (2) and *Sarat Chandra De* v. *Taraprasanna Bhattacharyya* (3). The last case follows the case in *Upendra Nath Ghose* v. *Dwarknath Biswas* (2) which is an authority for the proposition that where a tenant stipulates that he would pay enhanced rate according to the *pargana* rate the *kabuliyat* may be considered either as new contract under which the tenant agreed to pay enhanced rent or as a contract containing recitals of the incidents of the tenancy which was in existence from before. The other terms of the *kabuliyat* are not clear as to whether it was a conformatory *kabuliyat* or a *kabuliyat* executed by the tenant who was inducted into the land under it. It is not necessary for me to say more with regard to that case; but if proper occasion arises I may have something to say on the question as to the generality of the language employed in it. Section 50, cl. (1), says that where a tenure or holding is held at a rent which has not been changed from the time of the Permanent Settlement, it shall not be liable to be increased. Clause (2) gives only one of the modes of proving that a holding was held at a uniform rent from the time of the Permanent Settlement; and if such proof is adduced it will give rise to the presumption of fixity of rent. If the tenant succeeds in proving that he has paid rent at the same rate for a period of 20 years then the presumption is that he has held it at that rate from the time of the Permanent Settlement. If any tenant since the Permanent Settlement comes into possession of the land and stipulates that he would pay enhanced rent, I fail to see how such stipulation can affect or rebut the presumption raised as to the uniform payment of rent, from the time of the Permanent Settlement. Such a stipulation by the tenant may be enforced either as a new contract or it may be used as a piece of evidence to show that the holding was not held at the same rent from the time of the Permanent Settlement. The facts of the case of *Sarat Chandra Dey* v. *Taraprasanna Bhattacharyya* (3), to which my learned brother was a party are very different from the present case. There the *kabuliyat* was for a term and it is not clear from the report of the case that the *kabuliyat* was one creating a tenancy or was evidence that the holding was not held at the same rent from the time of the Permanent Settlement. But the learned Judges in that case interpreted that *kabuliyat* and observed as follows: "It cannot be disputed that this is the correct interpretation of the terms of the contract between the parties, and the document so interpreted rebuts the presumption mentioned in s. 50." It seems that their Lordships used

(1) 44 Ind. Cas. 595; 22 C. W. N. 321.
(2) 44 Ind. Cai. 593; 22 C. W. N. 322.
(3) 70 Ind. Cas. 437; 36 C. L. J. 333; (1923) A. I. R. (C.) 141.

the particular document in that case as a piece of evidence which was sufficient to rebut the presumption under s. 50. The case of *Upendranath Ghose* v. *Dwarkanath Biswas* (2) was considered in a well considered judgment in the case of *Abhoy Sankar Mazumdar* v. *Rajani Mandal* (4), where Richardson, J., observes that under cl. (1) of s. 50 if the rent has not in fact been changed from the time of the Permanent Settlement then it shall not be liable to be increased. If an instrument is subsequently executed forty or fifty years later the mere fact that the rent is expressed to be variable will by itself make no difference. I fully agree in the view expressed therein In the present case, however, the facts are different. The tenant by the *kabuliyat* of 1868 covenanted that if after measurement land is found to be in excess he will pay rent for the same according to the prevailing rate. This stipulation is in perfect accord with s. 50 (1) which says that the rent at which a holding is held from the time of the Permanent Settlement shall not be liable to be increased except on the ground of alteration in the area of the holding. This condition, therefore, can in no sense be said to rebut the presumption raised under s. 50. In this connection I should like to observe that a *kabuliyat* containing a stipulation like agreeing to pay enhanced rent in future is only a piece of evidence which can be taken into consideration to show that the tenancy did not exist from the time of the Permanent Settlement or that it was not held at an invariable rent from that time. It is after all a piece of evidence the effect of which can be well judged by a Court of fact and in my judgment it is not proper for a Court of law to lay down whether a piece of evidence is or is not sufficient to rebut the presumption raised under s. 50. In this case the learned Special Judge considered this *kabuliyat* with all its terms and has come to the conclusion on a consideration of the evidence that even if it were a stipulation to allow enhancement it will not effect the defendant's immunity, if in fact he establishes a presumption that he has held at a rate unchanged since the Permanent Settlement. That I take to be a finding of fact which we cannot disturb in a second appeal. This objection, therefore, fails.

(4) 47 Ind. Cas. 359; 29 C. L. J. 371; 22 C. W. N. 940.

There is one other point which was suggested, namely, that the Courts below should not have allowed deduction of 5 per cent. on account of closeness of measurement. I understand this has been the practice under the Settlement Rules framed by the Government and no authority has been placed before me to induce me to depart from this course. I may remark that it is found by the Courts below that there has been an increase of area held by the defendant which has been assessed at the rent found to be fair and equitable by the Special Judge.

In the result this appeal fails and is dismissed with costs one gold *mohur*.

Cuming, J.—I agree.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1146 OF 1923.

April 3, 1925.

Present:—Justice Sir Theodore Caro Piggott, KT.

BALDEO RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KUN KUN RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27, O. XLVII, r. 1—Appeal—Additional evidence, when can be taken—Fresh evidence, discovery of, effect of.

An Appellate Court has no jurisdiction to admit fresh evidence merely on the ground that the evidence had been discovered by one of the parties to the litigation under circumstances which would warrant an application for review of judgment under O. XLVII, r. 1 of the C. P. C. [p. 587, col. 2.]

In the matter of Nandkishore, 4 Ind. Cas. 809; 32 A. 71; 6 A. L. J. 979, followed.

Second appeal from a decree of the District Judge, Ghazipur.

Mr. *U. S. Bajpai*, for the Appellant.

Messrs. *Haribans Sahai* and *K. Verma*, for the Respondent.

JUDGMENT.—This is an appeal by two plaintiffs whose suit for possession of a certain house and recovery of rent has been dismissed by two Courts. The first question raised is whether the judgment of the lower Appellate Court can be accepted as one which complies adequately with the requirements of the law on the subject. Obviously the learned District Judge, having heard the arguments in

the case, thought so little of the plaintiffs' claim that he could not be troubled to deal with the points taken in the memorandum of appeal before him systematically or in any detail. He did, however, apply his mind to the most crucial point in the case. The title of the plaintiffs came to them from one Cheddi, who claimed as heir under the Hindu Law of one Sukh Lal. The plaintiffs had to prove Chhedi's title, failing which their suit could not succeed. Now, the plaintiffs' case was that Chhedi was the son of one Khedu, and that Khedu and Sukh Lal were brothers the sons of one Behari. On the other side evidence was produced that the name of Sukh Lal's father was Raghubar. The learned District Judge felt satisfied that the evidence on the record proved this point against the plaintiffs. He has produced a judgment which I do not consider commendable or altogether satisfactory, but I am not prepared to set aside the proceedings in the lower Court, or to order the appeal to be re-heard as a first appeal in that Court, merely on the ground of a technical objection to the form of the judgment. So far as this matter goes there is only one other point that is at all arguable on behalf of the appellants. The evidence that Sukh Lal's father was called Raghubar included a certain document, as to which objection was taken that it had not been proved in the manner required by law. It was not put forward as a document of title. What was put in evidence was simply a statement made in writing by one Sukh Lal, since deceased, that the name of his father was Raghubar. I am satisfied that for the purpose for which it was used that statement was duly proved against the plaintiffs. There is one other matter with which I must deal. Along with the petition of appeal the plaintiffs have tendered a petition supported by affidavit asking this Court to admit further evidence. The evidence in question is documentary, and it falls under two distinct heads. In the first place, copies are tendered of certain proceedings in a former litigation, described as Suit No. 143 of 1887, the object of which is to prove that Sukh Lal's father was called both Behari and Raghubar. I have thought it expedient to examine these documents, without prejudice to the question whether they ought or ought not at this stage to be admitted in evidence. It was pointed out long ago by a Bench of this Court [*vide In the matter of Nandkishore* (1)] that the Appellate Court as such, has no jurisdiction to admit fresh evidence merely on the ground that it had been discovered by one of the parties to a litigation under such circumstances as would warrant an application for review of judgment under O. XLVII, r. 1, of the C. P. C. At the same time it must be admitted that the position which arises when a litigant alleges himself to have discovered facts such as to warrant the invocation of the rule above mentioned at a time when an appeal against the decision complained of is actually pending, is a somewhat difficult one. On a strict interpretation of O. XLVII, r. 1, it would seem that the mere fact that an appeal has been preferred excludes the application of the said rule. This is not of course an answer to the contention the powers of an Appellate Court in the matter of the production of additional evidence are strictly limited by O. XLI, r. 27, of the same Code. It may be that the particular question now under consideration was not adequately considered when the rules under the C. P. C. were framed, and that some additional to these rules might well be made to deal with cases of this sort, though they cannot be of frequent occurrence. Sitting as a Single Judge, I should consider myself bound, if the appeal before me could only be disposed of on this one ground, to follow the ruling laid down in *Nand Kishor's case* (1) above referred to. If the matter were *res interga* I would take leave to suggest that, in the absence of any rule dealing specifically with this point, a Court of Appeal might in the interests of justice stretch the words, "or for any other substantial cause," in O. XLI, r. 27, aforesaid, so as to enable it to take action if the interests of justice clearly required it to do so. The present is not, in my opinion, such a case. To being with, the affidavit along with which this additional evidence is tendered is unsatisfactory and inadequate. One thing is certain that if additional evidence is to be admitted at all under the circumstances now before me, the principles laid down in O. XLVII, r. 1, of the C. P. C. must be strictly applied in order to determine the admissibility or otherwise of the additional evidence. On the affi-

(1) 4 Ind. Cas. 809; 32 A. 71; 6 A. L. J. 979.

davit before me I am in no way prepared to hold that the additional evidence which I am now considering could not have been produced by the present plaintiffs at the time when the decree under appeal was passed, if they had exercised due diligence. As I am dealing with this matter on broadly equitable grounds, I may add that having looked through the documents relating to the proceedings in Suit No. 147 of 1887, I consider them quite inconclusive and am not of opinion that they either would or should have effected the decision of the question in issue if they had been tendered in the Trial Court. Strictly speaking, I doubt it if they were admissible at all. The plaintiffs had called Chhedi as their own witness, and Chhedi had deposed positively that the name of his father's father was Behari, and that the said Behari was never known by any other name. I doubt if the plaintiffs could have been permitted to contradict their own witnesses on this point.

There are two other documents tendered which are of the nature of reports made by Police Officers (presumable still alive) in connection with an enquiry held by the said officers in the exercise of their lawful jurisdiction in the month of December 1920. This evidence as it stands is not admissible at all against the defendant in the present suit. If the plaintiffs had called one or both of the Police Officers in question as a witness and sought to examine such witness on the proceedings in question, the witness could no doubt have been asked to refresh his memory with reference to these documents. They could not have been put in evidence in any other way. For these reasons I have rejected the application for the admission of additional evidence.

The result is that this appeal fails, and I dismiss it accordingly with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1311 OF 1924.
January 6, 1925.
Present:—Mr. Justice Campbell.
GAJJA SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
NATHA SINGH—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 55—Co-sharers—Possession of one co-sharer—Injunction to restrain co-sharers from interference, duration of.

Where the exclusive user of a plot of land by a co-sharer is interfered with by other co-sharers, a perpetual injunction should not be granted against the latter and the duration of injunction should be limited to the period during which the land remains in the lawful possession of the plaintiff. [p. 589, col. 1.]

Second appeal from a decree of the District Judge, Ludhiana, dated the 18th March 1924.

Dr. *Nand Lal*, for the Appellants.

Mr. *Sagar Chand*, for the Respondent.

JUDGMENT.—This suit concerns the strip of ground coloured pink on the plan, Ex. P I, which lies between pieces of land admittedly in the respective possession of Natha Singh, plaintiff, and of Harnam Singh and Gajja Singh defendants. The plaintiff sued for possession of the strip of ground and for a perpetual injunction directing the plaintiff to close a door marked P a *pernala* marked S and a drain marked R. The lower Appellate Court has decreed the claim and the defendants have come here on second appeal. The findings of the lower Appellate Court are: firstly, that the land in question is *shamilat*, secondly, that the plaintiff brought a suit against Gajja Singh for possession of it previous to the present suit, obtained an *ex parte* decree and got actual possession in execution of that decree, and thirdly, that after obtaining such possession he was forcibly dispossessed by Gajja Singh and Harnam Singh. In regard to the door, the *parnala* and the drain, the finding is that these were all built after the previous suit. The first argument for the appellants is an attempt to dispute the finding of fact that in execution of the previous decree the plaintiff got actual possession. This finding is final in second appeal since it is based on evidence. The second point taken is that the former decree had no effect upon Harnam Singh. There is, however, a finding of fact that Harnam Singh was not in possession at the time of the former suit and that he took possession after the decree. The third argument that Harnam Singh was entitled in the capacity of a co-sharer in the *shamilat* to evict the plaintiff merely because he had ownership rights in the land, does not require serious consideration. On the facts found the plaintiff was unmistakably entitled to regain possession by means of the present suit. As regards the injunction, it is admitted by

the learned Counsel for the plaintiff-respondent that a perpetual injunction should not have been given against the defendants who are part owners of the disputed plot and that the injunction should have been granted only for so long as the land remained in the lawful possession of the plaintiff. It is also admitted that the site of the door and the site of the *parnala* are included in the ground of which the plaintiff has been given possession and that the injunction in respect of these two erections is meaningless. I accept the appeal to the extent of setting aside the injunction as regards the door P and *parnala* S for the reason that the plaintiff's decree for possession effects their removal. As regards the drain R. the plaintiff will have an injunction restraining the defendants from running their water from it on to the site in dispute for so long as the plaintiff retains exclusive possession of this plot. On the findings of the learned District Judge it is quite clear that the plaintiff has sustained special damages by the construction of this drain which was not made until he had been forcibly dispossessed by the defendants. The appellants, however, will pay the plaintiff the costs of this appeal which on its main point stands dismissed.

Z. K. *Appeal partly allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 23 OF 1924.

February 13, 1925.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Rankin.

G. M. HAY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BONOMALI MULLICK—PLAINTIFF—RESPONDENT.

Calcutta Rent Act (III of 1920), s. 11—Lease, expiry of—Tenant holding over—Refusal of landlord to accept rent—Deposit in Controller's Office—Period during which deposit may be made—Breach of covenant by tenant at time of giving up possession—Tenant, whether disentitled to protection of Act.

Under a certain lease the rent became due on the 5th of each month succeeding that for which it was payable. The landlord refused to accept the rent. The Rent Controller's Office was closed from the 19th up to the 22nd. On the 23rd defendant, who was the tenant, presented a petition and obtained an order from the Rent Controller for the receipt of the amount of rent together with the requisite 10 per cent. The defendant was not able to pay the money to the cashier on that date owing to the large number of people who were waiting to make payments and the money was paid into the Controller's Office on the 24th:

Held, that under the circumstances the deposit had been made in accordance with the provisions of sub-s. (4) of s. 11 of the Calcutta Rent Act. [p. 590, col. 2.]

The fact that a tenant commits a breach of a covenant when he gives up possession of the premises is not sufficient to disentitle him from the protection afforded by the provisions of the Calcutta Rent Act during the whole of the period during which he has been holding over after the date of the expiry of his lease. [p. 591, col. 2.]

Appeal against a judgment of Mr. Justice Pearson, dated the 10th January 1924.

Messrs. *L. P. E. Pugh*, *J. Langford James* and *M. N. Kanjilal*, for the Appellants.

Sir *Benode Mitter* and Messrs. *N. N. Sircar* and *S. C. Bose*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the defendants against the judgment of my learned brother Mr. Justice Pearson which is dated the 10th of January 1924.

The suit was brought for ejectment, mesne profits and damages.

The defendants were the tenants and occupiers of the premises Nos. 171, 172 and 174, Dhurmtollah Street, in Calcutta. The premises were held under a lease for a term of ten years from the 1st of January 1911, which term expired on the 31st of December 1920.

The plaintiff is the lessor and Messrs. Breakwell and Co., were the lessees. In November 1918 the remainder of the term was assigned to Messrs. Hay and Porter, who are the appellants in this case: and, the rent for the whole of the premises was Rs. 1,050 per month.

At the end of the term there were negotiations between the parties with a view to the renewal of the lease. But these came to nothing and, on the 20th of April 1921, this suit was brought.

The defendants remained in possession until the 31st of January 1923, when they delivered vacant possession to the plaintiff.

It is clear that the defendants tendered the rent for the month of January 1921 on the 4th of February 1921. The rent for one month was payable on the 5th of the following month. That tender was refused by the plaintiff: and, there is no doubt that from that time onward the plaintiff refused to receive any rent from the defendants.

Accordingly, the rent was paid to the Rent Controller with the addition of 10 per cent. in accordance with the provisions of the Calcutta Rent Act, and, with one exception the rent for each month was paid prior to the 15th of the following month. The exception to which I have referred, was with reference to the rent which was payable in respect of the month of September 1922.

It appears that the rent for September 1922 was actually paid on the 24th of October 1922 to the Rent Controller. The office of the Rent Controller was closed on account of certain holidays from some day before the 19th of October and the 23rd of October was the first day after the 19th October which was available for the deposite of rent with the Controller.

The learned Judge in his judgment stated as follows: "Subsequent to the termination of their lease and during the period up to the time they vacated the premises, the defendants deposited rent with the Rent Controller at the rate reserved by the lease plus 10 per cent. This they did every month, payment being in every case prior to the 15th of the month."

When the case was argued in this Court, it was alleged that that finding of the learned Judge was wrong, and our attention was drawn to two rent receipts, which went to show that the rent in respect of the month of September 1922 was in fact paid on the 24th of October, as I have already mentioned.

The learned Counsel for the defendants stated that there was an explanation of that to the effect which I have already stated. The result was that we were of opinion that it was necessary for evidence to be given with regard to this matter: and the hearing of the appeal was adjourned in order that the defendants might produce that evidence. The evidence was given to-day by Krishna Lal Chatterjee, who was an accountant employed by Messrs. Breakwell & Co. and Atindra Nath Mukerjee, who was a clerk employed in that office: and, from their evidence it is clear that the explanation which was given by the learned Counsel for the defendants was correct and was fully supported by the evidence.

The explanation shortly stated was that when the defendants' clerk went to the Rent Controller's Office on the 23rd of October, which was the first available date after the 19th of October, and presented a petition and obtained an order from the Rent Controller for the receipt of the money. He was not able to pay the money to the cashier because there were many others waiting to make payments on behalf of other people, and it appears that at or about 3 o'clock the cashier refused to receive any more money on that day and told the people, whose money had not been received, to come on the following day. The result was that Messrs. Breakwell & Co.'s clerk went to the Rent Controller's Office on the 24th of October and paid the money. The receipt was dated the 24th. These are the facts with regard to this part of the case.

The learned Judge was of opinion that the defendants ought to have deposited the standard rent on or before the 5th day of every month and as they had not done that the defendants were not entitled to the protection of the Rent Act.

The learned Counsel for the defendants drew our attention to s. 11, sub-ss. (4) and (5) of the Calcutta Rent Act. I will read sub-s. (5), first: "(5) No tenant shall be entitled to the benefit of this section in respect of any premises, unless within three months of the date of the commencement of this Act he has paid all arrears of rent due by him in respect of the said premises, and also unless he pays the rent due by him to the full extent allowable by this Act within the time fixed in the contract with his landlord, or in the absence of any such contract, by the fifteenth day of the month next following that for which the rent is payable." Sub-section (4) is as follows: "(4). Where a landlord refuses to accept the rent referred to in sub-s. (*i*) offered by a tenant, the tenant may deposit it with the Controller within a fortnight of its becoming due."

In this case the rent became due on the 5th of the month succeeding that for which it was payable. The landlord refused to accept the rent. Consequently, it was the duty of the tenant, under the provisions which I have just read, to deposit it within a fortnight from the 5th of the month a fortnight from the 5th—the time when the rent became due in this case—would make the date by which the rent would be payable—the 19th of the month.

Having regard to this contention and the evidence which was given to-day Mr. Sircar, the learned Counsel for the plaintiff, admitted that the ground upon which the learned Judge held that the defendants were not entitled to the protection of the Rent Act could no longer be supported. But the

learned Counsel argued that he could support the learned Judge's decision upon another ground : and, he relied on the first sub-section of s. 11 which runs as follows:—"(1) Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872, no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays rent to the full extent allowable by this Act, and performs the conditions of the tenancy."

His argument was that the defendants had not performed the conditions of the tenancy.

In the first place, he drew attention to a report which was made by a Mr. Johnstone as to the state of the premises in March 1922 and, he argued that that showed that the defendants had not complied with the covenant of the lease to keep the premises in repair, and that consequently the defendants had not fulfilled the conditions as required by s. 11 (1): and, even though they had paid rent to the full extent allowable by the Act, they had not performed the conditions of the tenancy by keeping the premises in repair.

In my opinion, we ought not to give effect to this contention.

The learned Judge come to no conclusion that the defendants, so long as they were in possession of the premises, had committed any breach of the covenant: and, I am not at all satisfied that the plaintiff relied upon that as a reason which would entitle him to a decree for possession at the trial. With regard to the evidence, it seems to me that there is evidence each way: there is the evidence of Mr. Johnstone that the premises had not been kept in repair in accordance with the terms of the lease : on the other hand, there is evidence that the premises had been kept in repair: and, it is not possible, in my judgment, for this Court to come to any conclusion as to whether the defendants, while they were in possession, committed any breach of the terms of the lease.

The learned Counsel then urged that the learned Judge had found that the defendants had committed a breach of one of the covenants in that, at the end of January 1923, they removed certain fixtures which they had no right to remove and when they gave up possession the premises were not in good and substantial repair and condition in accordance with the terms of the lease and that the learned Judge had assessed damages in respect of the breach of that covenant at Rs. 1,500.

There is no doubt that that is the finding of the learned Judge, but I am not prepared to accept the learned Counsel's contention that the fact that the defendants had committed a breach of that covenant when they gave up possession of the premises, was sufficient to disentitle them to the protection of the Rent Act during the whole of the period during which they were holding over after the end of December 1920.

In my judgment on the facts of this case there is no sufficient proof that the defendants failed to comply with the terms of the lease until the end of January 1923, and consequently the plaintiff was not entitled to a decree for possession until the end of January 1923 when in fact the plaintiff got possession.

Consequently, the plaintiff is not entitled to any mesne profits in respect of the period for which he has claimed.

In my judgment the plaintiff is only entitled to a decree for Rs. 1,500 with regard to the damages assessed by the learned Judge in respect of the breach of the covenant not to remove fixtures and to deliver up possession of the premises at the termination of the term in good and substantial repair.

The result, therefore, is that in my judgment this appeal should be allowed and the learned Judge's decree should be varied. In place of the decree passed by the learned Judge there will be a decree in favour of the plaintiff for Rs. 1,500 as damages.

We give a direction that the four pieces of Government securities to which reference has been made be handed to the defendants upon the defendants producing a letter from the executors of Mr. Breakwell authorising them to receive the securities. The plaintiff will be entitled to withdraw the money deposited by the defendants with the Rent Controller.

As regards costs, we are of opinion that the plaintiff should get the costs of the trial with the exception of the costs of Mr. Shorsbree, and that the plaintiff should pay the defendants the costs of the appeal (one set of costs to be set off against the other). These costs are to be ordinary costs which will carry two Counsel.

The war bonds deposited with the Registrar will be handed to the defendants' Attorney.

Rankin, J.—I agree.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 465 AND 466 OF 1925.

April 6, 1925.

Present :—Justice Sir Theodore Caro Piggott, KT.

BIJAI—PLAINTIFF—APPELLANT

versus

NARAIN—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 167, Sch. IV—Suit for declaration of joint right in occupancy holding, whether cognizable by Civil Court.

A suit for a declaration that the plaintiff is a joint occupancy tenant along with the defendant is not excluded from the cognizance of a Civil Court by the provisions of s. 167 of the Agra Tenancy Act, inasmuch as such a suit is not provided for in the Fourth Schedule to the Act.

Second appeal against a decree of the Subordinate Judge, Aligarh, dated the 27th November 1924.

Mr. *N. P. Asthana*, for the Appellant.

JUDGMENT.—These two connected appeals arise out of two suits which were tried together. There was a dispute between Bijai and his brother Narain about a certain occupancy holding. Bijai claimed to be a joint tenant along with Narain. Each of them brought a suit in the Civil Court to enforce his own claim. The First Court decided in favour of Bijai, but that decision was reversed on appeal. On the findings of fact recorded by the lower Appellate Court I am satisfied that the second appeals filed by Bijai in this Court are not maintainable. In one of the memorandum of appeal reference is made to s. 167 of the Agra Tenancy Act. As a matter of fact, that section does not apply, because there is no Article of the Schedule to the Act under which a suit or application could have been made by these rival claimants to an occupancy holding, which would have brought the dispute between them to a determination. In any case the plea comes with an ill grace from Bijai, who has himself invoked the jurisdiction of the Civil Court. The lower Appellate Court has, in fact, found that Bijai separated from his father Faturi and his brother Narain, receiving his rightful share in the joint family property and that he is at present in sole possession of an occupancy holding in respect of which Narain is preferring no claim. I must take the lower Appellate Court also to have found that Narain and Faturi agreed to continue joint, or re-united after the joint status of the family had been broken by Bijai's withdrawal. It was open to the lower Court to find on the evidence that, inspite of the fact that the name of Faturi alone was recorded as tenant of this holding in the village papers, the tenancy was really vested in the joint family consisting of Faturi and his son Narain. On this finding the case is governed by two decisions of this Court, each passed by a Bench of two Judges. The older in date is *Mahabir Singh* v. *Bhagwanti* (1) in which incidentally I regret to observe that the head-note* is absolutely misleading and misrepresents the principle of law which the learned Judges actually laid down. The same point was decided by another Bench of two Judges in *Mindya* v. *Jhurya* (2). That the question is an arguable one in view of the wording of s. 22 of the Agra Tenancy Act would, I think, not be denied by any one; but sitting as a Single Judge, I am bound to follow the decisions above referred to. Nor do I wish to suggest that personally I doubt the correctness of those decisions. These appeals fail and I dismiss them accordingly.

Z. K. *Appeals dismissed.*

(1) 33 Ind. Cas. 110; 38 A. 325; 14 A. L. J. 278.
(2) 57 Ind. Cas. 272; 18 A. 769; 2 U. P. L. R. (A.) 257; 42 A. 668.

*The head-note referred to in the judgment is that of 38 A.—[*Ed.*]

LAHORE HIGH COURT.

MISCELLANEOUS CRIMINAL APPLICATION No. 170 OF 1923.
IN CRIMINAL APPEAL No. 927 OF 1923.
May 5, 1924.

Present :—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

MUHAMMAD SADIQ—APPELLANT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 421, 561-A—Appeal—Reasonable opportunity to accused or his Counsel of being heard not given—Appeal, dismissal of—Inherent power to direct re-hearing.

The language of s. 421 of the Cr. P. C. requires a reasonable opportunity to be given to the appellant to be heard in support of his appeal and if such reasonable opportunity is not given the Court has no jurisdiction to dismiss the appeal. Where a criminal appeal is dismissed without reasonable opportunity having been given to the appellant or his Counsel of being heard, the Court has inherent power to make an order that the appeal should be re-heard after giving the appellant or his Counsel a reasonable opportunity of being heard in support of the appeal.

Miscellaneous Criminal Application against the reference of Mr. Justice Campbell.

Syed *Mohsin Shah*, for the Petitioner.

Chaudhri *Zafrulla Khan*, for the Respondent.

ORDER.—The facts of the case and the point referred for the decision of the Division Bench are fully stated in the referring order of Campbell, J. The question to be decided is whether this Court can order the re-hearing of an appeal presented by Muhammad Sadiq, son of Muhammad Yusaf, under s. 419 of the Cr. P. C. which was dismissed by a Judge of this Court without the appellant or his Pleader having had a reasonable opportunity of being heard in accordance with the provisions of the proviso to s. 421 (1) of the Cr. P. C. The referring Judge, while of the opinion that s. 561-A of the Cr. P. C. did not give the High Court any power to review its own judgment or order, considered that under the circumstances of the present case a re-hearing of the appeal would secure the ends of justice within the meaning of that section. As pointed out by him, it has been laid down repeatedly that a judgment in a criminal appeal or revision cannot be interfered with on review either by the same or any other Bench of the Court. In the case reported as *In the matter of Gibbons* (1) it was held by a Full Bench of the Calcutta High Court that "the verdict and judgment of a Division Bench of a High Court, coupled with the sentence in a criminal case, are absolutely final, and as soon as they have been pronounced and signed by the Judges, the High Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision or interfere with it in any way." This decision was considered by a Division Bench of the same Court in *Rajjab Ali* v. *Emperor* (2). The Court referred therein (page 63* of the volume) to two previous cases reported as *Bibhuti Mohun Ray* v. *Dasi Money Dasi* (3) and *Bibhuty Mohun Roy* v. *Dasimoni Dassi* (4). Those were cases where applications for revision had been dismissed in default and where they were restored to the pending file. The Judges said that "where a case is disposed of merely for default of appearance or where an order is passed to the prejudice of an accused person and by mistake or inadvertence no opportunity has been given to him to be heard in his defence such an order is not one to which the ruling in the Full Bench case applies". That opinion was *obiter* and was passed upon the decisions in the two cases which are not on all fours with the present one. In a case reported as *Proceedings, 7th November 1873* (5) it was held that "when a criminal appeal has been rejected without hearing the appellant's Pleader and it is afterwards proved to the satisfaction of the Appellate Court that an adequate excuse has been made for the Pleader's non-appearance, it is open to the Appellate Court to re-hear the appeal on its merits." This decision was referred to with approval by a Division Bench of the Madras High Court in the case reported as *Ranga Row* v. *Emperor* (6) where commenting on it the Judges said: "We have no doubt that this is correct, for the language of s. 421 requires a reasonable opportunity to be given and, if such reasonable opportunity is not given, the Court has no jurisdiction to dismiss the appeal."

It has been clearly shown in the order of the referring Judge that the appeal in question was dismissed without the appellant or his Pleader being given a reasonable opportunity of being heard in support

(1) 14 C. 42; 7 Ind. Dec. (N. S.) 29.

(2) 50 Ind. Cas. 25; 46 C. 60; 20 Cr. L. J. 265.

(3) 7 C. W. N. vii (7).

(4) 3 Ind. Cas. 393; 10 C. L. J. 80; 10 Cr. L. J. 287.

(5) 7 M. H. C. R. App. xxix.

(6) 16 Ind. Cas. 518; 12 M. L. T. 350; 23 M. L. J. 371; 13 Cr. L. J. 710; (1912) M. W. N. 982.

*Page of 45 C.—[*Ed.*]

of the same. The order dismissing the appeal was, therefore, passed without jurisdiction. Without holding that the Court under s. 561-A, Cr. P. C., has inherent power to review its own order, we think that this is certainly a case where the Court has inherent power to make an order that the appeal of Muhammad Sadiq, son of Muahmmad Yusaf, should be re-heard after giving him or his Counsel a reasonable opportunity of being heard in support of the same and we order accordingly.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 11 OF 1925.
March 24, 1925.
Present:—Mr. Wazir Hasan, A. J. C.
JOHN CASSEL—ACCUSED—APPLICANT
versus
EMPEROR—PROSECUTOR.

Hackney Carriages Act (XIV of 1879), s. 6 (g)—Bye-laws framed by Lucknow Municipal Board, bye-law 18—Carriage re-painted and awaiting for number—Number painted on lamps—Breach of bye-law.

Where a hackney carriage, whose lamps bear the number, has been re-painted and is awaiting for he number to be painted on it, the absence of the number from a conspicuous part of the carriage does not involve a breach of bye-law 18 framed by the Lucknow Municipal Board under s. 6 (*g*) of the Hackney Carriages Act.

Case referred by the District Magistrate, Lucknow.

The Government Pleader, for the Crown.

ORDER.—This is a Reference under s. 438 of the Cr. P. C. by the District Magistrate of Lucknow with the recommendation that the conviction of John Cassel under s 7 of Act XVI of 1861 be set aside.

The applicant John Cassel is the proprietor of a *tonga* which he lets for hire. In the final order passed by the Trial Court the conviction of the applicant is stated to rest on s. 7 of Act XVI of 1861. That section makes it penal to let for hire any carriage without the same being licensed: but the perusal of the judgment of that Court also makes it clear that it intended to charge with and to convict the applicant also for the offence of the number of license not having been painted upon a conspicuous part of the *tonga* That is an offence which is made punishable under s. 6 of the same Act.

The Municipal Board of Lucknow, however, seems to derive its powers of making bye-laws the infraction of which may be penal under the provisions of the Hackney Carriages Act XIV of 1879. This is shown by the copy of the bye-laws framed by the Municipal Board of Lucknow, which copy I have before me. These bye-laws are framed under the authority given by s. 6 of the Hackney-Carriages Act, 1879. The bye-laws as to the necessity of obtaining a license are Nos. 5 and 11 and under bye-law 26 (5) the carriage-driver is required to keep the license in his possession at the time when he is plying the carriage on hire. Breach of the rules is made penal by s. 7 of the Act. Under s. 6, cl. (*g*), of the same Act the Municipality could make a rule for the numbering of a carriage. That rule is to be found in bye-law 18. This comparison of the provisions of Act XVI of 1861 and of Act XIV of 1879 leads to the result that the applicant, John Cassel, if guilty, could be convicted either under the one or the other of the two Acts.

I first deal with the question of license. The learned District Magistrate finds that the applicant, John Cassel, is in possession of the license which is in proper form. The non-possession of the license is, however, not the offence for which he has been convicted; but it seems to me that the offence for which he has been convicted is the breach of the Municipal rule requiring him to keep the license on his person while plying the carriage on hire. The case of the applicant was that he had the license with him. The Trial Court, however, found on evidence that he had not. The learned District Magistrate does not find in so many words that the applicant had the license with him at the time though the tenor of the reference which he has made suggests that he is inclined to accept the version of the applicant. In agreement with the District Magistrate, therefore, I would hold that the applicant had his license with him. On this finding his conviction in the matter of the license cannot be upheld.

On the question of the absence of the number from a conspicuous part of the carriage, the learned District Magistrate is of opinion that the explanation of the applicant that his carriage had just been re-painted and was awaiting for the number, was correct because as a matter of fact five days after the *challan* the carriage was actually re-inspected and passed correct. Further the learned District Magistrate also

seems to hold that the lamps of the carriage bore the number. I accept this finding also.

The result is that the Reference is accepted. The conviction of John Cassel is set aside. The fines if paid shall be refunded to him.

Reference accepted;
Conviction set aside.

Z. K.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1502 OF 1924.

December 15, 1924.

Present:—Justice Sir Henry Scott-Smith, KT.

ISHAR DAS—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 465, 471—Producing forged copies of entries in Revenue Records in support of complaint in pursuance of order of Court—Offence.

Accused filed a complaint of trespass and was told to produce copies of the Revenue Records in support of his claim and knowingly he produced forged copies as genuine:

Held, that the accused had not been forced to produce the copies and that he was guilty of an offence under s. 471 of the Penal Code.

Criminal revision from an order of the Sub-Judge, Sialkot, dated the 18th October 1924.

Dr. *Nand Lal*, for the Petitioner.

Mr. *Desraj Sawhney*, for the Crown.

JUDGMENT.—Petitioner has been convicted of an offence under s. 465-471, Indian Penal Code, and his appeal having been dismissed he has come up to this Court on the revision side.

I have carefully considered the evidence on the record and the arguments of Counsel, and have no hesitation in holding that petitioner has been rightly convicted. As regards the documents Exs. P, A, B and C, it appears that petitioner himself made or caused to be made P. A. and altered or caused to be altered P. B. and P. C. with the object of showing that the tenants were cultivating under himself the mortgagor and not under the mortgagee. I am unable to accept the argument that the *patwari*, because petitioner had complained against him, purposely made incorrect copies in order to get him into trouble.

Dr. Nand Lal cited *Assistant Sessions Judge, North Arcot* v. *Ramanmal* (1) as authority for the proposition that an involuntary production of a document in Court cannot be said to amount to use of it. The facts of the present case are distinguishable. Here the petitioner was told to produce copies of the Revenue Records in support of his complaint of trespass, and it has been found that he knowingly produced forged copies as genuine. The case is different from one where a person has a forged document in his possession which he does not intend to use as genuine, but which a Court forces him to produce. All that can be said for petitioner is that he gave up his case and did not further press it on the day after he had put in the documents. The sentence, however, is not a heavy one and I see no sufficient reason for interference with it. The petition is rejected.

Z. K.

Petition rejected.

(1) 13 Ind. Cas. 275; 36 M. 387; 10 M. L. T. 563; 1912) M. W. N. 3; 13 Cr. L. J. 35; 22 M. L. J. 141.

PATNA HIGH COURT.

CRIMINAL REVISION No. 131 OF 1925.

May 25, 1925.

Present:—Mr. Justice Macpherson.

AKHTAR HUSSAIN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 428, 439—Appeal—Additional evidence, when can be admitted—Power of Court, scope of—Admission of additional evidence—Revision—Interference by High Court, when justified.

The scope of s. 428 of the Cr. P. C. is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons for such opinion. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure of the prosecutor or the Magistrate, as the vindication of the innocence of a person wrongfully accused where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth. [p. 597, cols. 1 & 2.]

In India the onus is placed on the Court not merely to listen to the evidence but to enquire to the utmost into the truth of the matter and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on an Appellate Court by s. 428 of the Cr. P. C., it cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a mis-carriage of justice; on the contrary the section is directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case. [p. 597, col. 2; p. 598, col. 1.

The powers given by s. 428 of the Cr. P. C. to a Criminal Court are not less than are given to a Civil Court in the matter of admission of evidence at the appellate stage and Courts ought not to circumscribe them where the Legislature has not seen fit to do so. [p. 599, cols. 1 & 2.]

Even where it might itself in the exercise of its discretion as an Appellate Court have declined to admit additional evidence, the Court of revision will by no means always interfere with an order of the Appellate Court admitting additional evidence. To justify interference in revision in such a case the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits. [p. 599, col. 2.]

Application against a decision of the Sessions Judge, Bhagalpur, dated the 19th February 1925, affirming that of the Deputy Magistrate, Bhagalpur, dated the 15th January 1925.

Mr. *W. H. Akbari*, for the Petitioner.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This application in revision is directed against the conviction of the petitioner by the Deputy Magistrate of Bhagalpur under s. 47-A of the Bihar and Orissa Excise Act, 1915, in respect of being in possession of cocaine contrary to the provisions of that Act and the sentence imposed upon him of three months' rigorous imprisonment which conviction and sentence were upheld in appeal by the Sessions Judge of Bhagalpur.

In support of the rule Mr. Akbari advances two pleas. The first of these is that the conviction is wrong on the merits, or that at all events the Sessions Judge has not adequately examined the evidence adduced to prove that the petitioner was in possession of the cocaine.

The prosecution case was that when the petitioner and Sujaet Ali, a prosecution witness left a house in the town of Bhagalpur and were walking along the road an Excise petty Officer and peon came up to them and arrested them, that when the Excise Sub-Inspector arrived soon afterwards, the petitioner dropped a match-box which he had been holding in his hand and which on being picked up by the Sub-Inspector was found to contain a white powder eventually reported by the Chemical Examiner to Government to be cocaine hydrochloride the possession of which by the petitioner is an offence under s. 47-A.

Mr. Akbari urges that though there are discrepancies in the prosecution evidence with regard to the time when the petitioner threw away the match-box, these have only been lightly dealt with by the Appellate Court whereas (he contends) that Court should have inferred from them that the petitioner was not in possession of the match-box or its contents. I have accordingly examined the evidence carefully and find that there are in fact discrepancies. The essential question, however, is whether the petitioner dropped the match-box containing the white powder. On this point there is no discrepancy at all. Indeed the evidence is that Sujaet, when walking with him, saw him carrying something in his hand, that the sixth prosecution witness saw the match-box in his closed right fist before he dropped it and that several other witnesses saw him drop it. The witnesses unconnected with the Excise Department all say that the petitioner dropped the match-box after the Sub-Inspector came and the evidence of the Sub-Inspector is to the same effect. The only evidence to the contrary is that of the petty officer. The learned Sessions Judge has dealt with it and has come to the conclusion that in stating that the petitioner threw down the match-box before the arrival of the Sub-Inspector and that it was lying on the ground when the latter arrived, the petty officer made a mistake. His discussion of the point has been adequate. Moreover, his conclusion is, in my opinion, correct and there is not the faintest doubt that the petitioner was in possession of the match-box containing the white powder.

The second contention is that the action of learned Sessions Judge in directing further evidence to be taken under s. 428 of the Cr. P. C. was illegal. When the appeal came up for hearing the Sessions Judge found that some of the connecting links in the evidence to prove the identity of the packet examined by the Chemical Examiner were missing. Considering that additional evidence was necessary on this point he recorded his reasons and directed the Magistrate to take the necessary further evidence on the point. The Magistrate accordingly examined two witnesses. The first, who is the Sub-Inspector of Police in charge of the Magistrate's *malkhana*, testified that he received the packet from the Excise Sub-Inspector and had it packed for despatch by post in a packet which was sealed with the private seal of the Trying Magistrate and addressed to the Chemical Examiner, and the second is the con-

stable who despatched the packet by registered post. It is not denied that this testimony supplies the links which the learned Sessions Judge found missing from the original evidence as to the identity of the material examined by the Chemical Examiner with the white powder contained in the match-box. But Mr. Akbari contends that s. 428 of the Cr. P. C. does not empower the Sessions Court to bring this evidence on the record. He maintains that s. 428 is only to be utilised in a case where there is some evidence upon which the appellant could be convicted though that evidence is not satisfactory, and he suggests that "this is a *via media* which the Courts in India have worked out for themselves." In support of his contention he cites the decision in *Empress of India* v. *Fateh* (1), the opinion of Sundara Ayyar, J. in *Jeremiah* v. *Vas* (2) and the opinion of Sadasiva Ayyar, J. in *Varadarajulu Naidu* v. *Emperor* (3). In reply the Assistant Government Advocate relies upon the majority view in *Varadarajulu Naidu* v. *Emperor* (3) and on the terms of s. 428. In my judgment the contention of Mr. Akbari is unfounded and cannot prevail.

The scope of s. 428 is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. Indeed Sadasiva Ayyar, J., in his judgment in *Varadarajulu Naidu* v. *Emperor* (3), wherein he quotes with approval the two earlier views cited on behalf of petitioner, does not deny the power of the Appellate Court to take additional evidence under s. 428 even where it considers that though the prosecution fails on the evidence on record negligence on the part of the prosecution should be excused, but holds that as a matter of discretion the power should only be exercised against the accused in very exceptional cases, for instance in a case where "there is evidence, which, if reliable, proves a relevant fact but the Appellate Court feels a doubt on the point and thinks that additional evidence might throw light which would enable it to arrive at a definite and satisfactory conclusion."

(1) 5 A. 217; A. W. N. (1882) 227; 3 Ind. Dec. (N. S.) 176.

(2) 12 Ind. Cas. 961; 36 M. 457; 10 M. L. T. 506; (1911) 2 M. W. N. 576; 22 M. L. J. 73; 12 Cr L. J. 591.

(3) 51 Ind. Cas. 343; 42 M. 885; 20 Cr. L. J. 455; 37 M. L. J. 81; (1919) M. W N. 669.

But the object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure of the Court Sub-Inspector or the Magistrate as the vindication of the innocence of a person wrongfully accused where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth. It is indeed impossible on the plain words of the enactment to differentiate between these two cases. And indeed it would not be a sound exercise of discretion to do so in the circumstances of this country presumably well-known to the Legislature, where justice when it fails does so by erroneous acquittal at least as much as by erroneous conviction. Reference may also be made in this connection to s. 540 of the Cr. P. C. and s. 165 of the Indian Evidence Act. Under the former the Court is empowered at any stage of an inquiry or trial to summon a person as a witness or examine any person in attendance or re-call a person previously examined and it is expressly laid down that the Court shall summon and examine and re-call and re-examine any such person, if his evidence appears to it essential to the just decision of the case. Under the latter the Judge is armed with very extensive powers of asking any question in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant and may order the production of any document in order to discover or to obtain proper proof of relevant facts. It is clear that the Legislature endorsed the view "that the English theories that the public have no interest in arriving at the truth and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are not at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England."

In India the onus is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the Appellate Court by s. 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a mis-carriage of justice, on the contrary the enactment is, like the other provisions referred to, directed to the attainment of

justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case. The conditions for the exercise of the power are set out in the section itself, and within these limits it is contemplated that the power will be exercised. The Criminal Law of India is, to use the words of Sadasiva Ayyar, J., "against allowing mere technicalities to stand in the way of a decision on the merits, if it can be reasonably helped" and the Appellate Court is by no means condemned to countenance a mis-carriage of justice because the prosecutor or even the Trial Court fails to realise the necessity of bringing certain evidence on the record, even if that evidence is not purely formal. In this case the evidence cannot be said to be merely formal, though it is of the kind which is not infrequently and in the present instance was so regarded by the parties and even by the Magistrate. There is thus no foundation in principle for the view advanced by Mr. Akbari.

Authority also when carefully examined is against the contention. It may here be indicated that all the rulings cited relate to the stage of appeal, not to the stage of revision. A close examination of the case of *Empress of India* v. *Fateh* (1) casts a different light on that decision. In that case the accused had been committed to the Sessions on charges under ss. 471 and 193 and had been convicted only on the former. In appeal Mahmood, J., held that the facts did not constitute an offence under s. 471. When the Government Pleader asked for a conviction under s. 196 and apparently that additional evidence be taken, the Court further held that the facts did not constitute an offence under s. 196. The learned Judge then went on to indicate that not only had the prosecution not insisted on the second charge or supported it by evidence but that it was not even pointed out in appeal what further evidence would be forthcoming against the appellants, and remarked that in the circumstances where the accused had been committed to the Sessions on distinctly framed charges the High Court would not, except in very exceptional circumstances, direct that further inquiry should be made or that additional evidence should be taken. Thus *Empress of India* v. *Fateh* (1) clearly falls within the category which I have referred to, where there are special peculiarities which would induce any Court to refuse to put s. 428 in operation. There had been a Sessions trial where no effort had been made to establish one of the charges and the Appellate Court very properly, if I may say so with respect, refused to allow the production in appeal, to establish that charge, of additional evidence which the Public Prosecutor could not even specify at the time when he applied to the Court for action under s. 428. There was thus abundant ground for refusing to act under s. 428 (or rather s. 282 of the Code of 1872 which, for some reason which is not clear, is referred to) without reference to any general proposition as to the intention of s. 428. There was also no occasion for formulating such a proposition and a case is only an authority for what it decides.

Then *Jeremeah* v. *Vas* (2) was not decided on the observation of Sundara Ayyar, J. which is reminiscent of *Empress of India* v. *Fateh* (1). Moreover, the majority of the Bench of three Judges in *Varadarajulu Naidu* v. *Emperor* (3) expressed themselves as follows regarding that observation :

"When the Appellate Court has statutory power to prevent such a mis-carriage (of justice) by directing fresh evidence to be taken on the point, I am unable, with great respect, to agree with the observation of one of the learned Judges in *Jeremiah* v. *Vas* (2) in so far as it questions propriety of taking action under s. 428 in such a case to supply a defect in formal proof".

Similarly the dissentient judgment of Sadasiva Ayyar, J., in that case is not an authority on the point for decision in that case. The majority of the Bench of which he was a member held that the powers given by s. 428 are perfectly general and are subject only to the condition that the Court shall record its reasons, and that where a conviction on a serious charge would, though otherwise sustainable, have to be upset for want, owing to a misconception, of formal proof of sanction, the case was a fit one in which to supply under s. 428 the defect in formal proof of the sanction. The reference to a 'defect in the formal proof' was all that was necessary for the purposes of that case. Since the appeal must have been allowed if the defect could not be remedied by additional evidence, it follows that the principle supported by the views cited on behalf of petitioner, namely, that the power conferred by s. 428 " is not in-

tended to be exercised in cases in which the prosecution having had ample opportunities to produce evidence" either "have done so and that entire evidence falls short of sustaining the charge" [*Empress of India* v. *Fateh* (1)] or "have failed to do so" [*Jeremiah* v. *Vas* (2)] is overruled and has no authority or value behind it.

Reference may here be made to the ruling of the Court of Appeal in *William James Robinson* v. *King* (4) as showing that though the power to admit evidence is to be exercised with great care it extends even to the admission of evidence which was not even in existence at the date of the trial and so could not have been produced at all. The Crown sought the admission of evidence to show that the appellant since his conviction had written a letter from prison which had a material bearing on the case, being indeed an admission that he had committed the crime. The Crown relied upon s. 9 of the Criminal Appeal Act which gives the Court of Criminal Appeal the same powers as the Court of Appeal possesses in civil matters. Reading, L. C. J., said :— "It is clear that the Court of Appeal to civil matters has power to admit evidence which would throw material light on the issue. It is a power which must always be exercised with great care. As it is admitted that the evidence will throw a light on the matter in question, we have decided to admit it. The value of the evidence will be a matter for subsequent consideration."

The Indian Legislature has not restricted the powers conferred by s. 428 by reference to the powers under O. XLI, r. 27 of a Civil Court in appeal but it is clear from decision of the Judicial Committee in *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (5) that in a civil appeal even where the Appellate Court itself has discovered an inherent *lacuna* or defect, the Court may admit evidence to fill up the gap or remedy the defect.

The powers given by s. 428 are certainly not less than are given to a Civil Court in the matter of admission of evidence at the appellate stage and Courts of Appeal ought not to circumscribe them where the Legislature has not seen fit to do so.

A further point is that there is a distinction between the case where a Court of Criminal Appeal is asked to take action under s. 428 and the case where such Court having taken such action, interference with its order is sought in revision. Even where it might itself, in the exercise of its discretion as the Appellate Court, have declined to admit such evidence, the Court of revision will by no means always interfere with order of the Appellate Court allowing additional evidence. To justify interferrence in revision the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits. But in this case I am satisfied that not only has there been no error of law and no prejudice on the merits but further that a proper discretion has been exercised and indeed that a failure to take the additional evidence which was "essential to the just decision of the case" would have constituted a grievous disregard of the interests of justice. Accordingly the second plea also fails.

The Rule is accordingly discharged. The petitioner must surrender forthwith to undergo the unexpired portion of his sentence.

Z. K. *Rule discharged.*

(4) 12 Cr. App. Rep. 226.

(5) 74 Ind. Cas. 747; 4 P. L. T. 447; 21 A. L. J. 554; (1923) A. I. R. (P. C.) 128; 1 Pat. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277; 39 C. L. J. 318; 50 I. A. 183 (P. C).

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 958 OF 1924.

February 5, 1925.

Present:—Mr. Justice Le Rossignol and Mr. Justice Fforde.

Musammat RAO—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 164, 533—Confession, record of—Warning to accused that confession may be used as evidence against him, omission of, effect of—Confession, whether admissible in evidence.

Section 164 of the Cr. P. C. requires that a Magistrate before recording any confession should explain to the person making the confession that he is not bound to make the confession and that if he does so it may be used as evidence against him. Where the memorandum made by the Magistrate at the foot of the confession does not show that this requirement was complied with and the Magistrate when called as a witness at the trial does not state that he had told

the accused that he was not bound to make a confession, the confession is inadmissible in evidence.

Criminal appeal from an order of the Sessions Judge, Jullundur, dated the 3rd October 1924.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *D. C. Ralli*, for the Opposite Party.

JUDGMENT.—The appellant, *Musammat* Rao, has been convicted under the provisions of s. 302, Indian Penal Code, of the murder of newly born illegitimate child and has been sentenced to transportation for life.

It appears that on the 26th July 1924, this woman, who was pregnant and shortly about to give birth to a child, was taken by some of her relatives into a sugarcane field and there with the assistance of a midwife named *Musammat* Banon, she was delivered of a female child. The eivdence for the prosecution is that a few moments after the birth Rala Singh an uncle of the appellant, called out to her that the baby was crying and that something should be put into her mouth. Upon this the appellant took a piece of pottery and put it into the mouth of the child. This evidence is repeated by all the prosecution witnesses who testify to the actual occurrence. The midwife in her evidence makes the addition that she asked *Musammat* Rao what she was doing, whereupon the latter told her to mind her own business, and said that the child was hers and that she was going to kill it. This witness alleges that upon this reply she herself went away. She did not mention the incident to anybody, and made no attempt to remove the obstruction from the child's mouth. On the occasion of the child's birth there were present on or near the scene of the occurrence two uncles of the appellant, Rala Singh and Tular Singh, also her father Basanta and a friend Achhar Singh. None of these persons has been called to give evidence. The incident in question occurred in the afternoon of the 26th July and the child died about midnight of the same day. The result of the autopsy shows that the child died of suffocation caused by the introduction of the piece of pottery into its throat.

The appellant made a statement to a Magistrate on the 29th July, which is substantially the same as the evidence given by the prosecution witnesses. This statement has been objected to on the ground that it does not comply with the provisions of s. 164, Cr. P. C., and that the deficiency in the formality prescribed by that section has not been cured on the re-call of the Magistrate under the provisions of s. 533, Cr. P. C In our opinion this confession is not admissible in evidence. The principal requirement introduced by the Amending Act in s. 164 is that a Magistrate before recording any confession should explain to the person making it that that person is not bound to make a confession and that if he does so it may be used in evidence against him. This essential requirement was not complied with on this occasion. The Magistrate on being re-called to supplement the deficiency of the recorded document did not state that he had in fact told the woman that she was not bound to make a confession. We must accordingly reject this document as a piece of evidence.

Upon the case as presented by the Crown we are not satisfied that the appellant did in fact introduce the piece of pottery in question into the mouth of the child. It is far more probable that the midwife herself was responsible for this particular act. The appellant had a moment before been through the pangs of childbirth and it is not probable that she was in a condition to carry out any instruction given to her by the persons surrounding her.

For the reasons given above we accept the appeal and setting aside the conviction and the sentence acquit the appellant and direct that she be set at liberty.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 70 OF 1925.

March 17, 1925.

Present:—Mr. Justice Sulaiman.

GAJRAJ SINGH AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203, 436—Dismissal of complaint—Further enquiry, order directing—Notice to accused, whether necessary.

Where no process has been issued to the accused at all and he does not appear in Court and the complaint against him is dismissed summarily under s. 203 of the Cr. P. C. the accused cannot be said to have been

"discharged" within the meaning of s. 436 of the Code. It is only after he has appeared in Court and the evidence against him in Court is found to be insufficient so as to make it unnecessary to call upon him to enter upon his defence that he can be discharged. An order dismissing a complaint under s. 203, therefore, may be set aside and further enquiry ordered under s. 436 of the Cr. P. C. without any notice to the accused.

Criminal revision from an order of the Additional Sessions Judge, Cawnpore, dated the 20th December 1924

Mr. *G. W. Dillon*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a criminal revision from an order dated the 20th of December 1924 contained in the judgment in a case against the opposite party, directing that a case against the present applicants be started under ss. 147 and 323 of the Indian Penal Code, to be tried by a Deputy Magistrate.

The Police had *challaned* the members of the opposite party under ss. 147 and 325 of the Indian Penal Code. A cross complaint was filed by the accused persons in that case against the complainants under ss. 147 and 323. A Police report on this complaint was called for and after the accused in the case *challaned* by the Police had been convicted, the learned Magistrate dismissed the complaint of these accused persons against the complainants under s. 203 of the Cr. P. C.

The accused persons appealed to the learned Sessions Judge who, upholding their convictions, dismissed their appeals. He felt inclined to hold that there was a free fight between both parties and neither could have claimed a right of private defence. That finding of course is in no way binding on the party consisting of the complainants, nevertheless it was open to the learned Judge to order that further enquiry should be made into the complaint which had been dismissed under s. 203 of the Cr. P. C. The learned Advocate for the applicants contends that this order is improper because it was passed without any notice to his clients and his contention is that no further enquiry should have been ordered without first giving an opportunity to the applicants to show cause.

Under the old Cr. P. C. it was held that when a complaint was dismissed under s. 203 it was not necessary to issue notice to the accused person before ordering further enquiry. In the case of *Angan* v. *Ram Pirbhan* (1), Tudball, J., pointed out that such a notice was quite unnecessary. That case has been followed subsequently by Banerji, J., in the case of *Liaqat Husain* v. *Emperor* (2).

Section 436 of the old Code, however, has been amended under the new Code and a proviso to the following effect has been added. "Provided that no Court shall make any direction in this section for enquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made". It is clear, however, that this proviso cannot apply to a dismissal of a complaint under s. 203; it only applies to the case where an accused person has been *discharged*. When no process is issued to the accused at all and he does not appear in Court and the complaint against him is dismissed summarily under s. 203 the accused person cannot be said to have been "discharged". It is only after he has appeared in Court and the evidence against him is found to be insufficient so as to make it unnecessary to call upon him to enter upon his defence that he can be discharged. Under the old Code the Courts were unanimous that in the case of the dismissal of a complaint under s. 203 notice was not necessary. The amendment has, in my opinion, left those rulings untouched, for it is confined to the case of discharge only and does not apply to the dismissal of a complaint either under s. 203 or s. 204.

The application, therefore, has no force and is dismissed.

Z. K. *Application dismissed.*

(1) 18 Ind. Cas. 146; 35 A. 78; 10 A. L. J. 531; 14 Cr. L. J. 2.

(2) 43 Ind. Cas. 622; 40 A. 138; 16 A. L. J. 30; 19 Cr. L. J. 206.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1641 OF 1924.

January 23, 1925.

Present:—Mr. Justice Broadway.

SHER KHAN—PETITIONER

versus

DR FAZAL ILLAHI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145 (1) —Dispute relating to land—Breach of the peace, apprehension of—Preliminary order, absence of, effect of—Jurisdiction of Magistrate to institute proceedings.

Before instituting proceedings under s. 145 of the Cr. P. C. a Magistrate must satisfy himself that a dispute likely to cause a breach of the peace exists concerning any land, etc., and he must make an order in writing stating the grounds of his being so satisfied Where no such order is made the Magistrate has no jurisdiction to institute proceedings under the section, and any proceedings started by him without making the requisite order are liable to be set aside as taken without jurisdiction.

Criminal revision against an order of the Sessions Judge, Attock at Campbellpur.

Mr. *M. L. Puri*, for the Petitioner.

Mr. *M. M. Tufail*, for the Respondent.

JUDGMENT.—This is a Reference by the Sessions Judge, recommending that certain proceedings under s. 145, Cr. P. C., taken in the Court of Dewan Prithwi Chand, a Magistrate exercising First Class powers, be set aside. The reasons are stated to be that the said Magistrate ignored the provisions of sub-ss. (1) and (5) of the section in question (145) and, therefore, had no jurisdiction.

After hearing Counsel for both the parties, I am not prepared to hold that sub-s. (5) has been contravened but the proceedings must be set aside on the ground that the Magistrate has lamentably failed to carry out the clear provisions of s. 145 (1) Cr. P. C. That section requires that a Magistrate has to satisfy himself "that a dispute likely to cause a breach of the peace exists concerning any land" and has then to "make an order in writing, stating the grounds of his being so satisfied....."

No such order was made in the present case and the Magistrate, therefore, had no jurisdiction in the matter. I, therefore, accept this recommendation and set aside the proceedings of the Magistrate.

Z. K. *Proceedings set aside.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 238 OF 1924.

August 14, 1924.

Present:—Justice Sir Pugh Walmsley, KT., and Mr. Justice Mukerji.

MAHAMMAD YASIN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 197, 360—Chairman of Union Committee, removeable under certain circumstances by Commissioner—Prosecution—Sanction of Local Government, whether necessary—Deposition read by witness—Statement, whether duly recorded.

A Chairman of a Union Committee who can under certain circumstances be removed from his office by the Commissioner, cannot be said to be not removeable from his office save by the Local Government, within the meaning of s. 197 of the Cr. P. C. Consequently the sanction of the Local Government is not necessary for the prosecution of such a person under s. 197.

Where the deposition of a witness instead of being read over to him in the presence of the accused is handed over to the witness and is read by the witness himself, there is no compliance with the provisions of s. 360 of the Cr. P. C. and the deposition cannot be used as the foundation of a conviction.

Criminal Appeal against an order of the Sessions Judge, Pabna and Bogra, dated the 7th April 1924.

Mr. *Monnier* and Maulvi Syed *Nousher Ali*, for the Appellant.

Babu *Anil Chandra Roy Chaudhuri*, for the Crown.

JUDGMENT.

Walmsley, J.—The appellant was the Chairman of the Union Committee at Chatmohor in the District of Pabna, and he has been convicted under ss. 218, 409 and 477-A of the Indian Penal Code. A concurrent sentence of three months has been passed under each of the ss. 218 and 409, Indian Penal Code. There was also a fine imposed under s. 409, Indian Penal Code, and no sentence was passed separately on the accused under s. 477-A, Indian Penal Code.

The first point which is urged on behalf of the appellant is that the proceedings were bad because there was no sanctian given by the Local Government as required by s. 197, Cr. P. C. I do not think there is any substance in this objection because it appears that a member of the Union Committee can be removed under certain circumstances by a Commissioner, so that it cannot be said of him that he is not removeable from his office save by the Local Government.

The second objection is that there was no compliance with the provisions of s. 360, Cr. P. C., regarding the depositions of several of the witnesses. Reference is particularly made to P. W. Nos 1, 3, 8, 9, 10, 13, 14, 15, 16, 17 and 19. Reliance is placed upon the recent decision in the case of *Hira Lal Ghose* v. *Emperor* (1) and it is urged that, in accordance with that decision, the evidence of these witnesses cannot

(1) 83 Ind. Cas. 905; 28 C. W. N. 968; (1924) A. I. R. (C.) 889; 26 Cr. L. J. 201; 41 C. L. J. 224; 52 C. 159.

be treated as evidence on which a conviction can he founded. There is an affidavit to the effect that there was not strict compliance with the law in reading over the evidence given by these witnesses. On other hand, there is a letter from the Sessions Judge sending up a report of the learned Pleader who conducted the prosecution. The statements made by that Pleader seem to me to support the case of the appellant, because it is evident that the Pleader failed to understand the true nature of the requirements of s. 360. As I understand that section both the witnesses whose statements have been recorded and the accused who is on trial are to be given an opportunity of knowing what has been recorded and obviously a mere reading over of the evidence by the witnesses cannot convey to the accused what has been recorded as the evidence given by the witnesses. It appears to me, therefore, that we must hold that the evidence was not duly recorded as required by s. 360 and cannnot, therefore, be used as the foundation of a conviction. The result is that the findings and sentences in this case must be set aside and the case remitted to the Sessions Court, where it will be opon to the authorities, if they think proper, to proceed against the accused *de novo*. The appellant, we are told, is on bail. He may remain on that bail pending further orders by the District Magistrate.

Mukerji, J.—I agree.

Z. K. *Case remitted.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 448 OF 1924.

September 15, 1924.

Present:—Mr. Justice Kulwant Sahay.

RAM SARAN SINGH AND OTHERS—ACCUSED—PETITINERS

versus

NIKHAD NARAIN SINGH AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 200, 202, 203, 204, 345, 439—Case instituted on complaint—Cross-cases—Postponement of issue of process in one case till after disposal of other case—Order, legality of—Discretion of Court—Revision—Interference by High Court.

Section 344 of the Cr. P. C. is applicable to a case even before the issue of process under s. 204 of the Code and a Magistrate is entitled under the former section, if there be a reasonable cause for doing so, to postpone an enquiry or trial and to postpone the issue of process under s. 204. Section 202 of the Code deals with enquiries after a Magistrate has taken cognizance of an offence on complaint, and before he dismisses it under s. 203 or issues process under s. 204 and there is nothing in the law which prevents a Magistrate from postponing the issue of process under s. 204 if there is reasonable cause for doing so even if the case be a warrant case. [p. 604, cols. 1 & 2.]

It is the policy of the law that a Court should proceed to enquire into and try the case as soon as it takes cognizance of a complaint, but it is not prevented by any provision of the law from postponing the enquiry or the trial if there are sufficient and reasonable grounds for so doing. [p. 604, col. 2.]

Where a Magistrate postpones the issuing of process in a cross-case till after the disposal of the other case, the only question is as to whether there is any reasonable cause for such order. If there be such cause it is a matter of discretion and if the Magistrate does not exercise his discretion judicially in postponing the case, the High Court will interfere and set aside the order. But if the discretion is exercised in a sound and judicial manner there is no reason why the High Court should interfere with the exercise of the discretion. [p. 605, col. 1.]

Application against an order of the Sub-Divisional Magistrate, Begusarai, dated the 12th July 1924.

Messrs. *C. C. Das* and *D. C. Varma*, for the Petitioners.

Messrs. *N. N. Sinha* and *B. P. Sinha*, for the Opposite Parties.

JUDGMENT.—It appears that on the 12th July 1924 two complaints were filed before the Sub-Divisional Magistrate of Begusarai; one complaint was filed by the present petitioners against the opposite party charging them with offences under ss. 147, 325 and 447, Indian Penal Code, and the other complaint was filed by Sampat Lal Singh, one of the opposite party in the present case, against the petitioners in the present case charging them with offences under s. 148 and other sections of the Indian Penal Code. The learned Sub-Divisional Magistrate examined the complaints in both cases. In the complaint of the petitioners the order passed by him was as follows: "Put up after disposal of the counter-case". In the complaint filed by Sampat Lal against the petitioners the order was as follows:

"Summon Udit, Ugan, Ramdev, Ram Saran, Ram Balak, Raghunandan and Dev Lal s. 148, Indian Penal Code, for 31-7. There are *talwar* cuts on the side of this complainant and the complainant in the counter-case does not say that there are such cuts on his side. I have compared the initia statements of the complainants in the tw

cases and think that the case instituted by Sampat Lal should be tried first".

Against the order passed in the complaint filed by the petitioners, namely, the order to put up the case after the disposal of the counter-case, the petitioners went up before the Session Judge in revision and the learned Judge rejected the petition summarily. The petitioners now come up to this Court against this order and pray that the order for putting up the case after the disposal of the counter-case may be set aside and the Magistrate may be directed to proceed with their case simultaneously with the counter case. The learned Counsel for the petitioners has relied on the provisions of ss. 200, 202, 203, 204, 252 and 344 of the Cr. P. C. and he argues that when a complaint is filed under s. 200 and the Magistrate takes cognizance of the offence, and the complainant is examined, the Magistrate is bound to issue process under s. 204 unless he thinks it fit to dismiss the complaint under s. 303. He further argues that after issuing process under s. 204 he ought, in the present case, which is a warrant case, to proceed under s. 252 and that the Magistrate was bound to proceed to hear the complainant and take all evidence as may be produced in support of the prosecution. He says that the Magistrate had no jurisdiction to postpone the case under s. 344 which does not govern the issue of process under s. 204. I am unable to agree with the learned Counsel in this contention. Section 344 occurs in Ch. XXIV of the Code which deals with general provisions as to enquiries and trial. Mr. C. C. Das argues that the provisions of s. 344 only come into operation when the enquiry or trial has commenced and he says that an enquiry or trial does not commence until after the issue of process under s. 204. I am unable to agree with Mr. Das in this contention. In my opinion s. 344 is applicable to cases even before the issue of process under s. 204 and the Magistrate is entitled under s. 344, if there be a reasonable cause for doing so, to postopone any enquiry or trial and to postpone the issue of process under s. 204. Section 202 deals with enquiries after a Magistrate has taken cognizance of an offence on complaint and before he dismisses it under s. 203 or issues process under s. 204, and there is nothing in the law which prevents a Magistrate from postponing issue of process under s. 204 if there is reasonable cause for doing so even if the case be a warrant case.

The next contention of the learned Counsel for the petitioners is that after a Magistrate has taken cognizance of a case it is the policy of the law that he should proceed to deal with the case and not to postpone the enquiry or trial and he relies upon the case of *Sheikh Bahatar* v. *Nobad Ali* (1). I agree with the contention of the learned Counsel that it is the policy of the law that a Court should proceed to enquire into and try the case as soon as it takes cognizance of a complaint, but he is not prevented by any provision of the law from postponing the enquiry or trial if in his opinion there are sufficient and reasonable grounds for so doing. In the case of *Sheikh Bahatar* v. *Nobad Ali* (1), relied upon by the learned Counsel for the petitioners, their Lordships after laying down the general proposition that it is the policy of the law to go on immediately with the enquiry or trial proceeded to consider whether in that particular case there were reasonable grounds to justify the order of postponement made by the Magistrate and after considering the facts of the case they were of opinion that there were no reasonable grounds.

It has been contended on behalf of the opposite party that simultaneous trial of two counter cases is illegal and reliance has been placed upon the case of *Dhako Singh* v. *Emperor* (2). This case does not support the contention of the learned Vakil for the opposite party. Mr. Justice Jwala Prasad held in that case that there is no prohibition in law for simultaneous trials of counter cases and nothing has been placed before me to justify the contention that the sumultaneous trial of two counter cases is illegal. In the case referred to above [*Dhako Singh* v. *Emperor* (2), the question arose as to whether the conviction of the petitioner in that case was bad in law on account of two counter cases being tried simultaneously and his Lordship held that the mere fact of two cases being tried simultaneously would not justify the setting aside of the conviction, but if the petitioner could show any prejudice on account

(1) 83 Ind. Cas. 625; (1924) A. I. R. (A.) 634; 26 Cr. L. J. 65; 23 C. W. N. 487.

(2) 58 Ind. Cas. 243; 1 P. L. T. 498; 21 Cr. L. J. 973.

of the simultaneous trial of two cases then he would be entitled to a setting aside of the conviction. Reliance has been also placed by the learned Vakil for the opposite party upon the case of *Lalji Singh* v. *Naurangi Lal* (3). In that case two counter complaints were filed before the Sub-Divisionai Magistrate and he referred both the cases to a Sub-Deputy Magistrate for enquiry and report and on receipt of the report he issued process in one case and directed the counter case to be put up after the disposal of the former case and it was held that the action of the Sub-Divisional Magistrate did not contravene any rule of procedure and that the discretion exercised by the Magistrate in postponing the case was not revisable by the High Court. In my opinion the only question to be decided in such cases is as to whether there is any reasonable cause for postponing one case until after the disposal of another. The power given to a Court to pospone the hearing of one case until after the disposal of another case is conferred by s. 344 which provides that if, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any enquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. Therefore, the real question is as to whether there is any reasonable cause for postponing the counter case. If there be such cause it is a matter of discretion and if the Magistrate does not exercise his discretion judicially in postponing the case, this Court will interfere and set aside the order, but if the discretion is exercised in a sound and judicial manner there is no reason why this Court should interfere with the discretion. In the present case the complainant in the counter case, who is one of the opposite party in the present application, admits having assaulted the complainant who is the petitioner in the present case. The only question for decision, therefore, would be whether he did so in exercise of the right of private defence of property or person. That question can be conveniently decided after the disposal of the complaint made by the opposite party in the present case. I, therefore, see no reason to interfere with the order of the Sub-Divisional Magistrate. It is, however, desirable that the counter case should be taken up immediately after the conclusion of the case which is now being tried, namely, the case started on the complaint of Sampat Lal Singh, and as soon as this case, namely, the case started on the complaint of Sampat Lal, is concluded, the counter case, namely, the case started on the complaint of the petitioner, should be taken up and, if possible, the judgment in the case of Sampat Lal should be postponed until after the conclusion of the trial of the case instituted by the petitioner.

Z. K. *Rule discharged.*

(3) 71 Ind. Cas. 248; 3 P. L. T. 764; (1922) Pat. 304; 4 U. P. L. R. (Pat.) 112; (1922) A. I. R. (Pat.) 618; 24 Cr. L. J. 120.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 60 OF 1925.

March 24, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

P. B. PONDE—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

City of Bombay Police Act (IV of 1902), s. 70—Accused persons arrested in Native State and handed over to Bombay Police—Investigation not complete—Remand to Police custody—Jurisdiction of Presidency Magistrate.

Accused, who were residents of Indore State, committed certain offences in Bombay. The Bombay Police applied to a Presidency Magistrate in Bombay to make a requisition for the surrender of the accused by the Indore State, and for that purpose certain information was supplied to the Magistrate by the Police. The requisition was made and the accused were arrested by the Indore Police and were handed over to an Inspector of the Bombay Police by whom they were brought down to Bombay and were immediately taken before the Magistrate who had made the requisition. On an application by the Police under s. 70 of the City of Bombay Police Act, the Magistrate remanded the accused to Police custody under that section:

Held, that the accused were brought to Bombay in Police custody and that the investigation not being complete, the Magistrate had jurisdiction to make the order of remand under s. 70 of the City of Bombay Police Act. [p. 607, col. 1.]

Criminal application against an order of the Chief Presidency Magistrate, Bombay.

Sir *Thomas Strangman* (with him Mr. *P. B. Shingne*), for Applicants Nos. 1 and 2.

Mr. *Velinkar*, (with him Mr. *P. B. Shingne*), for Applicants Nos. 3 to 7.

Mr. *Kangi*, Advocate-General (with him Sir *John Bowen*), Public Prosecutor, for the Crown.

JUDGMENT.

Coyajee, J.—The petitioners in this case ask this Court to revise an order made by the Chief Presidency Magistrate on February 20, 1925, authorising their detention in the custody of the Police till March 6, and pray that it may "be ordered that the accused should not be kept in Police custody any longer but should be ordered to be kept in Jail custody."

The material facts are these:—

On or about January 22 the petitioners were arrested in Indore for being concerned in offences punishable under ss. 302 307, 365, 120-B, 109 and 511 of the Indian Penal Code. The offences it is alleged were committed in the City of Bombay and the petitioners were arrested in Indore by the Indore State Police at the instance of Inspector Smith of the Criminal Investigation Department Bombay. On February 4, the Chief Presidency, Magistrate on the application of Inspector Smith addressd a letter to the Agent to the Governor-General in Central India asking him to make a demand to the Darbar for surrender of the petitioners. The requisition was complied with. They were brought to Bombay on February 7 and were immediately taken before the Chief Presidency Magistrate by the said officer. "Then" says the Magistrate "an application was made to me by Mr. Smith under s. 70 of the City of Bombay Police Act for remand of the arrested persons. On the materials placed before me I was satisfied that there was a substantial ground for suspecting that the prisoners had committed an offence and their detention in the Police custody was really necessary for further investigation of the offences alleged. Further when questioned the accused had no objection to being remanded into Police custody. Accordingly I remanded them into Police custody till the 20th." Later Counsel on behalf of the petitioners applied to the Magistrate to re-consider that order on the ground that it was not competent to him to remand them into Police custody. After hearing arguments the Magistrate rejected the application and on February 20 he made a further order which is now under consideration.

On the facts placed before us no question arises as to the legality of the arrests. No such contention was raised before the learned Magistrate nor is it shown that the petitioners were arrested in Indore by the Bombay Police. But what is contended is this, *viz.*, the powers of the Bombay City Police as regards arrests of accused persons and investigation into criminal cases are regulated by the City of Bombay Police Act, 1902; that Act does not empower a Police Officer to pursue a fugitive offender into any place outside British India; the petitioners were handed over to Inspector Smith at Indore in compliance with the requisition made by the Chief Presidency Magistrate; the petitioners when they were produced before that Magistrate were, therefore, in *his* custody not in *Police* custody, consequently the Magistrates' order authorizing their detention in Police custody was illegal.

We are unable to accept this contention. The proceedings are governed by the aforesaid Act. The pertinent Chapter is the 5th and the material sections are Nos. 70, 72 and 74. Section 70 lays down that: "(1) Whenever (*a*) it appears that any investigation under this Act cannot be completed within the period of twenty-four hours..... and (*b*) there are grounds for believing that the accusation is well-founded, the officer in charge of a section shall...forthwith forward the person accused to a Presidency Magistrate, together with a report setting forth the substance of the information received and of the evidence adducible in the case. (2) The Presidency Magistrate to whom an accused person is forwarded under sub-s. (1) may after considering any information reduced into writing as hereinbefore provided, and examining any witnesses that he may consider necessary, from time to time authorize the detention in, such custody as he thinks fit, of the person accused, for a period not exceeding fifteen days at a time, and shall, if he does so, record his reasons for so doing." Section 72 requires that every investigation under the Act should be completed without unnecessary delay and as soon as it is completed the officer in charge of the section should prepare a report in the form prescribed therein. Then s. 74 provides that: "If the officer in charge as aforesaid considers that there is

sufficient evidence or reasonable ground of suspicion to justify him in so doing he shall—(a) forward the accused person to the Presidency Magistrate having jurisdiction...and (c) shall also send to such Magistrate the report prepared under s. 72."

In this case the investigation is not yet complete; no report was prepared (s. 72); and none was sent to the Magistrate (s. 74). It is true that on February 4, the Police applied to the Magistrate to make a requisition for the surrender of the petitioners by the Indore State, in accordance with Government Order No. 219, Political, April 12, 1875, and for that purpose certain information was supplied to him. But that fact does not lead to the necessary inference that the Police Investigation was then complete or that it should be deemed to be complete. For, even when a duly qualified Police Officer considers it necessary to take action under s. 70 of the Act, he has to submit "a report setting forth the substance of the information received and of the evidence adducible in the case"; and thereupon the Magistrate may "from time to time" authorize the detention of the accused person in Police custody "after considering any information reduced into writing...and examining any witnesses that he may consider necessary." The mere fact, therefore, that in this case the Chief Presidency Magistrate was furnished with certain information to enable him to make the requisition aforesaid, does not mark the completion of Police Investigation and the commencement of an inquiry or trial before him.

I, therefore, agree with the learned Magistrate in holding that at the material time the Police Investigation was not complete; that the petitioners were in Police custody that he had not taken cognizance of the said offences (s. 190, Cr. P. C., 1898); and that it was competent to him to make the order now sought to be revised.

In my opinion his order was right.

Macleod, C. J.—I agree. The whole fabric of the argument of Counsel for petitioners was based on the suggestion that the petitioners were brought down from Indore to be handed over to the personal custody of the Magistrate. There is no extradition treaty between the Government of India and the Indore State, but by a recognition of the principles of international comity, effect was given to the request of the Agent to the Governor-General for Central India that the petitioners should be handed over to the Bombay Police Officers. The fact that the Agent to the Governor-General moved in the matter at the request of the Chief Presidency Magistrate does not in any way alter the fact that the petitioners were under the arrest of the Bombay Police and arrived in Bombay in Police custody, so that the provisions of the City of Bambay Police Act were applicable.

Z. K. *Application rejected.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 14 OF 1925.

March 24, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

NITYARANJAN MONDAL AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Relationship between Magistrate and lawyer—Transfer of case.

It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation.

Where one of the lawyers engaged in a case is a near relation of the presiding Magistrate the case should be transferred from the Court of that Magistrate to that of some other competent Magistrate.

Rule granted on the application of the petitioners for transfer of the case pending against them under s. 379, Indian Penal Code, in the Court of the Honorary Magistrate, Rampurhat, to the file of some other Magistrate.

Babus *Dinesh Chandra Roy* and *Subodh Chandra Lahiri*, for the Petitioners.

Babu *Patitpaban Chatterjee*, for the Opposite Party.

Mr. *Asraf Ali*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The only serious ground on which this application for transfer is based, is that the *muktear* who is appearing for the complainant is, as admitted by the learned Magistrate, a close relation of his. It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation. The complainant in this case is a Pleader and we are surprised that a member of that branch of the profession should have engaged a *muktear* whom he knew to be related to the Magistrate who would try the case. The *muktearnama* was not filed until the day

on which the case was transferred to this Honorary Magistrate.

We accordingly make this Rule absolute. We transfer the case from the file of the Honorary Magistrate Mr. A. P Mukerjee to that of any other Magistrate whom the District Magistrate may select.

Z. K. *Rule made absolute.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 553 OF 1924.

August 8, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

JATINDRA MOHAN BANERJEE—PETITIONER

versus

GOURI BALA DEBI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488—"Living in adultery", meaning of—Birth of illegitimate child—Forfeiture of maintenance.

The expression "living in adultery" in sub-s. (5) of s. 488 of the Cr. P. C. points to a continuous course of conduct and not merely to isolated acts of immorality. Unless continuity of conduct is established it cannot be inferred from a single act of adultery that the woman is "living in adultery".

Although a woman has given birth to an illegitimate child it is open to a Magistrate, to find that apart from that circumstance, she is not "living in adultery" within the meaning of sub-s. (5) of s. 488.

Rule against an order of the Third Presidency Magistrate, Calcutta, dated the 21st June 1924.

Babu *Probodh Chunder Chatterjee*, for the Petitioner.

Babu *Benoyendra Prosad Bagchi*, for the Opposite Party.

JUDGMENT.

Chotzner, J.—This is a Rule calling upon the Chief Presidency Magistrate and upon the Opposite Party to show cause why the order specified in the petition should not be set aside.

It is said that the petitioner and the opposite party are husband and wife and that they have not been living together for nearly twenty years, and it is admitted that during that period the petitioner has been paying her a monthly sum of Rs. 10 under an order under s. 488 of the Cr. P. C.

The petitioner's case is that the opposite party had been living in her father's house up till some time in December 1923 when she gave birth to an illegitimate child and was driven away by her brother who was living with her and her mother in that house. The petitioner thereupon applied to the Court of the Chief Presidency Magistrate for the cancellation of the maintenance order. The learned Magistrate, however, rejected the application. The Magistrate observed that though the child was illegitimate "there is nothing further to show that the woman has been 'living in adultery,' which alone would entitle the petitioner to stop the maintenance." He referred to the case of *Kallu* v. *Kaunsilia* (1).

The learned Vakil for the petitioner has contended that when there is the undeniable fact of the woman being the mother of an illegitimate child and when other circumstances have been proved to show that she has been guilty of different acts of misconduct the learned Magistrate should have found that she was "living in adultery" within the meaning of s. 488, Cr. P. C.

The learned Vakil who has appeared for the opposite party, on the other hand, contends that although the birth of this child may show an act of adultery it does not establish that the mother has been "living in adultery" so as to make her amenable to the penalties laid down in s. 488, cl. (5).

The expression "living in adultery" has been judicially interpreted more than once. In the case of *Gantapalli Appalamma* v. *Gantapalli Tellayya* (2), Shephard, J., said: "The words point to a continuous course of conduct, not to isolated acts of immorality." In the case of *Patala Atchamma* v. *Patala Mahalakshmi* (3), the learned Judges refer with approval to this case as well as to the case of *Kallu* v. *Kaunsilia* (1) and say: "These words refer rather to a course of conduct, or at least to something more than a single lapse from virtue."

We are of opinion that this is the proper and natural construction to be put upon the words and unless continuity of conduct is established, it cannot be inferred from a single act of adultery that the woman is "living in adultery." In the present case we think that although the woman has given birth to a child it was open to the Magistrate to find that, apart from that circumstance, she was not "living in adultery," and that we should consequently not interfere with his decision.

The Rule is accordingly discharged.

Sanderson, C. J.—I agree.

Z. K. *Rule discharged.*

(1) 26 A. 326; 1 A. L. J. 18; A. W. N. (1904) 23; 1 Cr. L. J. 84.

(2) 20 M. 470; 2 Weir 643; 7 M. L. J. 303; 7 Ind. Dec. (N. S.) 333, (F. B.).

(3) 30 M. 332; 5 Cr. L. J. 359; 17 M. L. J. 279; 2 M. L. T. 166.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 46 OF 1924.

March 18, 1925.

Present:—Mr. Justice Heald and Mr. Justice Chari.

MA NAN THU AND ANOTHER—APPELLANTS

versus

MA SHWE MI AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 123, 142—Succession Act (X of 1865), s. 190—Karen *Christian dying intestate—Suit by heir to obtain possession of his share of estate—Limitation.*

A suit for a distributive share of the estate left by an intestate is governed by Art. 123 of Sch. I to the Limitation Act. [p. 610, cols. 1 & 2.]

The heirs of a deceased person very often leave the estate undivided and either enjoy the profits jointly living in commensality or divide the profits among themselves. Where in such a case one of the heirs is excluded from the enjoyment of the profits and sues to recover his share of the estate, Art. 123 is inapplicable for the reason that the heirs have taken their shares, but that, instead of dividing the property and enjoying their shares they have agreed to enjoy the whole property jointly. There is, therefore, no property of the intestate left to be distributed and Art. 123 cannot apply. When, under such circumstances, one of the heirs is excluded from joint enjoyment, he sues to recover not a share in the estate of the deceased, but his share in the joint property. In such a case the suit is one for partition and is governed by Art. 142 of Sch. I to the Limitation Act. [p. 610, cols. 1 & 2.]

Karen Christians, being Christians of Asiatic descent, are native Christians, and, therefore, s. 190 of the Succession Act is inapplicable to them. [p. 610, col. 2.]

There is nothing to prevent the heirs of a *Karen* Christian from taking possession of the estate and agreeing to enjoy it in common. Their title becomes complete when they take possession of the property, and, when thereafter any of them are excluded from enjoyment the cause of action arises on such exclusion, and the suit is governed by Art. 142 of Sch. I to the Limitation Act and limitation will start from the date when the plaintiff is excluded from the possession of the property. [p. 610, col. 2; p. 611, col. 1.]

Second appeal against a decree of the District Court, Maubin, in C. R. No. 85 of 1923.

Mr. *Kyaw Htoon*, for the Appellants.

Mr. *Saw Hla Pru*, for the Respondents.

JUDGMENT.—In this appeal the only point argued before us is a point of limitation.

The facts of the case bearing on this point are as follows:—

One U Su Kho, a *Karen* Christian, died on the 25th of March 1910. Some ten years before his death, he had become a Roman Catholic Christian with his wife and family. He left a paddy land, measuring 20·54 acres. He left surviving him Ma U *alias* Ma Nyein and seven children. Six of these children are the plaintiffs in the suit, while the widow is the first defendant, and the second defendant is the other child of the deceased. The third and fourth defendants, who are mother and son, are the transferees of the property under the following circumstances:—

On the 25th of March, 1915, the first defendant, Ma U, the widow of U Su Kho, and her son, Maung Pu, the second defendant, mortgaged this land for Rs. 1,600 to Maung Ba Tu, the fourth defendant. It is alleged, and not denied, that, in the mortgage transaction, Maung Ba Tu was only the *benamidar* for his mother, Ma Nan Thu, the third defendant. On the 13th February 1919, Ma U and Maung Pu sold this piece of land outright to Ma Nan Thu for a consideration of Rs. 2,000. This consideration is stated to have been made up of the sum of Rs. 1,600, the principal due on the mortgage-deed, and the interest which had accrued due thereon.

The plaintiffs allege in the plaint that all the children of U Su Kho and the widow remained in joint enjoyment of the property till the 13th of February 1919, when the third defendant, by virtue of the sale-deed in her favour, took possession of the same. They base their cause of action on the dispossession and file the suit for possession of their share.

The Trial Court held that it was not proved that the heirs were in possession of the land jointly, or as tenants-in-common, and that the suit was, therefore, one for the recovery of their distributive share in the estate of U Su Kho, and was barred by limitation.

On appeal, the District Court held it proved that the plaintiffs and defendants Nos. 1 and 2 remained in possession as tenants-in-common, and the suit was, therefore, not barred.

Before considering the facts of the case, it is necessary to see what Article of the Limitation Act applies. It has been broadly held in some of the earlier Indian cases that Art. 123 only applies when the suit is against persons, such as executors or administrators, on whom a duty is cast, to distribute the share. The recent decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit* (1) has been held to

(1) 38 Ind. Cas. 809; 9 L. B. R. 56; 10 Bur. L. T. 135; 44 C. 379; 32 M. L. J. 71; 19 Bom. L. R. 294; 15 A. L. J. 96; 21 M. L. T. 97; 21 C. W. N. 527; 26 C. L. J. 169; 44 I. A. 42 (P. C.).

have displaced the Indian decisions. Thus, in the case of *Sri Rajah Parthasarathy Appa Rao* v. *Sri Rajah Venkatadri Appa Rao* (2), the learned Chief Justice, Sir Walter Schwabe, states: "In *Maung Tun Tha* v. *Ma Thit* (1), the Privy Council held that Art. 123 applied to a case of a claim to a share of the estate against co-heirs in possession of an estate when there was intestacy;" and in the Bombay case of *Shirinbai* v. *Ratanbai* (3), Mr. Justice Macleod says: "I agree with the learned Judge that the decision of the Privy Council in the case of *Maung Tun Tha* v. *Ma Thit* (1) lays it down that Art. 123 applies to every suit in which the plaintiff seeks to recover an undistributed share in the estate of an intestate." The point of limitation was not, however, directly before the Privy Council, as was pointed out by Fawcett, J., in *Nurdin Najbudin* v. *Umrao Bu* (4). The matter was recently considered by a Bench of this Court in the case of *Maung Po Kin* v. *Maung Shwe Bya* (5), and it was held that Art. 123 of the Limitation Act does apply to a suit for a distributive share of the estate left by an intestate. But an exception was made in respect of cases where the whole body of the heirs agree to enjoy the property left by the deceased jointly, without effecting a partition. In such cases Art. 142 or Art. 144 would apply.

There would thus be no difficulty in this case if the estate were that of a Buddhist, Muhammadan, or Hindu. It has been judicially recognized that the heirs of a deceased person very often leave the estate undivided and either enjoy the profits jointly, living in commensality, or divide the profits among themselves: *vide* the cases of *Abul Kader* v. *Aishamma* (6), *Kallangowda Nangangowda Patil* v. *Bibishaya Shah Mohamad Khan* (7) and *Nurdin Najbudin* v. *Umrao Bu* (4). In such cases Art. 123 is inapplicable for the reason that the heirs have taken their shares; but, instead of dividing the property and enjoying their shares separately, they have agreed to enjoy the whole property jointly. There is, therefore, no property of the intestate left to distribute, and Art. 123 cannot apply. When, under such circumstances, one of the heirs is excluded from joint enjoyment, he sues to recover, not a share in the estate of the deceased, but his share in joint property.

The suit is one for partition, and Art. 142 or Art. 144 of the Limitation Act will apply. The reasoning which applies to such cases is well put by Mr. Justice Heaton in *Kallangowda Nangangowda Patil* v. *Bibishaya Shah Mohamad Khan* (7), where he says: "We have here the very common case of Muhammadans who succeed to the property of a deceased relative, and by agreement amongst themselves instead of distributing that property by shares, hold it in common. They are entitled under our law to do this. They are not under an obligation to at once divide the property according to their shares. They can hold, and continue to hold, it in common, and having done so they hold it under an agreement. They can continue to do so for an indefinite period, but when they wish they can put an end to this common holding, and ask that there shall be a partition." Every word of this remark applies to the case of Buddhists, Burman or *Karen*.

The difficulty in this case, however, is that the parties are not Buddhists but *Karen* Christians, governed by the Indian Succession Act. Section 190 of that Act explicitly lays down that no right to any part of the property of a person, who has died intestate, can be established in any Court of Justice unless Letters of Administration have been granted by a Court of competent jurisdiction.

It may well be that, in the case of persons to whom that section applies, the heirs, seeking the aid of the Court, may find that they are unable to justify their joint possession. Act VII of 1901, however, exempts Native Christians from the operation of s. 190 of the Succession Act. *Karen* Christian being Christians of Asiatic descent, are native Christians, and, therefore, s. 190 is inapplicable to them.

There is nothing to prevent the heirs of *Karen* Christians from taking possession of the estate and agreeing to enjoy it in common. Their title becomes complete when

(2) 70 Ind. Cas. 689; 46 M. 190; (1922) M. W. N. 532; 16 L. W. 369; 43 M. L. J. 486; (1922) A. I. R. (M.) 457; 31 M. L. T. 221.

(3) 51 Ind. Cas. 209; 43 B. 845; 21 Bom. L. R. 384.

(4) 59 Ind. Cas. 780; 45 B. 519 at p. 521; 22 Bom. L. R. 1429.

(5) 76 Ind. Cas. 855; 1 R. 405; (1904) A. I. R. (R.) 155.

(6) 16 M. 61; 2 M. L. J. 200; 5 Ind. Dec. (N. S.) 750.

(7) 58 Ind. Cas. 42; 44 B. 943; 22 Bom. L. R. 936.

they take possession of the property, and, when thereafter any of them are excluded from enjoyment, the cause of action arises on such exclusion.

We, therefore, hold that, if the heirs were in common enjoyment of the property, and one or more are excluded by their co-heirs from the enjoyment, then the Article applicable is Art. 142 of the Limitation Act, and that limitation will start from the day when the plaintiffs were excluded from possession of the property.

It is now necessary to decide whether or not the plaintiffs in this case were in common enjoyment of the property

Ma Shwe Mi, the first plaintiff, states that, after the death of the father, all the brothers and sisters were enjoying the land. She is supported by her sister, Ma Me Hla, and by Maung Po Lu and U Po Lon. The former says that some children worked the land and some did not. The latter states that the land was let out to Ma Tin for one year and, thereafter, he saw the children of Ma U working the land. Maung Po Thin deposes to the same effect, and so does Ma Shwe Kin.

We can find no reason for discrediting this body of evidence, and it is probable that some such arrangement as is deposed to by the first plaintiff was made, as. otherwise, it will be difficult to explain the fact of the children not claiming their shares earlier.

For these reasons we hold that the plaintiffs were in enjoyment of the land in suit until the date of the sale to the third defendant, and that their suit was not barred by limitation.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 175 OF 1924.

May 8, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

SITA RAM—PLAINTIFF—APPELLANT

versus

PEARE *alias* ALLOO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 96 (3)—Parties agreeing to be bound by decision of Court after local inspection, effect of—Appeal, whether lies.

Plaintiff brought a suit that a certain spout opened by the defendant towards his court-yard should be closed. The defence was that the spout was an old one and not a recent one and that it threw water on the defendant's own land. During the progress of the suit the parties made statements before the Court that they did not want to produce any evidence whatsoever and that whatever the Court after making a local inspection decided, that would be acceptable to both the parties. The Court made a local inspection of the place and as a result of such inspection decreed the suit:

Held, that the matter in dispute having been left entirely to the decision of the Court the parties could not resile from their agreement and were bound by the decision whether it was, as a matter offact, right or wrong, and that the decision must be treated to have been one based on a compromise between the parties and was not open to appeal. [p. 612, col. 1.]

First appeal from an order of the Subordinate Judge, Bareilly, dated the 18th August 1924.

Mr. *G. Agarwala*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This is an appeal from an order remanding the case so that it be tried *de novo* and the parties be allowed opportunities of producing additional oral and documentary evidence.

The plaintiff brought a suit praying that a certain spout opened by the defendant towards his court-yard should be closed. The defence was that this spout was an old one and not a recent one, and that in any case it threw water on the defendant's own land. On the 10th of December 1923 both the parties made statements before the Court that they did not want to produce any evidence whatsoever, and that whatever the Court after making a local inspection decided that would be acceptable to both the parties. This was duly signed by the parties. In pursuance of this no further evidence was recorded by the Munsif, and he made a local inspection of the place and came to the conclusion that the spout was a recent one and not an old one at all. He was further inclined to hold that the water from this spout did not fall on the defendant's land. He accordingly decreed the claim.

The defendant went up in appeal, and the lower Appellate Court has set aside that decree. The lower Appellate Court has remarked that the learned Munsif kept no notes of inspection, and has made no reference in his judgment to the documents that were filed by the parties. And then, again, although the parties had clearly stated that they would not produce any more evidence, the lower Appellate Court,

curiously enough, has directed that there should be a trial *de novo* and further evidence, both oral and documentary, should be produced by both parties. The order of remand cannot possibly be upheld.

The substantial dispute between the parties was as to whether the spout in question should or should not be closed. Instead of incurring the expense involved in producing a lot of oral evidence the parties decided that they should not produce any evidence whatsoever and should abide by the decision of the learned Munsif after he had made a local inspection. The document which recorded their agreement did not at all say that any inspection notes should be prepared by the Munsif and be left on the record; nor did it say that he should necessarily refer to all the documentary evidence that were produced by the parties. The matter in dispute was left entirely to the decision of the learned Munsif, and, in our opinion, the parties cannot now resile from their agreement and must be bound by the decision of the learned Munsif whether it was, as a matter of fact, right or wrong. The decision, therefore, must be treated to have been one based on a compromise between the parties and was no longer open to appeal. For the sake of reference we may refer to the case of *Himanchal Singh* v. *Jatwar Singh* (1) and that of *Ram Sunder Misra* v. *Jai Kiran Singh* (2).

We, accordingly, allow this appeal, and, setting aside the order of the Court below, restore the decree of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 80 Ind. Cas. 16; 46 A. 710; (1924) A. I. R. (A.) 570; L. R. 5 A. 439 Civ.

(2) 87 Ind. Cas. 174; 23 A. L. J. 251; L. R. 6 A. 270 Civ; (1925) A. I. R. (A.) 271.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 24 OF 1925.

March 26, 1925.

Present :—Mr. Daniels, J. C.

MISRI LAL AND ANOTHER—APPLICANTS—APPELLANTS

versus

Musammat ASHARFI BIBI—OPPOSITE PARTY—RESPONDENT.

Succession Certificate Act (VII of 1889), s. 25—Probate and Administration Act (V of 1881), s. 64—Finding in proceeding to obtain succession certificate, whether conclusive in proceeding to obtain Letters of Administration.

A finding as to relationship arrived at in proceedings under the Succession Certificate Act does not bar the trial of the same question between the parties in a proceeding for the grant of Letters of Administration under s. 64 of the Probate and Administration Act.

Appeal against an order of the Second Additional District Judge, Lucknow at Unao, dated the 16th January 1925.

Mr. *A. P. Sen*, for the Applicant.

Mr. *N. C. Dutt*, for the Respondent.

JUDGMENT.—The appellants applied for Letters of Administration to the estate of Sheo Din deceased under s. 64 of the Probate and Administration Act. The learned Judge has refused to go into the merits of the application because in proceedings under the Succession Certificate Act it was held that the appellants had failed to establish their relationship to the deceased. The learned Judge has failed to give effect to the provisions of s. 25 of the Succession Certificate Act which provides that no decision under that Act shall bar the trial of the same question in any other proceedings between the parties. In view of that section it was not open to the learned Judge to treat the finding arrived at on the succession certificate application as concluding the question raised before him. I accordingly set aside his order and direct him to restore the case to the file and dispose of it on the merits. Costs will abide the result.

Z. K. *Order set aside.*

RANGOON HIGH COURT.

CIVIL REVISION No. 116 OF 1924.

January 15, 1925.

Present:—Mr. Justice Pratt.

MAUNG AUNG THA—PLAINTIFF—PETITIONER

versus

MAUNG BA THAN—DEFENDANT—RESPONDENT.

Master and servant—Wrongful discontinuation of service—Damages, liability of servant to pay.

Ordinarily if a servant leaves his employment without notice, he cannot draw wages for that portion of time which he has served since the last periodical payment of wages. There is no authority, however, for the proposition that a servant is liable to be mulcted in damages for the loss caused to his master by his leaving his employ without notice.

Civil revision against the decree of the Judge of the Small Cause Court, Mandalay.

Mr. *T. K. Banerjee*, for the Applicant.
Mr. *Mitter*, for the Respondent.

JUDGMENT.—Plaintiff, a mill owner, sued the defendant, his employee, for damages caused by his leaving his employment without notice. His case was that owing to his inability to find a substitute for defendant, whose work was to watch the grinding stones, the mill had to cease working for two days and he was entitled to be re-imbursed for the loss caused thereby. The Judge found that there had been no misunderstanding between the parties as to what notice of termination of employment should be given. He also found that the plaintiff could have arranged for the defendant's work to be done in his absence. He held, therefore, that it was fair that defendant should compensate plaintiff for the loss incurred by the non-running of the mill for one day. It is clear from the evidence of plaintiff's own witness that defendant's employment was subject to termination at one day's notice. The ordinary rule is that, if a servant leaves his employment without notice, he cannot draw wages for that portion of time which he has served since the last periodical payment of wages. Smith, Master and Servant, 5th Edition, p. 182; *Raja Shew Bakhsh Bogla Ballab Das* v. *Perumall* (1). No authority has been cited for the proposition that a servant is liable to be mulcted in damages for the loss caused to his master by his leaving his employ without notice. Moreover it is clear from the Judge's finding and the evidence, that arrangements could have been made for the mill to run in defendant's absence, and that, therefore, the closing of the mill was not a necessary consequence of defendant's leaving his work.

I am of opinion that plaintiff established no legal right to damages. I set aside the finding and decree of the Court of Small Causes and direct that the suit be dismissed with costs. Applicant will be given costs in this Court also.

Z. K. *Decree set aside.*

(1) II U. B. R. (1901-06), Master and Servant, p. 1.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1191 OF 1923.
April 7, 1925.
Present:—Mr. Justice Mukerji.

Munshi NEHAL SINGH—DEFENDANT—APPELLANT
versus
Lala JAGANNATH DAS—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 193 (1)—Isolated plot of land, whether mahal *or share in* mahal—*Sale held by Assistant Collector in execution of decree of Revenue Court, validity of—Irregularity.*

An isolated plot of land within the ambit of a *mahal* cannot be regarded as a *mahal* or a share in a *mahal* within the meaning of cl. (*l*) of s. 193 of the Agra Tenancy Act. [p. 614, col. 1.]

Where in execution of a decree passed by a Revenue Court a *mahal* or a portion of a *mahal* is sold by an Assistant Collector and not by the Collector, the irregularity does not vitiate the sale. [*ibid.*]

Fatmatul Kubra v. *Achchi Begam*, 21 Ind. Cas. 831; 11 A. L. J. 1009; 36 A. 33 and *Mahmud Jahan Begam* v. *Govind Ram*, 59 Ind. Cas. 4; 18 A. L. J. 783; 43 A. 45, distinguished.

Second appeal against a decree of the Subordinate Judge, Meerut, dated the 21st of April 1923.

Mr. *Haribans Sahai*, for the Appellant.
Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—Briefly, the facts involved in this appeal are these. The plaintiff's father purchased the shares of the descendants of one Amjad in a hamlet appertaining to *khewat* No. 1 in a certain *mahal* described in paragraph No. 1 of the plaint at an auction sale held on the 16th of July 1916. The plaintiff filed the suit out of which this appeal has arisen on the last day of limitation against the appellant who was a co-sharer in the *mahal*. The statement in the plaint was that the defendant took possession of the '*purva*' without the plaintiff's consent. The plaintiff stated that he was in possession and was dispossessed but did not state when he got possession and when he was dispossessed.

The appellant's defence was mainly the following:—

(1) The auction sale was held through an *amin* and this was in contravention of s. 193, cl. (*l*) of the Tenancy Act and the sale did not pass any title to the plaintiff.

(2) The suit is barred by time.

(3) The share purchased by the plaintiff is less than what is claimed; and

(4) At the time of sale some of the judgment-debtors were minors and their certificated guardian was not made their guardian

for the suit and that, therefore, the sale was invalid.

The Court of first instance dismissed the suit. But the lower Appellate Court gave a decree without, however, clearly specifying to what extent the plaintiff's suit stood decreed.

I will now consider the several points that have been urged on behalf of the defendant appellant before me.

The first point that has been urged is that the *qurq amin* was not competent to sell. Section. 193, cl. (*l*) of the Tenancy Act says that when any property is to be sold is a *mahal* or a share in a *mahal* the decree should be sent to the Collector who would execute the same as if it had been a decree of his own Court. The '*purwa*' or hamlet is neither a whole *mahal* nor a share in a *mahal*. It may be a part of a *mahal* or portion of a *mahal*, being an isolated plot of land within the ambit of a *mahal*. It is clear, therefore, that the rule contained in cl. (*l*) does not govern the present case. I may point out that, ordinarily, every thing that is usually sold in execution of a Revenue Court decree is situate within a *mahal*, *e. g.*, a tree, a house, etc. If the interpretation put by me on s. 193, be too narrow, all execution cases must be had in the Court of the Collecter himself and no other officer. This could hardly have been contemplated. Further, it appears to me that there is nothing in s. 193 which would go to show that the irregularity would vitiate the sale. There is no question of jurisdiction. The Collector can sell only as the Revenue Court and the decree in this instance being a rent-decree was also passed by the Revenue Court. Instead of a Collector an Assistant Collector sold the property. I hold that the sale is good and the cases cited by the learned Counsel for the appellant, *viz*: *Fatmatul Kubra* v. *Achchi Begam* (1) and *Mahmud Jahan Begam* v. *Govind Ram* (2) have no application. The language of law on which those rulings were given was different.

The second point that was urged before me was that three of the seven descendants of Amjad, *viz.*, Ibrahim, *Musammat* Najiban and *Musammat* Naziran were minors and were not properly represented in the execution proceedings. This point was not urged before the lower Appellate Court in support of the judgment. It, however, appears that they were represented in the execution proceedings by the same persons as had been appointed guardians for the suit in the suit itself. This is to be gathered from the judgment of the Court of first instance. I hold that there is nothing irregular to vitiate the sale.

The third point urged was that of limitation and I think the lower Appellate Court was right. The defendant-appellant is a co-sharer and he never asserted that he was holding adversely to Amjad or his heirs.

The last question that was urged before me relates to the quantity of share to be decreed to the plaintiff. On this point, as I have already said, there is an ambiguity and the learned Judge of the lower Appellate Court has not decided the point. I remit the following issue to the Court below under O. XLI, r. 25 of the C. P. C.:—

What shares did the judgment-debtors hold in the *purwa* at the date of the auction-purchase, *viz.*, on the 16th of July 1910?

Fresh evidence will be admitted and the finding will be returned in two months.

I may draw the attention of the Court below to the fact that it is a part of the appellant's case that one at least of the heirs of Amjad had already transferred his share in the *purwa* before the auction-sale. The effect of this on the issue will have to be considered by the lower Appellate Court.

Z K. *Order accordingly.*

(1) 21 Ind. Cas. 831; 11 A. L. J. 1009; 36 A. 33.
(2) 59 Ind. Cas. 4; 18 A. L J. 783; 43 A. 45.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 133 OF 1924.

March 11, 1925.

Present:—Mr. Justice Heald and Mr. Justice Chari.

MANA ABU BUCKER *alias* MAHOMED ABU BACKER—APPELLANT

versus

BEE BEE—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50—Letters of Administration, revocation of—Misrepresentation of date of death of deceased in application for grant, effect of—Discretion of Court—Muhammadan Law—Will—Legacy in favour of one of several heirs, validity of—Consent of heirs.

The power given to the Court by s. 50 of the Probate and Administration Act to revoke a grant of Letters of Administration is a discretionary one. [p. 616, col. 1.]

Brinda Chowdhrain v. *Radhica Chowdhrain*, 11 C. 492 at p. 495; 5 Ind. Dec. (N. S.) 1087, followed.

The fact that an application for grant of Letters of Administration misrepresented the date of the death of the deceased is not sufficient to entitle the Court to revoke Letters of Administration which have already been granted. [p. 615, col. 2.]

Under the Muhammadan Law a testator can dispose of one-third of his property by Will in favour of strangers. He can dispose of more only if the heirs consent. As against the heirs themselves he is prohibited from leaving a legacy to one particular heir and thus enlarging the share of that heir, unless the other heirs consent. In each case the consent of the other heirs must be given after the death of the testator, and all the heirs must consent in order to make the bequest or legacy valid. [p. 616, col. 1.]

Appeal from an order of the High Court, Original Side, in C. M. No. 170 of 1924.

Mr. *N. C. Sen*, for the Appellant.

JUDGMENT.—In this case one Varasai Pattu Ammal died leaving a Will. An application was made for Probate of the Will. The Will is dated the 2nd of October, 1922. By the terms of that Will the testatrix disposed of two plots of land, almost the only property of which she was possessed other than her personal apparel and ornaments, by a direction that one Bee Bee, the aunt and foster-mother of the testatrix, should bring up the daughter of the testatrix; that the aunt should also collect the rents and pay the taxes of the property, and spend the balance of the income for the maintenance of the daughter. The aunt was also directed to transfer the property to the child when she became a major.

Bee Bee, the aunt, applied for Probate of this Will on the ground that she was an executrix by implication. Mr. Justice Beasley, by an order to be found in the diary, held, on the authority of *Sheshamma* v. *Chennappa* (1) that she was not such an executrix. Without making a fresh application, Bee Bee amended her application so as to read as one for Letters of Administration with the Will annexed.

The terms of the Will clearly show that the minor daughter of the deceased was intended by her to be her universal legatee. Letters, with the Will annexed, could be granted to such legatee without citations; but, the universal legatee, being a minor, the proper procedure was to have applied under s. 33 of the Probate and Administration Act for Letters for the use and benefit of the minor until she attains majority.

(1) 20 M. 467; 7 Ind. Dec. (N. S.) 331.

By merely correcting the old application the applicant omitted to mention that she applied for Letters for the benefit of the minor till the minor attains majority. But a reference in para 6 of the application to the terms of the Will shows that Bee Bee intended only to apply for Letters for the benefit of the minor. Letters of Administration, however, with the Will annexed, were granted to Bee Bee, and she is presumably in possession of the property by virtue of that grant.

On the 19th of August, 1924, Mana Abu Bucker, who is the appellant before us, applied for the revocation of the Letters ofAdministration granted to Bee Bee. The grounds on which he applied were: *First*, that the testatrix died on the 10th of January 1923, and it was falsely stated in the application that she died on the 20th of October 1922; *secondly*, the Will was not a genuine Will but a forgery.

Mr. Justice May Oung, sitting on the Original Side, dismissed the application on the ground that the petitioner had not made out any right to intervene. If the learned Judge meant that the petitioner had failed to establish his *locus standi*, he was wrong since the petitioner, as the deceased's paternal uncle's son, will be entitled to the residue of the estate after payment of the legal shares of the daughter and the husband of the deceased. If, on the other hand, the learned Judge meant that the petitioner had failed to make out any grounds for interference, his order, in our opinion, is correct. No grounds of objection, other than the above two, were taken.

As regards the first ground of objection, we fail to see that one mis-statement of the date of the death made any difference whatever to the application. The testatrix was undoubtedly dead at the time when the application was made, and we fail to see what difference it could have made whether she had died eleven months prior to the date of the application, or thirteen months prior to the same. The misrepresentation made is not a material one; it does not in the least affect the merits of the application; and it is not a ground for revoking the Letters.

As regards the second objection, the Will, it is true, was not proved in, what is known in English Law as solemn form—that is, after a contest. The allegation of the petitioner is that the Will is a forgery

It is settled law that a Muhammadan can dispose of one-third of his property by Will in favour of strangers. He can dispose of more only if the heirs consent. As against the heirs themselves he is prohibited from leaving a legacy to one particular heir and thus enlarging the share of that heir, *Khajooroonissa* v. *Rowshan Jehan* (2).

The bequest by the testatrix of the whole of her property in favour of her daughter is an invalid bequest, even if the Will be genuine. The husband of the deceased files an affidavit that he consented to the making of the Will, and this affidavit may be construed as a consent, after the death, to the bequest, but under Muhammadan Law, *all* the heirs must consent to a legacy in favour of one heir.

The legal position is, therefore, that the appellant is not in the least affected by the disposition in the Will. His rights are exactly the same, whether the Will is a forged one or a genuine one.

Under these circumstances, it is difficult to say what ground there is for him to ask for revocation of the Letters granted to Bee Bee. The proper course is for him to file an administration suit against the administratrix and ask for the delivery of his share.

The power given to a Court to revoke Letters of Administration is, as the wording of the section shows, a discretionary one. *Brinda Chowdhrain* v. *Radhica Chowdhrian* (3).

As we have stated above, the existence of the Will does not in the least militate against the rights of the appellant, if he has any, and we see no reason, therefore, to exercise our discretionary power under s. 50 of the Probate and Administration Act.

The appeal is dismissed with costs, two gold *mohurs*.

Z. K. *Appeal dismissed.*

(2) 2 C. 184; 3 I. A. 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412 (P. C.).

(3) 11 C. 492 at p. 495; 5 Ind. Dec. (N. S.) 1087.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 100 OF 1921.

March 3, 1924.

Present:—Justice Sir N. R Chatterjea, Kt., and Mr. Justice Cuming.

Sri Sri GOPAL JEW THAKUR THROUGH NARENDRA NATH MONDAL —PLAINTIFF—APPELLANT

versus

RADHA BINODE MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Charitable endowment—Property purchased to establish "devalaya"—*Erection of temples —Installation of deity—Rents appropriated towards* deb sheba—*Dedication, proof of*—Shebait, *position of —Civil Procedure Code (Act V of 1908), s. 11*—Res judicata—*Suit instituted by* shebait *on behalf of deity—Suit held not to be maintainable—Decision on other issues, whether binding—Decision arrived at incidentally, whether operates as* res judicata.

The position of a *shebait* is not the same as that of a trustee in English Law in whom the property is vested. The *shebait* is only a manager, the property being vested in the deity. The possession and management remain with the *shebait* and the right of suit is vested in the *shebait* though the property is vested in the *thakur*. [p. 628, col. 2.]

A suit by some of the *shebaits* against other *shebaits* for proper management of the *debutter* properties, where the defendants deny the *debutter* character of the properties, is a suit on behalf of the deity, and must be treated as such in order to determine whether the decision in such a suit operates as *res judicata* in a subsequent suit. [*ibid.*]

Where a suit is properly framed and the Court decides several issues the decision on each issue is binding upon the parties. Where, however, it is held that the suit as framed is not maintainable, the suit should be dismissed on that ground alone and the Court cannot try the other issues so long as the suit is not properly framed. A finding on any of the other issues in such a suit does not operate as *res judicata* in a subsequent suit. [p. 629, col. 2.]

A decision on a question which is merely incidentally decided in a previous suit does not operate as *res judicata* in a subsequent suit. [*ibid.*]

When the question to be determined is whether a certain property is trust property, or, whether it belongs to the alleged trustee in his own right, instances of appropriation of such property by the alleged trustee to his own use, if they are numerous and extend far back into the past in a continuous series, will be a good evidence of his right: but if the instances are only recent or are few and far between they are not likely to be of much value and may be treated merely as instances of abuse of trust. [p. 630, col. 2.]

The question whether instances of personal appropriation by a trustee are merely evidence of breaches of trust or are evidence of there being no endowment is sometimes a difficult one, but it cannot be affirmed that an endowment cannot be proved from treatment of the properties, merely because there was personal appropriation by the *shebaits* in some instances. [*ibid.*]

A deed of dedication is not essential for the purpose of a valid dedication which may be inferred from application of the proceeds and family conduct. [p. 629, col. 2.]

One test of a *bona fide* or nominal endowment is to see how did the founder treat the property, or, how have his descendants treated it, and whether the income of the endowed lands has been continually applied to the object of the dedication. [p. 630, col. 1.]

In the case of private *debutter* properties it is not unusual to describe them as "ancestral" or as "our *debutter* properties" and the heirs of the founder describe their interest as *shebaits* according to the shares which they have in secular properties. [p. 622, cols. 1 & 2.]

The mere fact that the rents of a particular property are applied for the worship of a deity for a long period may not be sufficient to establish that the property is *debutter*, because the worship of family deities may be and sometimes is carried on with the income of a specified property belonging to the family. That by itself may not be sufficient to establish the absolute *debutter* character of the property, but it may in certain circumstances have an important bearing in determining whether the property is *debutter*. [p. 632, col. 1.]

A certain plot of land was purchased expressly by the vendees for building "*devalaya*." The deed was not taken in the name of the deity and the vendees were to have the right of gift and sale. A temple was built upon the property so purchased and a deity was subsequently installed. Later on some other property was purchased by the same vendees and it was stated in the deed that the property was being purchased for the *sheba* of a particular deity. The deed also contained a passage as follows:- "your sons and grandsons and other heirs in succession will as *shebaits* of the said *thakur* continue to perform the *sheba* with the income of the lands, etc." In addition to the temple the necessary out houses and offices for the *debutter* staff were built and the rents of the *debutter* properties were separately collected, while the rents of the secular properties belonging to the family were collected by the agents of each co-sharer separately. The rents of the *debutter* estate were applied for the worship of the deities and none of the co-sharers ever took any portion of the rents for his own use. There were admissions of the successors of the original founders in some of the documents with respect to certain properties that they were dedicated to the deity. On the other hand there was evidence that some of the properties had been treated as secular properties by the descendants of the founders:

Held, (1) that the statement in the first deed of sale that the vendees would have the power of gift or sale was the statement of the vendor who was selling the property and that it was merely used to show that an absolute right in the property was being transferred to the vendees; [p. 619, col. 2.]

(2) that the words in the second sale-deed "your sons and grandsons and other heirs" were used in the conveyance to show that the vendees were to have an absolute right and that the words "as *shebaits* of the said *thakur* continue to perform the *sheba*" must have been inserted in the conveyance at the instance of the vendees and were evidence of their intention to purchase the property for purposes of the *deb sheba*; [*ibid.*]

(3) that instances of the treatment of some of the properties as secular properties by the descendants of the founders must be treated as abuse of trust on the part of the *shebaits* and did not affect the character of the remaining properties which had all along been treated as *debutter*; [p. 630, col. 1: p. 634, col. 1.]

(4) that such of the properties as had been treated all along as *debutter* properties and the income of which had been applied to the *deb sheba* must be declared to be *debutter* properties. [p. 636, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court of 24-Perganas, dated the 6th May 1921.

Babus *Mohendra Nath Roy* and *Bimala Charan Deb*, for the Appellant.

Babus *Sarat Chunder Ray Chowdhury*, *Atul Chandra Dutt*, *Hiralal Chakraburty*, *Radhika Ranjan Guha* and *Apurba Charan Mukerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit instituted by Sri Sri Iswar Gopaljew Thakur and Sri Sri Iswar Sambhunath Sib Thakur represented by the *shebait* Narendra Nath Mondal for the declaration that the properties in suit (consisting of 33 items) are *debutter* properties of the deities and for other relief.

The *shebait* plaintiff, and the defendants to the suit are all members of the Mondal family of Bawali. It appears that the ancestors of the Mondal, *viz.*, Peary Lall Mondal and Moni Mohan Mondal established the two deities mentioned above more than 70 years ago, built temples and kept apart some properties for the maintenance of the worship and *sheba* of the deities, which are being carried on from their time.

A suit was instituted in the year 1919 by two of the members of the Mondal family for framing a scheme of management of the *seba* of the *thakurs* in which Radha Binode Mondal (the defendant No. 1 in the present suit) denied that the properties were *debutter*, and the Court held that the plaintiff in that suit had failed to prove that properties were absolute *debutter*, and accordingly dismissed the suit.

The titles of the deities having been clouded by the decision of that suit and the defendant No. 1 (whose religious tendencies having taken a different form) having denied the *debutter*, the present suit is instituted by Narendra Nath Mondal as representing the *thakurs*.

The defendant No. 1 Radha Binode Mondal alone contested the suit. He pleaded that the properties were not *debutter* and that the decision in the previous suit operated as *res judicata*. The Court below gave effect to the defendant's contentions and dismissed the suit. The plaintiff has appealed in this Court.

Two questions arise for consideration in this appeal. The first is, whether the properties are *debutter*, and the second, whether the decision in the previous suit operates as

res judicata. We will first deal with the question of *debutter*.

There is no deed of dedication produced in this case.

The *thakurbati* which contains the temple of Gopal Jew and Sambhunath Sib (and there are thirteen other Sib temples within the compound) was constructed in 1845 (1252 B. S) by the two brothers Peary Lall Mondal and Moni Mohan Mondal. It is situated on property No. 1 of the schedule to the plaint. The earliest document is a conveyance, dated the 7th April, 1832, by which Peary Lall Mondal purchased three *bighas* of land (a part of property No. 1) from certain *halders*.

It is stated in the deed that the vendors were selling the land in order that the vendee "May build *devalays*, etc.....Taking possession of the said land in accordance with our right of possession and building *devalays*, etc., thereon you shall continue to possess and enjoy the same down to your sons and grandsons in succession with the right of making gift and sale," etc., etc.

Before the remaining lands of property No. 1 were purchased, the *thakurbati* as stated above was built in 1845 (1252 B. S.). On the 29th September 1850, the two brothers Peary Lall and Moni Mohan purchased 4 *bighas* 8 *cottas* of rent-paying lands, and 2 *bighas* 2¼ *cottas* of rent-free lands (total 6 *bighas* 10¼ *cottas*), from one Sheikh Karim Mistry. It was stated in the deed that for the *sheba* of Sri Sri Iswar Gopal Jew Thakur of *harihardham* established by you on the bank of holy Ganges at Sahanagore you hereby purchase from me.....You with your sons and grandsons and other heirs in succession shall as *shebaits* of the said *thakur* continue to perform the *sheba* of Sri Sri Iswar Jew with the income of *kheraj* and *lakheraj* lands after getting your name recorded in place of my name....." The land purchased by this *kobala* is situated to the south of the 3 *bighas* purchased in 1832, and on which the *thakurbati* has already been built, as the northern boundary is described as "south of Iswar *debalaybati* belonging to you."

By the two *kobalas*, therefore, 9 *bighas* 10 *cottas* was purchased. A portion of the lands was subsequently acquired by the Government under the Land Acquisition Act in 1886, and the present area of the land covered within the *thakurbati* compound is between 6 and 7 *bighas*, though described as 9½ *bighas* in the schedule to the plaint.

The othe properties covered by the schedule to the plaint are mostly in occupation of tenants. Some of them have been identified with *amalnamas* or other documents showing them to be *debutter*. We will deal with them later on.

As stated above, the *thakurbati* is situate on a big plot of land with an extensive compound. There are the temples of the deities Gopal Jew, and Sambhunath Siva Thakur which appear to be the principal deities. There are thirteen other temples of Siva all of which are situated within the compound. The *thakurbati* is called *harihar dham*, *i.e.*, the (*dham*) abode of the deity *Hari* (Gopal Jew) and *Har* (Siva). There are tank and flower garden, cook sheds, *nahabat khana* and buildings for the establishment and priests attached to the *thak rbati* within the compound. There is a separate establishment for collection of rent of the *debutter* properties, and notwithstanding that there are numerous co-sharers in the Mondal family, no part of the income of the *debutter* properties is taken by the co-sharers, the whole being spent in *deb sheba*, although with regard to the secular properties, the realization of rent is separate according to the share of each by their separate staff, with the exception of two properties, the income of which is applied to the *deb sheba*, as the income of the *debutter* properties is not sufficient for the purpose.

As stated above, almost all the properties except property No. 1 (on which the *thakurbati* is situate) are let out to tenants and numerous *kabuliyats* have been produced to show that the lessors are described as *shebaits*. Rent receipts are granted to tenants by the joint *shebaits* through the collecting agents and rent suits are instituted by the co-sharers as *shebaits* in terms which show that the properties were treated as *debutter*, Radha Binode the contesting defendant himself signing and verifying some of the plaints as *shebait*.

Radha Binode, the contesting defendant in his deposition says that "the properties were never dedicated to be idols Gopal Jew and Shib by any deed," but in cross-examination admitted that Hem Sarkar realized rents from these tenants for twenty years or so. All the co-sharers appointed him *sircar* or *gomashta*. We have got other secular properties; we realize rents

for these properties according to our shares separately. Hem Sarkar realized sixteen annas shares of the rents regarding the disputed properties.....The collections made by Hem Sarkar were spent for the worship of the idols Gopal Jew and Shib. There are temples over property No. 1 of the plaint. The collection papers regarding the disputed property are kept in office within the compound of the temple.....I never took any share of the usufruct of the disputed properties. *Poojah* and *parbans* have been performed there. I gave evidence in Suit No. 206. I said in the previous case the worship is carried on now as before. I also said there is no neglect or defect in the same. The worship is still carried on in the temple.

"I have not seen the title deeds regarding the disputed properties. We have inherited these properties and so I say that these properties belong to Moni Mohun and Peary Mohun. Jadu Nath Mondal was the *shebait* of the idol, as I am one of the *shebaits*. My father was the *shebait* of the *thakur*. My grandfather was also a *shebait*. After my father's death the estate was taken charge of by the Court of Wards. I cannot say if the Court of Wards took charge of the disputed properties. I did not enquire if the Court of Wards took charge of the disputed properties."

Prima facie, therefore, the properties were treated as *debutter*, but the Court below relies uopn certain conduct of the *shebait* as showing that the properties have not been so treated. Reliance is placed by the Court below (and by the respondent before us) mainly upon the fact that certain *debutter* properties were partitioned among the *shebaits*, and certain compensation money under the Land Acquisition Act (when some *debutter* properties were acquired under the Act) was received by them according to their shares, and that these facts together with some others would go to show that the properties have not been treated in such a manner as to give rise to the inference that the properties were absolute *debutter*.

We will, therefore, deal with the evidence on the questions whether the properties are *debutter*.

The *thakurbati* situated at 93, Tollygunge Road is described as property No. 1 in the plaint. The first plot of land consisting of 3 *bighas*, as already stated, was acquired by a conveyance, dated the 7th April, 1832. It was expressly taken for building "*devalaya*." It is contended, however, by the respondent that the *kobala* was not taken in the name of a deity, and the vendee under the terms of the *kobala* was to have the right of gift and sale, so that Peary Lall the vendee could have sold the property the next day. But the *thakur* had not been established then, and as to the power of gift or sale, that was the statement of the vendor who was selling the property, and those expressions were used to show that an absolute right was being transferred to the vendee. We were referred to *Hara Sundar Majumdar* v. *Basunta Kumar Roy* (1), where it was held with reference to the words "the right and power of gift are yours" that there was no absolute dedication. But those words occurred in a deed in favour of the *shebait* executed by the person who professed to make the endowment and such words in favour of the *shebait* would no doubt be inconsistent with an absolute dedication. Here the words occur in the conveyance by which the property was acquired from a stranger and the *kobala* shows that the person who purchased the land did so with the intention of erecting a *devalaya* thereon. The next *kobala* was dated the 29th September, 1850, in respect of $6\frac{1}{2}$ *bighas*. The deities had already been established on the first plot, This *kobala* was also taken not in the name of the deities but in the name of Peary Lall and Moni Mohun. It was stated, however, in the deed that the property was being purchased for the *sheba* of Sri Sri Gopal Jew Thakur of Harihar *dham* "established by you on the bank of the holy Ganges."

Reliance is placed by the respondent upon the passages in the *kobala*, *viz.*, "Your sons and grandsons and other heirs in succession shall as *shebaits* of the said *thakur* continue to perform the *sheba* of Sri Sri Iswar Jew with the income of *kheraj* and *lakheraj* lands, etc.," but the vendor was Muhammadan. The words "Your sons and grandsons and orher heirs" are used in the conveyance to show that the vendee is to have an absolute right. The vendor had nothing to do with the *debutter*, and the words "As *shebaits* of the said *thakur* continue to perform the *sheba*" of the deities must have been inserted in the conveyance at the instance of the vendees, and showing their intention to purchase the property for purposes of the *deb sheba*.

(1) 9 C. W. N. 154 at p. 160.

Reference was made to the case of *Dakhni Din* v. *Rahim-un-nissa* (2), to show that acquiring land for building a temple is no evidence of dedication, and to the case of *Ram Dhan* v. *Prag Narain*(3), that in order to complete the gift there must be transfer of ownership from the donor to the donee. In the first case a Muhammadan erected a temple and made a grave upon the land and that by itself was held insufficient without any further evidence to prove dedication and a cessation of private ownership in respect of such land. In the second case there was a mere execution of a deed of endowment, and it was found that the income of the property was not devoted to the purposes of endowment, the donor never intended that the deed should be carried into effect and his heirs treated it as their personal property, and in these circumstances it was held that the mere execution of a deed of endowment is insufficient to create a valid endowment. In the present case not only were temples erected, but the deities were consecrated in the temples. There can be no consecration unless the donor divests himself of the property. In the Tagore Lectures for 1892 it is stated at page 127:— "The books of ritual contain a direction that before removing the image into the temple, the building itself should be formally given away to the God for whom it is intended. The *sankalpa*, or formula of resolves, makes the deity himself the recipient of the gift which, as in the case of other gifts, has to be made by the donor taking in his hands water, sesamum, the secred *kush* grass, and the like. It is this ceremony which divests the proprietorship of the temple from the builder and vests it in the image which, by the process of vivification, has acquired existence as a juridical personage." It is contended by the respondent that there is no evidence of consecration of the deities but the Mondals had extensive properties and were in a prosperous condition then and it is impossible to conceive that the images of the deities Gopal Jew and 14 Siva Lingas were established by them on the banks of the Ganges without consecration. The observation, would, no doubt, apply only to the site of the temples which were constructed on the plot No. 1 consisting of 3 *bighas*.

(2) 16 A. 412 at p. 414; A. W. N. (1894) 134; 8 Ind. Dec. (N. S.) 268.

(3) 62 Ind. Cas. 862; 43 A. 503; 19 A. L. J. 447; 3 U. P. L. R. (A.) 161.

The remaining 6½ *bighas* were acquired in 1850 subsequent to the consecration of the temples but as already stated there are tank, flower graden, cook sheds, *nahabat-khana* and out-offices for the residence of the staff for collection of rent on the *debutter* estate, and open space for holding *mela* at the time of *rash jatra*, all of which are enclosed within one compound.

It is pointed out, however, with reference to Smart's map and Billon's map that 93, Tollygunge Road consisted of part of 38-A part of 38-B, 38-E and 38-C, and that the register of 1886 shows that the whole of 38-A (2 *bighas* 3 *cottas* 8 *chitaks*) 38-B (4 *bighas* 0 *cotta* 15 *chitaks* 38-C (3 *bighas* 17 *cottas* 8 *chitaks*) were recorded in the name of Chandra Kumar Mondal and some other Mondals as if they were their secular properties. Holding No. 38-D consisting of 5 *cottas* 6 *chitaks* and holdings Nos. 38-F, 38-G (2 *bighas* 9 *cottas* 2 *chittaks* were recorded in the register in the name of Gopal Jew Thakur. But the holdings Nos. 38-D, 38-F, and 38-G were acquired by *amalnamas* in the names of the *thakurs* by the Mondals, as *shebaits* and they were recorded in the register as such, whereas in the case of holdings Nos. 38-A, 38-B, 38 E and 38-C the *amalnamas* having been taken in the names of Mondals, (and not in the names of the deities) they were recorded in their own names. Unless there is a deed of transferring the right to another person, the Land Registration Authorities would not recognize the right of the *thakurs* and this seems to be the explanation why those holdings were recorded in the names of the Mondals not in the name of the *thakurs*.

As stated above the *thakurbati* compound originally comprised 9½ *bighas*. There were some subsequent acquisitions, *viz.*, holdings Nos. 38-D, 38-F, ann 38-G. Those plots together with holdings No. 38-E consisting of 2 *bighas* 8 *cottas* 8 *chitaks* (out of 9½ *bighas*) were acquired by Government under the Land Acquisition Act in 1886, and the compensation appropriated by the Mondals. This will be dealt with later.

Property No. 18 of the schedule to the plaint consists of holdings Nos. 30 and 31. Holding No. 31 consisting of 13 *cottas* 3 *chitaks* of land was purchased on the 6th September, 1852, by Chandra Kumal Mondal, the eldest son of Peary Lal Mondal aud the land was described as being to the west of "*kheraj*" land dedicated for *sheba* of Gopal Jew Thakur established by

shehaits Peary Lall and Moni Mohun. In 1853 proceedings were taken for assessment of revenue on the land under Regulation II of 1819 and the defendant was described in the *robokari* dated the 31st August 1853 as "Sri Sri Iswar Shambhunath Sib Thakur Sebait Chandra Kumar Mondal." In the *robokari* dated the 26th July, 1854 (where the same description of the contesting defendant appears) there is a recital of the statement of Chandra Kumar Mondal "purchased by the defendant as dedication for the *sheba* of Sri Sri Sambhunath Sib Thakur and was possessed by him as *shebait*." The land was declared to be rent free in possession of the contesting defendant.

Subsequently, however, it appears that the land was held liable to assessment of rent, and Chandra Kumar Mondal as *shebait* of Shambhunath Thakur made an application to the Collector on the 23rd January 1861 for Settlement of the land which was purchased and possessed for the *sheba* of the said *thakurs*. An *amalnama* was accordingly granted on the 16th February 1861 to Chandra Kumar as *shebait* of the deity.

With regard to the holding No. 30 there is an *amalnama* granted to Gopal Jew's *shebait* Peary Lal Mondal dated the 16th September 1852 in respect of 1 *bigha* 19 *cottas* 12 *chitaks* and on the same date Peary Lal and Moni Mohun executed a *kabuliyat* in favour of the Collectorate in respect of the said land accepting the settlement as *shebait* of Gopal Jew Thakur.

The two holdings Nos. 30 and 31 (along with other properties) formed the subject-matter of a suit for partition in the year 1872. In that year a suit (No. 1539 of 1872) was instituted by Nil Madhab Mondal and two other sons of Moni Mohun Mondal as *shebait* of Gopal Jew Thakur against Chandra Kumar Mondal and Jadu Nath Mondal, sons of Peary Lal Mondal for declaration of *ijmali* possession of both parties in respect of holding No. 31 and part of holding No. 30 described as 1 *bigha* 10 *cottas* more or less and for a perpetual injunction restraining the defendants from digging foundation or erecting building thereon, It was alleged in the plaint that the land "has been dedicated for the *sheba* of the above-named Iswar Deb and *ijmali* profits thereof have been spent for the *sheba* of the said Iswar Thakur." By a petition for amendment dated the 20th May 1872 the plaintiffs stated that the area of holding No. 31 was 13 *cottas* 3 *chitaks* and deducting 8 *cottas* occupied by the new house of the defendants from 1 *bigha* 10 *cottas* 12 *chitaks* the area of holding No. 30 the total area claimed was 2 *bighas* 4 *cottas* 15 *chitaks*. Chandra Kumar by his petition dated the 20th may 1872 in that suit set up a family custom of constructing houses on all sorts of *ijmali* lands "whether the same are *debutter* or otherwise" by individual members to which no co-sharers ever took objection and further stated that 13 *cottas* 3 *chitaks* (*i. e.*, holding No. 31) was not the property of the deity Gopal Jew Thakur, but his own purchased *nishkar bajeapti bandobusti* land. The dispute as to the lands of holdings Nos. 30 and 31 as also various other lands was referred to arbitration, and as a result of the arbitration, a partition deed was executed on the 20th September 1872. A quantity of land 15½ *bighas* was allotted to each of the two parties. The 15½ *bighas* allotted to Chandra Kumar and Jadu Nath included the lands of holdings Nos. 30 and 31. They were admitted to be the property of the deity, and as Chandra Kumar Mondal and Jadu Nath had already dug foundations they were to pay Rs. 16 as rent to, and hold the land as tenant of the deity.

The 15½ *bighas* allotted to the sons of Moni Mohun (the plaintiffs in that suit) included holdings Nos. 20 and 21-C and these two holdings were to be held as tenants by them on payment of a rent of Rs. 16 to the deity. The appellants contend that holdings Nos. 20 and 21-C were not *debutter* before, but were made *debutter* by the deed of partitions.

On the same day (20th September 1872) there was a further partition between the sons of Peary Lal, *viz.*, the two brothers Jadu Nath and Chandra Kumar themselves in respect of the 15 *bighas* and oodd. The 2 *bighas* 9 *cottas* of *debutter* lands of holdings Nos. 30 and 31 were allotted to Chandra Kumar for dwelling. But it was the tenancy right created in the 2 *bighas* and odd by the deed of partition (Ex. 21) which was allotted to Chandra Kumar (along with other secular properties in which the parties had proprietary right) in the partition between the two brothers, as the reference to the payment of annual rent of Rs. 16 "into the *sarkar*" of the deities clearly shows.

Jadu Nath in his allotment got holdings

Nos. 40 and 40-A consisting of 6 *bighas* 5 *cottas* 5½ *chitaks* as secular property. 40-A appears to have been acquired by Peary Lal and Moni Mohun as *shebaits* of Gopal Jew by an *amalnama* dated the 28th January 1852. Smart's map is relied upon on behalf of the respondent to show that both 40 and 40-A are premises Nos. 9 and 9-1, Chandra Kumar Mondal's Lane. The dwelling house of the defendant No. 1 (the son of Jadu Nath) stands on 9, Chandra Kumar Mondal's Lane. It is accordingly contended on behalf of the respondents that although the property 40-A was acquired as *shebaits* of the *thakur*, there is nothing to show that since its acquisition it was applied for *sheba* of the deity, and, as a matter of fact, it was allotted to one of the parties on partition as secular property without even providing for payment of any rent.

The Suit No. 1539 of 1872 was dismissed on the 30th September 1872 on the ground that the matter had been amicably settled.

These two partition proceedings are relied upon by the respondent as showing that the properties were treated as secular properties of the Mondals. As already stated the *amalnamas* and other documents relating to holdings Nos. 30 and 31 show that they were acquired by Peary Lal or Chandra Kumar as *shebait* of the deity Gopal Jew. In the plaint in the suit for partition instituted by the sons of Moni Mohun against Chandra Kumar and Jadu Nath the sons of Peary Lal it was stated "That we and the defendants are in *ijmali* possession in equal shares of all our ancestral properties and lands, etc, out of the said properties 1 *bigha* 10 *cottas* more or less has been dedicated for the *sheba* of the above named Iswar Deb, and the *ijmali* properties, therefore, have been spent for the *sheba* of the said Iswar Thakur." The "equal shares" refer to the ancestral properties and not to the property dedicated. Further on, however, in the plaint it is stated that the plaintiff asked the defendants not to dig foundation so long as "our respective shares are not distinctly demarcated by metes and bounds." But later on the land is stated to be in the undivided *ijmali* possession of the parties.

It is to be observed, however, that in the case of private *debutter* properties it is not unusual to describe them as "ancestral" or as "our *debutter* properties" and the heirs of the founder describe their interest as *shebaits* according to the share they have in secular properties. In the next place, it was distinctly asserted in the plaint that the properties had been dedicated for the *sheba* of the deities, and the "profits thereof have been spent for the *sheba* of the *thakur*." Chandra Kumar it is true set up his own right to holding No. 31 as his own "purchased" property, but in the resumption proceeding of 1854 relating to the land he distinctly stated that the property was dedicated for the *sheba* of Shiba Thakur and was possessed by him as *shebait*, and he applied for and obtained a Settlement of the land as *shebait* of the *thakur* in 1861, and although in the partition suit he set up his own title to the land, the title of the *thakur* was clearly admitted in the partition deed which followed the arbitration in the suit. The partition deed dated the 20th September 1872 describes the land as *debutter* lands of the deities and clearly recognizes the title of the deities to the property. Chandra Kumar and Jadu Nath were to hold the land as *mourasi mokarrari* tenant of the deities on payment of the rent of Rs. 16 to the *sarkar* of Gopal Jew Thakur. The collectorate revenue of the lands was to be paid from the estate of Gopal Jew, while in case of lands other than *debutter* allotted to the parties, the revenue was to be paid by the parties themselves into the collectorate. These evidently were not let out to tenants at the time, and all that can be said is that a *mourasi mokarrari* Settlement was made which the *shebaits* had no power to make It is contended by the respondent that it was really an arrangement for dividing the properties on payment of certain sums for the upkeep of the *deb sheba*. It appears, however, that foundation for buildings had been dug and disputes between the two branches of the family were settled by the arbitrators in that way, the title of the deities was recognized, and the land was to be held as tenant of the *thakurs* on payment of rent to them, and although the *mokarrari* Settlement was an abuse of the power of *shebaits* it was distinctly provided in the deeds that "in future none of us will be entitled to prepare new bricks in the *debutter* or alter the condition of the said lands without the consent of all." It is true that Chandra Kumar and Jadu Nath were to have the power of alienation by sale and gift, etc., but that evidently referred to the tenancy right

created by the partition deed in their favour.

By that deed the holdings Nos. 20 and 21-C were allotted along with some other properties to the sons of Moni Mohun. Holdings Nos. 20 and 21-C are comprised in property No. 17 of the schedule to the plaint.

With regard to the holdings Nos. 20 and 21-C it is stated in the partition deed. "As regards the *jotes* of Guru Charan Patra and Adwaita Goala of Sahanagar measuring 1 *bigha* 5 *cottas* 3 *poas* 2 *chitaks* and the *jote* of Ram Kalpa Teli and others measuring 17 *cottas* 2 *poas* in all 2 *bighas* 3 *cottas* 1 *poa* 2 *chitaks* was formerly the properties owned by us (both the parties). We both parties having dedicated the said 3 *bighas* 3 *cottas* 1 *poa* 2 *chitaks* of lands for the *sheba* of Sri Sri Gopal Jew Thakur we shall remain in pessession and enjoyment of the said lands in *mourasi jamai* right by paying annually the *jama* of Rs. 16 into the *sarkar* of said Gopal Jew year by year, and shall be entitled to construct *pucca* buildings, etc., thereon and hold and enjoy the same. The collectorate revenue of the said land will also be paid annually from the estate of Sri Gopal Jew Thakur. It is contended on behalf of the respondents that there is nothing to show that these plots were acquired for *deb sheba* nor any previous document to show that they were given for *deb sheba* and all that was meant was that the income of the properties had been applied for the upkeep of the *deb sheba* from before, and not created *debutter* by the documents. But the deed itself states that the properties were "formerly owned by us," so that they could not have been acquired for *deb sheba* nor could there be any previous document to show that they were given for *deb sheba*, and the words "formerly owned by us" taken along with the words which follow, *viz.*, "we both parties having dedicated" would in the absence of any evidence showing appropriation of the income of the properties to *deb sheba* prior to the deed of partition, would indicate that they were dedicated for *deb sheba* by the parties for the first time by the deed of partition, specially having regard to the statement in that very deed with respect to holdings Nos. 30 and 31 that they had been dedicated for *sheba* and the *ijmali profits thereof have been spent for the sheba of the said thakur.*

It is pointed out by the respondents that holding No. 20 consisting of 5 *bighas* 3 *cottas* 10 *chitaks* was also a *debutter* of the same character as holdings Nos. 30 and 31, and reliance is placed on the Register of Holdings permanently settled in *dihi* Panchanangram [Ex. Z (12)] where Chandra Kumar, Nil Madhab Mondal are recorded as *shebaits* of Gopal Jew Thakur and with respect to holding No. 20, and in the last column whereof (which relates to mutation of names) the names of all the members of the family are entered as *shebaits* of Gopal Jew Thakur. Out of the 5 *bighas* 3 *cottas* 10 *chitaks*, an area of 4 *bighas* 4 *cottas* 3 *poas* 2½ *chitaks* were allotted to the share of Nil Madhab Mondal and others by the partition deed, and the remaining 1 *bigha* 5 *cottas* and odd were also allotted to the said persons, but they were to hold the 1 *bigha* 3 *cottas* and odd only on payment of Rs. 16 as rent to the *thakurs*, no rent being reserved for the major portion, *viz.*, 4 *bighas* 4 *cottas* and odd. The learned Subordinate Judge observes that the revenue *challans* put in by the plaintiff show that the revenue for holding No 20 is paid by Hem Sarkar in the name of idols but that it was treated (a portion of it) as secular property, and it is contended on behalf of the respondents that whenever occasion arose the parties did not hesitate to treat the properties as secular.

It would appear, however, from the deed of partition that the entire holding No. 20 was originally secular property, only a portion of it, 1 *bigha* 5 *cottas* and odd, was made *debutter* by the deed and a tenancy right was created therein in favour of Nil Madhab Mondal and others at a rent of Rs. 16, the remaining lands 4 *bighas* 4 *cottas* and odd continued to be secular property. That it was so would also appear from the schedule *kha* to the deed of partition. Both the items Nos. 1 and 2 of Schedule *kha* relate to holding No. 20. The first items deals with 4 *bighas* 4 *cottas* and odd, the second deals with 1 *bigha* 5 *cottas* and odd and the boundaries show that they are adjoining plots. The second item only (*jotes* of Guru Charan Patra and Adwaita Goala) consisting of 1 *bigha* 5 *cottas* and odd was made *debutter*. The rent of the entire holding No. 20 payable to the Collectorate was Rs. 8-5-6: See rent receipt of 1893 Ex. 16 (*y*). The division of the holding into two parts, one part only made *debutter* and the other part continuing as secular, does not appear to have been given effect to in the Collectorate,

and the entire holding was recorded in the Collectorate as the property of Gopal Jew at a rent of Rs. 8-5-6 (See Register Ex. 112). The explanation suggested is that after the deed of partition in 1872 by which there was a division of the holding into two parts, no division of the rent payable into the Collectorate was obtained or allowed, and as the deed provided that the Collectorate of the revenue of the land made *debutter* was to be paid from the estate of Gopal Jew Thakur, the entire holding was recorded in the Collectorate as the property of the deity who had to receive Rs. 16 as rent from the *mokorrari* tenant Nil Madhab Mondal and others and pay Rs. 8-5-6, the rent of the entire holding, to the Collectorate.

It is contended on behalf of the respondents that Billon's register must have been prepared between 1869 and 1872, as Billon's map was of the years 1869-70. It is not clear whether Ex. Z-12 is Billon's register. However that may be, it does not appear when the entry in Ex. Z-12 was made, and in the absence of anything to show that holding No. 20 was *debutter* prior to the deed of partition in 1872 the explanation suggested may be accepted.

If, as we hold, a portion only of holding No. 20 was made *debutter*, and the remaining portion continued to be secular, that fact of the transfers (by Exs. H, I and K) referred to in the judgment of the Court below does not go against the appellant. Exhibit H is a *kobala* dated the 22nd September 1893 executed by the sons of Chandra Kumar Mondal in favour of Lakhan Lal Mondal in respect of 19 *cottas* and odd out of 5 *bighas* 3 *cottas* and odd in holding No. 20. But as stated above only 1 *bigha* 5 *cottas* was created *debutter*, so the transfer of 19 *cottas* and odd appears to have been out of the secular portion, *viz.*, 4 *bighas* and odd. Exhibit I is a release dated 27th February 1910 executed by the sons of one Gobindo Bhattacharji in whose name Lakhan Mondal purchased 2 *bighas lakheraj* land. 58 Tollygunge Road (a part of holding No. 20), at a sale held for arrears of Municipal Tax. The eastern boundary of the land dealt with by the deed is described as *debutter* land of Gopal Jew Thakur, which shows that the *debutter* lands were excluded. Exhibit K is *kobala* dated the 5th October 1918 executed by one Prokash Sarkar in favour of Trailakhya Nath Mitra in respect of 1 *bigha* 15 *cottas* another portion of holding No. 20. But the eastern boundary of the land is described as the land of the *debutter* estate. The property sold, therefore, was outside the *debutter* property. Hem Chandra Sarkar the *gomashta* admits in his deposition that the site of the dwelling house of Banke Behary Mondal was partitioned among the co-sharers, that Prokash Chandra Sarkar purchased the share of Chandi and sold to another who is in occupation now. But as stated above, it was the secular portion of holding No. 20 which was the subject of the transfers, and the learned Subordinate Judge is in error in thinking it was *debutter* which was transferred by the documents referred to above.

As for holding No. 40-A which as stated above is covered by *amalnama* dated the 24th January, 1853 granted to Gopal Jew Thakur's *shebaits*, Peary Lall and Moni Mohun Mondal at a rent of Rs. 1-3-6, it is contended on behalf of the respondent that it was allotted to the *hisya* of Chandra Kumar in the partition between him and Jadu Nath. But in the first place the deed of partition (Ex. L) shows that out of 41 *bighas* and odd after deduction of 8 *cottas* 11 *chitaks* kept *ijmali* for the purpose of *Iswar Rash Jatra* were divided half and half. The area of holding No. 40-A as stated in the *amalnama* is 8 *cottas* 7 *chitaks*, while the land kept *ijmali* for purpose of *Rash Jatra* is 8 *cottas* 11 *chitaks*, but the difference may be due to different measurement. In the next place it is pointed out that the deed of partition shows that holdings Nos. 40 and 40-A in certain *dags* of a *chitta* measuring 6 *bighas* 5 *cottas* were allotted to the *hisya* of Chandra Kumar, and that having regard to the fact 40 and 40A are not separately shown in the map, and in the body of the deed of partition it is stated that 8 *cottas* 11 *chitaks* were kept *ijmali* for the purpose of "Iswar *Basanti Rash Jatra*" of the deity, which correspond approximately to 8 *cottas* 7 *chitaks* of the *amalnama* under which plot No. 40-A was acquired, it is contended that the portion of plot No. 40-A was not partitioned. There seems to be force in this contention; at any rate it is not clear that the land acquired under the *amalnama* was partitioned.

There was another partition suit in 1897 (Suit No. 124 of 1897) between the sons of Chandra Kumar Mondal themselves. The plaint (Ex. 5) included holdings Nos. 30, 31

and 24-8. The decree in that suit (Ex. T) runs as follows:—"That the suit be decreed that in conformity with the partition made by the Commissioner out of property No. 1 the land No. 1 as shown by green boundaries in the Commissioner's map with *pucca* building thereon be allotted to the plaintiff No. 1." Other properties were similarly allotted to the other parties. The learned Subordinate Judge says that Exs. 5 and T show that 24-B was allotted to a co-sharer when there was partition in 1897. Holding No. 24-B is covered by *amalnama* dated the 16th September, 1852 granted to Gopal Jew Thakur's *shebaits* Peary Lal and Moni Mohan in respect of 7 *cottas* 4 *chitaks* at a rent of Re. 1-0-3 (see also *kabuliyat* of the same date). The rent receipt (Ex. 16-K) dated the 15th June 1903 shows that Re. 1-0-3 was received through Hem Sarkar in respect of holdings Nos. 24-B and 24-C "owners Gopal Jew Thakur's *shebaits* Banke Behari Mondal and others." The decree does not show that 24-B was allotted to any party, but the Commissioner's map is referred to in the decree and that map shows that plot No. 3 was allotted to Kishori Mondal. Kishori Mondal says in his deposition that he does not admit 24 (*b*) and some other plots to be *debutter* properties, but in another passage he admitted that the disputed lands (which include 24-B) are *debutter* properties. It seems probable as suggested on behalf of appellant, that he got confused while mentioning the number of several holdings, and having regard to the fact that 24-B is covered by the *amalnama*, *kabuliyat*, and rent receipt, and to the evidence of Hem we are unable to hold upon the evidence of Kishori that it is not *debutter*. Radha Binode says in his deposition that Jadu Nath got 24-B and 24-C, and that holdings Nos. 24-B and 24-C, are premises Nos. 17 and 18, Chandra Kumar Mondal Lane. On the other hand the appellant contends that 24-B, is No. 13 of the plaint which is described as *khas patti* 1 *bigha* 5 *cottas* being Municipal premises 9-2, Chandra Kumar Mondal Lane. Hem Sarkar the *gomasta* of the *debutter* estate says, "Holding No. 24-B is *debutter* property. I pay its Government revenue. That holding is lying vacant. It is 9-2 Chandra Kumar Mondal Lane. I do not know that the dwelling house and garden of Kishori Mondal are on 24-B." 24-B no doubt was one of the properties mentioned in the plaint in Suit No. 124 of 1897. The Commissioner's map (referred to in the decree in that suit), however, does not give the numbers of the holdings, it only shows that plot No. 3 was allotted to the defendant No. 3 of that suit. Smart's Survey Map shows 24-B at more than one place, and it is difficult to say whether it is or is not plot No. 3 of the Commissioner's map 24-B is not mentioned in the schedule of partition deed of 1872 nor in the further partition between the two brothers Chandra Kumar and Jadu Nath, and this goes to support Hem Sarkar's statement. However, that may be, upon the materials before us, it is not clear that 24-B was allotted to any co-sharer on partition.

As for holdings Nos. 30 and 31 they were, no doubt, acquired as *shebait* under *amalnamas* but they were under the partition deed dated the 20th September 1872 (Ex. 21) to be held by Chandra Kumar and Jadu Nath in *mourasi mokarrari* right at a rent of Rs. 16 payable to the deities Gopal Jew and Sib Thakur. The tenancy right was allotted to Chandra Kumar Mondal under the deed of partition dated the same day (Ex. L) between Chandra Kumar and Jadu Nath, and in the partition of 1897 the same tenancy right in holdings Nos. 30 and 31 was allotted to the plaintiff No. 1, one of the sons of Chandra Kumar.

In the schedule of boundaries in the plaint in the partition suit of 1897, it is stated holding No. 31 the rent whereof is Rs. 16 per year payable into the Sarkar of Sham Lall Mondal and other *shebaits* of Gopal Jew Thakur." The plaint mentions the rent of Rs. 16 as payable for No. 31 only and No. 30 is mentioned along with other properties as paying revenue into the Collectorate. But that must be mistake, as both the deeds of partition dated the 20th September, 1872 (Exs. 21 and L) show that both the holdings Nos. 30 and 31 were to be held at a rent of Rs. 16.

Lastly there was a partition suit in 1909 (No. 72 of 1909) brought by one Megh Nath a purchaser of a portion of a certain property against Mondals. It appears that one-half of the properties were *debutter* and other half secular. Holding No. 78-1 consisted of 16 *cottas* 2 *chitaks* of which 8 *cottas* 1 *chitak* was *debutter* of Gopal Jew and out of the remaining 8 *cottas* 1 *chitak* (the secular portion) taken as 16 annas and 11 *gandas* 1 *kara* share, *i.e.*, 5 *gandas* 2½ *karas* undivided share of the entire land was purchased

by Megh Nath. It was necessary, therefore, for Megh Nath to proceed against some of the Mondals who were owners of the secular portion, as also against the *shebaits*. The defendants Nos. 1 to 12 were sued as *shebaits* and defendants Nos. 13 to 41 in their personal capacity. Radha Binode was sued in both capacities. The judgment in that case only dealt with the questions of allotment, but in the decree, the defendants Nos. 1 to 12 (the *shebaits*) are treated in a block with respect to costs and compensation. With respect to the other defendants the order was made each according to his share separately. The 8-annas share of the property which was described as *debutter* is property No. 25 of the plaint in the present suit. The description of property No. 25 (holding No. 78-1 Estate No. 1070) corresponds to the description in the Schedule *kha* in the decree of the partition of Megh Nath the difference being 8 *cottas* in the one and 7 *cottas* in the others which may be due to difference in measurements. It is to be observed that in that partition suit 8 annas of the properties were treated as *debutter* and the other 8-annas of the same properties as secular. The *debutter* was set apart and a partition was sought of the secular portion and this was done in the presence of all the Mondals including Radha Benode.

We now come to the land acquisition cases. There were three such cases in the year 1886. The first (No. 146 of 1886) relates to 5 *cottas* 5 *chitaks* of land comprised in holding No. 38-D in respect of which Rs. 610-14-0 was awarded as compensation on 3rd May, 1816. The Mondals were described to their own names and not as *shebaits*, and the share of each was specified. The names of the deities do not appear in the award, though the holding No. 38 was acquired under *amalnama* dated the 14th April, 1853 (and *kabuliyat* of the same date) by Peary Lall and Moni Mohun as *shebait* of the deity Gopal Jew. In Billon's register of rent free holdings in *dihi* Panchannagram also, the name of the tenant is mentioned as Gopal Jew Thakur's *shebaits* Chandra Kumar and Nil Madhab Mondal. The second award, No. 313 was in respect of 6 *cottas* of land (holdings Nos. 38-F and 38-G which adjoined the *thakurbati* did not form part of it) dated the 11th May 1886 (Ex. C-1) and for which Rs. 690 was awarded as compensation. The description of the Mondals was the same as in the last case. The Court below found that the land was covered by *amalnama* (for holding No. 38-G) dated the 14th April, 1853 (Ex. 7) which was taken by Peary Lal and Moni Mohun as *shebaits* of Gopal Jew. The area of the land covered by the *amalnama*, however, was 3 *cottas* only, bearing a revenue of Rs. 3-10-0 but the award seems to have been in respect not only of 38-G but also in respect of 38-F as would appear from the receipt of the compensation money withdrawn by Radha Binode. There is no *amalnama* with respect to plot No. 38-F but in Billon's register (Ex. 11) 38-F and 38-G are recorded together in the name of Gopal Jew Thakur *shebaits* Chandra Kumar and Nilmadhab Mondal. In Billon's register, however, the area of holdings Nos. 38-F and 38-G is stated to be 2 *bighas* 9 *cottas* and 2 *chitaks*, rent—Rs. 1-8-5, name of tenant—Gopal Jew Thakur *shebaits*—Chandra Kumar and Nil Madhab Mondal; and it is also stated that the "whole of the area acquired for extension of E. B. S. Railway for Dock purposes" whereas only 6 *cottas* of land in Sahanagore was acquired in 1886 for the Ballygunge line. (See award Ex. C-1 dated 11th May, 1886).

The third case of 1886 (No. 322 of 1886) relates to the acquisition of holding No. 38-E. The area acquired was 2 *bighas* 8 *cottas* 8 *chitaks* and Rs. 5,577 was the amount of compensation awarded. There is no *amalnama* in respect of 38-E, but it is contended on behalf of the respondent that as No. 93, Tollygunge Road, (the *thakurbati*) includes 38-E and as the *thakurbati* was acquired by the two documents Ex. 12 and Ex. 15, the plot No. 38-E must have been covered by one of the said two documents. In Billon's register, however, 38-E (area 3 *bighas* 17 *cottas* 8 *chitaks*) is recorded in the names of the Mondals as if they were secular properties.

The appellant on the other hand contends that the land covered by the *kobala* Ex. 15 dated the 7th April 1832 is the northern portion on which the temple stands. The land covered by the *kobala* Ex. 12 dated the 29th September, is bounded on the north by the *devalayabati*, no portion of the lands covered by those two deeds could have been acquired as 38-E. Reliance is placed also on Billon's register where 38-E (area 3 *bighas* 17 *cottas* 8 *chitaks* is recorded in the names of the Mondals as if they were secular properties. But holdings Nos. 38-A, 38-B which are admittedly parts of the *thakurbati* are also recorded in the

names of the Mondals and not as *shebaits*. So no inference can be drawn in favour of the appellant from Billon's register. The *thakurbati* is described in item No. 1 of plaint in the present suit as consisting of 9 *bighas* 10 *cottas*, but in the previous suit (No. 206 of 1915) it was stated to be 6 *bighas* only (see Item No. 17). Then again plaintiff's witness Gopal Chandra Chakrabarti stated that some lands of the temple (about 2 *bighas*) were acquired for the Budge Budge Railway line, and that after the said acquisition there are 6 or 7 *bighas* within the compound now. Another witness for the plaintiff, Hem Sarkar, also says that some lands of the temple were acquired for the Railway line. It is true there is no document showing that 38-E was acquired as debutter, but having regard to the evidence of plaintiff's witnesses it seems that 38-E was part of the *thakurbati* and that when it was acquired, the compensation money was taken by the Mondals as if the property was secular.

The compensation monies awarded in these land acquisition cases have not been claimed in the plaint, nor can they be claimed at this distance of time.

The next land acquisition case was of the year 1910 (No. 445 of 1910) in respect of 91, 84 and 85 Tollygunge Road consisting of 5 *bighas* 14 *cottas* and odd and Rs. 4,672-12-0 was awarded as compensation. The Mondals 12 in number as *shebaits* of Gopal Jew Thakur were mentioned as the persons interested. The compensation awarded in this case has not been withdrawn by the Mondals and is still lying in the Collectorate. The defendant Radha Binode in his evidence says, "I tried to withdraw some money on producing that judgment (the judgment in Suit No. 206 of 1915) before the Land Acquisition Collector, but my application was rejected as the award was made in the names of the idols."

The plaintiff has sued for a declaration that the money Rs. 4,672 (Item No. 16 of the schedule to the plaint) is *debutter* property.

The last land acquisition cases were of the year 1917 (Nos. 125 and 146) in respect of premises Nos. 99 and 103, Russa Road. The amount of compensations awarded was Rs. 36,711 for No. 103, Russa Road, (the area being 6 *bighas* 2 *cottas*) and Rs. 8,297 for No. 99, Russa Road the area being 1 *bigha*. This was after the decision in Suit No. 206 of 1915 which will be dealt with later. It appears from the judgment of the President of the Improvement Tribunal, dated the 16th May, 1919, that there was a dispute between the Mondals whether the premises were or were not *debutter* properties, and that the questions had been "finally disposed of" by the litigation (Suit No. 206 of 1915). The compensation money awarded was withdrawn according to the shares of each of the co sharers (the Mondals) after the final decision in the said Suit No. 206 of 1915, and the judgment of the President of the Improvement Tribunal, dated the 16th May, 1919, the executors of Kanai Lal (the father of the present plaintiff) withdrawing his share on the 2nd September, 1919. The compensation money for the two premises is claimed in items Nos. 14 and 15 of the plaint, but there is no prayer for recovery of the money from each of the sharers who has withdrawn the money.

It does not appear when or how premises Nos. 99 and 103 were acquired, though the plaintiff in his deposition says that those premises were *debutter* properties. He says that the defendants have purchased Government promissory notes with the compensation money, but that the interest of the notes is being applied for the *deb sheba* He says that the money has been entered in the account-books of the plaintiff, but the account-books have not been produced in the case. Three witnesses for the plaintiff Narendra, Hari Nath and Kishori Mondal, who are co-*shebaits*, have deposed that they are applying the interest of the Government promissory notes (purchased with the compensatian money) to *deb sheba*. Kishori stated that he wanted to purchase the notes as *shebait* of the deities, but that the Bank did not allow it. Laksman Mondal, (the defendant No. 14 and witness No. 2 for the defendant) admits that he stated in Suit No. 206 of 1915 that he was willing to have the compensation money deposited in Court to be credited to the *debutter* fund and Government Securities purchased. It is to be noted that the present suit was instituted on the 26th July, 1919. Some of the co-sharers withdrew their shares of the compensation money before the institution of the present suit, and others subsequent to it.

We have discussed the evidence, and before dealing with the questions of law raised before us relating to *debutter*, we will consider the question whether the decision in Suit No. 206 of 1915 operates as *res judicata*. There was an earlier suit (No. 212 of

1914) instituted on the 16th February, 1914, by some of the Mondals for framing a scheme of management, but it was withdrawn on the (?)th August, 1915, with to bring a fresh suit. Suit No. 206 of 1915 liberty was instituted by Gopal and Ram Lal Mondal (defendants Nos. 2 and 3 in the present suit) as *shebaits* of Iswar Gopal Jew against the other Mondals as "Sri Sri Iswar Jew Thakur's *shebaits*," the present plaintiff being defendant No. 3, and Radha Binode being the defendant No. 10 in the said suit. The first prayer in the plaint ran as follows: "That all the properties of schedule being *debutter* properties of Sri Sri Gopal Jew Thakur established by the said Peary Lall Mondal and Moni Mohun Mondal, a scheme may be framed for preservation, management and improvement of the said properties, and for efficient performance of the daily and periodical *shebas* of Sri Sri Gopal Jew Thakur and the festivals, etc.," and the second prayer was that "proper rules may be framed for giving effect to the said scheme and that a manager or a trustee may be appointed according to necessity."

Radha Binode Mondal, the defendant No. 10, denied that the properties were *debutter* and contended *inter alia* that the Thakur Gopal Jew was the family deity of the parties and that there were other deities also, the worship whereof was performed from the properties of the parties. The other defendants generally supported the plaintiff's case. The third issue in the suit was "Is the suit maintainable in the present form." and that fifth issue was "Are the properties described in the schedule of the plaint *debutter* properties; was there any valid *arpannama* or dedication of the same to the Thakur Sri Sri Gopal Jew." Upon the third issue the Court of first instance (the Subordinate Judge) was of opinion that the frame of the suit was defective as "the plaintiff should have sued for a declaration that the properties of the plaint are dedicated *debutter* properties." He accordingly held that the suit as framed was not maintainable. On the fifth issue he held that properties were not *debutter* and that there was no dedication of the same to *thakur*. There was an appeal to the District Judge who also held that it was not an absolute endowment, and that the suit was "not maintainable in its present form," and accordingly confirmed the judgment of the Subordinate Judge.

A second appeal to the High Court was dismissed under O. XLI, r. 11 on the 21st November, 1918. An application for review was made, but it was rejected on the 2nd April, 1919.

It is contended on behalf of the appellant that the decision in the Suit No. 206 of 1915 does not operate as *res judicata* on several grounds The first is that the suit was not on behalf of the deity. The deity was not the plaintiff; it was a suit by two persons describing themselves as *shebaits* against some others, also described as *shebaits*, for framing a scheme of management. Paragraphs 3, 4 and 5 of the plaint set out the reasons for bringing the suit, *viz.*, that some of the *shebaits* including Radha Binode were negligent about the *deb sheba*, had attempted to collect rent separately from tenants, had refused to sign plaints in suits against tenants, and that unless a Manager was appointed it was impossible to conduct cases. These, no doubt, were the reasons why the suit was brought. But we do not think it can be said that the suit was not on behalf of the deity. It is true, it was a suit by some of the *shebaits* against the other *shebaits* for proper management of the *debutter* property, but it cannot be said, as contended on behalf of the appellant, that two sets of *shebaits* were fighting with each other about the management of the properties, as the *debutter* character of the properties was not admitted, but was denied by the contesting defendant. The two *shebaits* who instituted the suit represented the deities, as it was a suit for the benefit of the endowment. Reliance is placed on Underhill on Trusts, 7th Edition, 305 and 306 that where there are more trustees than one all must act together. But the position of a *shebait* is not the same as that of a trustee in English Law in whom the property is vested. The *shebait* is only a manager, the property being vested in the deity. See *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (4), the possession and management remains with the *shebait*, and the right of suit is vested in the *shebait* though the property is vested in

(4) 65 Ind. Cas. 161; 48 I. A. 302 at p 318; 44 M. 831 at p. 843; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

the *thakur*: See *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (5).

The second ground is that the decision does not operate as *res judicata* as between co-defendants, as it was unnecessary to decide any question as between them to give relief to the plaintiff. Gopal and Ram Lal were the plaintiffs. They are the defendants Nos. 2 and 3 in the present suit. The defendant No. 3 in the previous suit claims to represent the deity in the present suit. The defendant No. 10 is the sole contesting defendant in the present suit, and he sets up the decision in the previous suit as *res judicata*. It is contended on his behalf that the question whether the properties are *debutter* was raised in that suit as between the plaintiffs (in that suit) and the defendant No. 10 as well as between the latter and the defendant No. 3, and that in order to give relief to the plaintiffs in that suit it was necessary to decide the question whether the properties were *debutter*, between the defendants Nos. 3 and 10. But the question of *debutter* was raised as between the plaintiff and the defendant No. 10, and it cannot be said that it was *necessary* to decide that question between the defendants Nos. 3 and 10 in order to give relief to the plaintiffs in that suit.

It is to be observed that the conduct of the previous suit was not in the hands of the defendant No. 3, and it is doubtful whether he could have appealed against the defendant No. 10 who was a co-defendant: see *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (6).

The fourth ground is that the Court having found that the suit as framed was not maintainable, it was unnecessary to decide the question of *debutter*, and that in fact it was not competent to decide the point so long as the suit was not properly framed. It is contended on behalf of the respondent that although the Court might have decided the suit on the third issue only, and refrained from deciding the question of *debutter* it did decide that question that it is open to the Court to decide several issues although the decision on one of the issues would be sufficient for the dismissal of the suit, and that in such case, the decision on each issue is binding upon the parties. The cases of *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (7) and *Rash Behary Sarkar* v. *Mahendra Nath Ghose* (8) are relied upon. The contrary view taken by the Allahabad High Court in *Shib Charan Lal* v. *Raghu Nath* (9) has not been followed in this Court. It is unnecessary to consider which view is correct, and it may be conceded that where a suit is properly framed, and the Court decided several issues the decision on each issue is binding upon the parties. But where, as here, the Court held that the suit as framed was not maintainable the suit should have been dismissed on that ground alone, and the Court could not try the other issues so long as the suit was not properly framed. And lastly we think that the question of *res judicata* must be decided in favour of the appellant from the fifth ground raised by him, *viz*, that the question of *debutter* was incidentally decided in the previous suit. In the first place, the decision of the question of *debutter* was only incidental after the decision of the third issue. In the next place the plaint in that suit proceeded upon the assumption that the properties were *debutter*. The first prayer stated that the properties being *debutter*, a scheme might be framed. It is true that in order that a scheme might be framed it was necessary to decide whether the properties were *debutter* when the defendant No. 10 Radha Binode denied their *debutter* character, and a specific issue was framed on the point. But the issue could not directly arise upon the plaint as framed. It was necessary to decide that issue only in order to frame a scheme which was the relief claimed in that suit, but the decision of that issue was only incidental. We are unable, therefore, to hold that the decision in Suit No. 206 of 1915 operates as *res judicata*. We will now deal with the question of law relating to *debutter*. As already stated there is no *arpannama* or deed of dedication, but a deed of dedication is not essential for the purpose of valid dedication which may be inferred from application of proceeds and family conduct: see *Muddun Lal* v. *Komul Bibee* (10), *Moonohar*

(5) 32 C. 120 at p. 141; 31 I. A. 203; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(6) 12 C. 580 at p. 582; 6 Ind. Dec. (N. S.) 394 (F. B.).

(7) 24 C. 900 at p. 904; 12 Ind. Dec. (N. S.) 1269.

(8) 21 Ind. Cas. 979; 19 C. L. J. 34 at p. 39.

(9) 17 A. 174; A. W. N. (1895) 47; 8 Ind. Dec. (N. S.) 437.

(10) 8 W. R. 42.

Ganesh Tambekar v. *Lakhmiram Govindram* (11), *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (12) and *Rambrama Chatterjee* v. *Kedar Nath Banerjee* (13)

As pointed out in an old case, *Ganga Narain Sircar* v. *Brindabun Chunder Kur Chowdhury* (14), one "test of a *bona fide* or a nominal endowment is to see how did the founder treat this property, or how have his descendants treated it; has the income of the endowed lands been continually applied to the object of dedication." The principles have been followed in series of cases: see *Bikani Mia* v. *Shuk Lal Poddar* (15), *Madhab Chandra Bara* v. *Sarat Kumari Debi* (16) and *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (12). These principles cannot be disputed, and have not been disputed on behalf of the respondents. They, however, rely upon some instances where certain properties have been dealt with as secular, to show that there was no absolute *debutter*. But as observed by the Judicial Committee in the case of *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (17), "a former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated to the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *shebait*. The Court could not with any propriety say, we will decline to protect the property and leave it further exposed to loss, and decline to make a declaration that it is trust property, merely, because they would not trust the plaintiff with its administration."

It is contended, however, on behalf of the respondents that the above principle applies only to cases where there is no dispute as to the dedication, *i. e.*, where the dedication is clearly proved or admitted, and has no application to cases where the fact of the dedication has to be inferred from the treatment of the property by the family, and that in such cases, specific instances of treatment of properties as secular by the members of the family cannot be explained away as abuses. The question whether instances of personal appropriation are merely evidence of breaches of trust or are evidence of there being no endowment, is sometimes a difficult one, but it cannot be affirmed that an endowment cannot be proved from treatment of the properties, merely because there was personal appropriations by the *shebaits* in some instances. We agree with the observation of Banerji and Gordon, JJ., in *Girijanund Datta Jha* v. *Saila Janund Datta Jha* (18), *viz.*, that "when the question to be determined is whether certain property is trust property, or whether it belongs to the alleged trustee in his own right, instances of the appropriation of such preperty by the alleged trustee to his own use, if they are numerous and extend far back into the past in a continuous series, will be good evidence of his right; but if the instances are only recent or are few and far between, they are not likely to be of much value, and may be treated merely as instances of abuse of trust." Each case must depend upon its own circumstances.

We have dealt with the instances relied upon by the Court below, or the respondents before us, to show that some of the properties have been treated as secular. They may be summed up as follows:—

(1) By the partition deed dated 20th September, 1872, a *mokarrari* tenancy was created in favour of the sons of Peary Lal (Chandra Kumar and Jadu Nath) in respect of holdings Nos. 30 and 31 which were acquired by Peary Lal and Moni Mohun as *shebaits* of the deities in 1852. The partition took place 20 years afterwards, and as a result of arbitration and by way of amicable settlement (as foundation of a building has already been dug) a permanent tenancy right was created therein, but recognizing the title of the deities and the land was to be held on payment of rent.

(2) By the same partition plots Nos. 20 and 21-C were allotted to the sons of Moni Mohun. A portion of plots Nos 20 and 21-C were, as we have seen, created *debutter* for the first time on that occasion and they

(11) 12 B. 247; 12 Ind. Jur. 387; 6 Ind. Dec. (N. S.) 650.
(12) 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C).
(13) 72 Ind. Cas. 1026; 36 C. L. J. 478 at p. 480; (1923) A. I. R. (C.) 60.
(14) 3 W. R. 142.
(15) 20 C. 116 at p. 204; 10 Ind. Dec. (N. S.) 79.
(16) 6 Ind. Cas. 26; 15 C. W. N. 126 at p. 131.
(17) 14 M. I. A. 289 at p. 306; 17 W. R. 41 at p. 44; 10 B. L. R. 19; 2 Suth. P. C. J. 512, 2 Sar. P. C. J. 23; 20 E. R. 795.
(18) 23 C. 645 at p. 659; 12 Ind. Dec. (N. S.) 429.

were to be held on payment of rent to the deities. Only a portion of plot No. 20 was created *debutter* and the several instances of transfer (by the deeds Exs. 8, I and K) relied upon by the Court below related to the secular portion of plot No. 20 and, therefore, does not affect the *debutter* portion.

(3) It was the tenancy right in plots Nos. 30 and 31 which formed the subject-matter of the further partition between the two brothers Chandra Kumar and Jadu Nath on the 20th September, 1872.

(4) Holding No. 40-A acquired by Peary Lal and Moni Mohun as *shebaits* was allotted to Jadu Nath, but that land appears to have been reserved for "Basanti Rash Jatra" of the deity and does not appear to have been partitioned, at any rate it is not clear that it was.

(5) In the partition of 1897 plot No. 24-B does not appear to have been actually partitioned, at any rate the materials are not clear to show that it was so.

(6) The partition of 1909 related to the secular portion of holding No. 78-1 and does not affect the *debutter* portion which was not partitioned. So far, therefore, as the partitions are concerned the only instance is the creation of a permanent tenancy right in the two holdings Nos. 30 and 31, the cases relating to 40-A and 24-B being at any rate doubtful.

With regard to the compensation awarded under the Land Acquisition Act there is no doubt that the *shebaits* appropriated the compensation awarded in the three land acquisition cases of 1886 in respect of lands which were held by them as *shebaits*. These no doubt were the instances where the *shebaits* treated the compensation money as if it was on account of secular properties. But this was about 30 years after the properties were acquired for the deities and the compensation money is not the subject of the suit. In the land acquisition cases of 1910 the compensation was awarded to the Mondals as *shebaits* and the money *has not been as yet withdrawn by any one*. Radha Benode attempted to withdraw his share, but he was not allowed to do so as the award was made in the name of the deities. The last acquisition cases were of the year 1917. The compensation has been withdrawn, but only after the previous Suit No. 206 of 1915 (which was brought for establishment of the title of the deities to the premises acquired) had decided that the properties were not *debutter* and the President of the Improvement Tribunal had held that the question whether the premises were *debutter* or not had been "finally disposed of" in the said suit. Some of the *shebaits* withdrew the compensation after the institution of the present suit and some of them profess to apply the interest of the compensation money to the *sheba* of the deities. In these circumstances acquisition cases of 1917 can hardly be relied upon as an instance of treatment of the property as secular.

As already stated, it is at any rate doubtful whether plots Nos. 24-B and 40-A were actually partitioned so that practically the only cases which can be relied upon as instances of treatment of properties as secular are the appropriation of the compensation money awarded in the land acquisition cases of 1886 and the creation of the *mokarrari* tenancy in two plots of lands (30 and 31) in 1872. The question is whether these instances are sufficient to establish that the remaining properties are not *debutter*. It is to be noted that the properties were acquired by Peary Lal and Moni Mohun. So long as they lived there is no instance of treatment of any of the properties otherwise than *debutter*. Twenty years afterwards a *mokarrari* tenancy was created in respect of two holdings under special circumstances by their descendants and thirty years afterwards they misappropriated the compensation money in respect of some of the *debutter* properties. But we think that the treatment of some properties by the descendants as secular does not show that the other properties (if they have been applied all along to the service of the deities) are also secular.

Considerable reliance is placed on behalf of the respondents upon the case of *Konwar Doorganath Roy* v. *Ram Chander Sen* (19), in support of the proposition that the mere fact that the rents of the particular property have been applied for a considerable time to the worship of an idol is not sufficient proof that the property is *bebutter*, or to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship, and that very strong and clear evidence of such an endow-

(19) 2 C. 341; 4 I. A. 52; 3 Sar. P. C. J. 631; 1 Ind. Dec. (N. S.) 508 (P. C.).

ment ought to exist. But in that case the evidence that the rents of a *mahal* (Gopeejan), were applied to the worship of the idol was "extremely vague and extremely loose." The Judicial Committee observed (at page 319*):—"But supposing it to be taken that the rents of this *mahal* were applied during the period that the witnesses speak of to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to show that an endowment was made other than that *robakari* to which reference has already been made."

"Besides the weakness of the proof of endowment on the part of the plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case."

The mere fact that the rents of a particular property are applied for the worship of the deity for a long period may not be sufficient to establish that the property is *debutter*, because the worship of family deities may be and sometimes is carried on with the income of a specified property belonging to the family. That by itself may not be sufficient to establish the absolute *debutter* character of the property. But that such fact may in certain circumstances have an important bearing in determining whether the property is *debutter* would appear from the passage itself quoted above. Their Lordships observed: "There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears the rents may have gone into the general body of the accounts relating to the estates of this family." In the case of *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (12), their Lordships after referring to the finding that the proceeds of the property "have all along been spent for the maintenance of the *sheba* of the said idol," observed that "the mere fact of the proceeds of any land being used for the support of any idol may not be proof that those lands formed an endowment for the purpose [*Muddun Lal* v. *Komul Bibee* (10)] but it is a fact that may well be taken into consideration when, as in this case, the intention of the founder has to be gathered from an ancient document expressed, to say the least, in ambiguous language."

In the present case, as stated above, the deities were established in temples about 70 years ago, and there are cooksheds, *nahabut-khana* and out-offices for the *debutter* staff (*gomoshta* and priests, etc.) all enclosed within a big compound which is separate from the residences of the *shebaits*. Admittedly the rents are separately collected in the *debutter cutchery* located in the temple compound by a separate staff while the rent of the secular properties belonging to the family are collected by the agents of each co-sharer (or set of co-sharers) separately. The accounts and collection of the *debutter* estate are entirely separate; the receipts for rents of the *debutter* estate are granted, in the names of *shebaits*, by the collecting agents of that estate, and litigation in connection with the *debutter* properties is carried on by the *shebaits* as such. Admittedly the rents of the *debutter* estate have all along been and are still being applied for the worship of the deities, and none of the co-sharers ever took any portion of the rents for his own use. We have discussed the evidence, and it would appear that some properties were acquired expressly for *deb sheba*. *Amalnamas* were taken in some cases by Peary Lal and Moni Mohun, the founders, as *shebaits* of the deity and there are admissions of their successors in some of the documents with respect to certain properties that they were dedicated to the deity. We have not come across any case in which properties treated in this way for such a long period have been held to be secular, merely because with respect to a few of the properties the descendants of the founder have treated them to be secular.

Reference was made on behalf of the respondents to the cases of *Maharanee Brojisoondery Debea* v. *RaneeLuchmee Koon-*

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wari (20) and *Budh Singh Dudhuria* v. *Niradbaran Roy* (21), in support of the contention that the taking of a property in the name of a deity does not make it *debutter*, and that evidence of an endowment must be produced by those who allege that the property is inalienably tied up. In the first case the Maharajah, no doubt, took the conveyance in the name of the deity, himself as *shebait*, but he dealt with the property as his own. There were no priests appointed, there was no turn of worship and there was "nothing stated in any way to show that the Maharajah intended that the idol should be kept up for the benefit of his heirs in perpetuity; and before it can be established the lands have been endowed in perpetuity, so that they can never be sold and must be tied in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Maharajah appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol as if it were his own property. There is no evidence at all of any of the essentials of an endowment in favour of the idol." It appears to have been a case of acquiring a property in the *benami* of the deity. The Maharajah acquired it ostensibly in the name of the deity, and then mortgaged it, his widow borrowed money by way of conditional sale to pay off the mortgage executed by him, the conditional vendees foreclosed the estate against the widow, and the suit to recover the property was brought 47 years afterwards.

The second case was that of an alleged charitable trust. It was held that the documents were ambiguous, there was nothing to show that the grantee of the property was to hold as trustee, while, on the other hand, there were words which might be taken to indicate that the grantor contemplated that the grantee should, out of his abundance, be charitable to wayfarers and travellers:—"The plaintiff has not shown that for a long series of years the property has been treated as trust property, or that it has never been treated by the grantee as his own. It has not been shown, as it might have been, if it was a trust property, that separate accounts were kept of the *debutter mahal*, and that the income of these *mahals* was always expended for the purposes of the trust."

Reference was also made to a passage in the judgment of the Judicial Committee in *Konwar Doorganath Roy* v. *Ram Chander Sen* (19) cited above, where at page 347* their Lordships observed:—"Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it, but in the case of a family idol, the consensus of the whole family might give the estate another direction." In the case of *Gobinda Kumar Roy* v. *Debendra Kumar Roy* (22), Rampini and Sharfuddin, JJ., following the above *dictum*, held that properties dedicated to a family idol may be converted into secular property by the consensus of the family. Where there is a consensus of all the members of the family there is no one to object to the diversion of the endowment to secular uses, but the question whether, in a case of an absolute *debutter*, where the property is absolutely vested in deity, the successors of the members of the family, who give the estate another direction, may not call in question the diversion of the estate, did not arise nor was considered by the Judicial Committee. In fact no question of "consensus of the whole family" arose in *Konwar Doorganath's case* (19), as their Lordships observed in the very next sentence:—

"No question, however, of that kind arises in the present case." It is to be observed that there is no suggestion that in the present case, properties were acquired in the *benami* of the deities by the founders for the benefit of the family, or to defraud any creditors. It is also to be observed that the question in the cases cited above arose with reference to the particular property which was dealt with by the founder or his heirs as personal property. In the present case the question arises with reference to properties which have not been dealt with as secular. The compensation money awarded in the land acquisition cases of 1886 were misappropriated by the *shebaits* evidently by the consensus of all the members of the family, and the *mokarrari* tenancy in two of the plots also appear to have been created by common consent. The said compensation money has not been

(20) 20 W. R. 95 at p. 96; 15 B. L. R. 176 Note; 4 Sar. P. C. J. 810 (P. C.).

(21) 2 C. L. J. 431 at p. 435.

(22) 12 C. W. N. 98.

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claimed in the suit, and we do not think that all the properties claimed in the suit must be treated as secular merely because some other properties were treated in the past as secular by the *shebaits*. We are of opinion that these instances should be treated as abuse of trust on the part of the *shebaits*, and do not affect the character of the remaining properties if they have all along been treated as *debutter*.

It is contended on behalf of the respondents that some indications of *debutter* are wanting in this case. It is urged that there are no turns of worship, and it does not appear that any *pujari* was originally appointed. There is no evidence that any *pujari* was originally appointed when the deities were consecrated about 70 years ago, but it must have been, because the parties being *sudras* the *puja* could not have been performed without a *pujari*. Provision for turns of worship does not seem to be necessary in the present case because there are priests appointed, and there is separate establishment for the *debutter* estate located on the *thakurbati* for managing the *deb sheba*. The *shebaits* acted jointly whenever occasion arose for any joint action being taken by themselves which could not be done by *debutter* agents, such as bringing suits for rent, until recently, when Radha Binode refused to do so and denied the *debutter* character of the properties.

The last question is whether all the properties in suit are *debutter*. Properties Nos. 1, 13, 17, 18 and 26 are covered by the documents by which they were either expressly acquired for the deities or affirmed their *debutter* character.

The learned Pleader for the appellant has placed before us certain other *amalnamas*.

Plot No. 38 consisting of 3 *bighas* 12 *cottas* 2 *chitaks* bearing a rent of Rs. 5-1-0 is covered by *amalnama* dated the 14th April, 1853, granted to Peary Lal and Moni Mohun Mondal *shebaits* of Gopal Jew Thakur. With respect to holding No. 6 there is an *amalnama* dated the 13th September 1852 (Ex. 9) granted to Gopal Jew Thakur's *shebaits* Peary Lal and Moni Mohun Mondal, area 17 *cottas* 10 *chitaks* at a rent of 15 annas and three pies. See also *kabuliyat* of the same date [Ex. 25 (*g*)], and rent receipt dated 28th June 1893 granted to Gopal Jew Thakur's *shebaits*, Banke Behari Mondals and others (Ex. 16*z*2). Item No. 21 in the list of documents filed in Suit No. 206 of 1915 shows that "certified copy of name registration" in holding No. 6 under Permanent Settlement was filed in the suit. Holding No. 37, consisting of 6 *bighas* 4 *cottas* 16 *chitaks*, rent Rs. 9-8-3, is covered by *amalnama* dated the 27th April 1852 granted to Gopal Jew Thakur's *shebaits* Peary Lall and Moni Mohun Mondal, the *kabuliyat* of the same date (Ex. 25*a*) and the rent receipts for 1892, 1893, 1901 and 1903 (Exs. 16*z*2, 16*z*3, 16-*o*, 16*v*, proved by Hem Sarkar) granted to owner "Gopal Jew Thakur's *shebaits* Banke Behari Lall Mondal and others.'" Item No. 22 in the list of documents filed in Suit No. 206 of 1915 shows that "certified copy of name registration in holding No. 37 under Permanent Settlement" was filed in that suit.

It is contended on behalf of the respondents that holdings Nos. 38, 6 and 33 had not been claimed in the suit though they are covered by *amalnamas*. The schedule to the plaint, however, does not give the numbers of *holdings* of all the properties claimed. Some are described by holding numbers, others by Municipal premises numbers. It does not appear to which of the properties (if any) mentioned in the schedule of the plaint they relate.

Then there are a large number of *kabuliyats* executed by tenants in favour of the *shebaits* of the deities, and rent receipts granted by them in respect of some holdings. For instance, Ex. 18 (4) *kabuliyat* dated the 30th April 1875, was executed by a tenant in favour of Gopal Jew Thakur's *shebait* in respect of 4 *cottas* 10 *chitaks* 4½ *gandas* of land out of the *lakheraj* land "dedicated for the *sheba* of Sri Sri Iswar Debatas established by our ancestors." There are 10 such registered *kabuliyats* containing similar description between the years 1890 and 1911 in favour of the *shebaits* (See Ex. 18 series). Then there are a large number of receipts by the *shebaits* to the tenants in respect of various parcels of lands (See Ex. 20 series). For instance Ex. 20-J. described the grantors as "Sri Sri Iswar Jew's *shebaits* Chandra Kumar Mondal and Nil Madhab Mondal." The names of other Mondals as *shebaits* occur in other receipts. In the rent receipts Ex. 19 series the name of the defendant Radha Binode appears along with those of other Mondals, and the property is described as "*mahal debutter*." There are also a large number of rent receipts granted by the Collectorate to the *shebaits*. For instance Ex. 16 (27) dated the 23rd June 1892 describes the

"owner" as Sri Sri Gopal Jew Thakur's *shebaits* Banke Behari Lal Mondal and others (rent Rs. 9-8 3) which relates to holding No 37 consisting of 6 *bighas* 4 *catta* 10 *chitaks* of land covered by *amalnamas* Ex. 10. These receipts cover a period of 27 years (from 1892 to 1918). Then there are rent decrees obtained by the Mondals including the defendant Radha Binode as *shebaits* of Gopal Jew Thakur against tenants [see Ex. 32 (*b*)] in the years 1904 and 1906.

It appears from the evidence of both sides that a large number of documents were stolen from the *debutter cutchery* (office) Hem Sarkar, the *gomashta* of the *debutter* estate, says "on return from home I found that all documents have been stolen from my *cutchery* within the temple" and that information was lodged with the Police. His statements are supported by Kishori Lall Mondal (one of the *shebaits*) who further stated that everybody there said that this theft had been committed by defendant No. 1. Every body suspected the defendant No. 1 at the time. I did not suspect him much, Radha Benode the defendant No. 1 says "eight or ten days after the theft of documents from the office within the compound of the temple I heard about it. The theft was not committed by me. I have no hand in it." However, that may be, the evidence shows that documents were stolen from the *debutter* offices. It also appears that a large number of documents filed in Suit No. 206 of 1915 were missing from the District Judge's Court. Hem Sarkar says "In the previous suit all the collection papers were filed by me in this Court. They were missing from the District Judge's Court. Babu Debendra Bose applied for return of these collection papers. They could not be found. A list of documents was filed in the case."

Debendra Bose, Pleader, has been examined and he says that he applied for the return of documents in April, 1919 and that the record *mohurrir* showed him on a reference to the record that a large number of documents were missing and that on making enquiries he found the box empty in the office of the Additional District Judge. Not a single document could be found in the box and that all collection parpers were in the box.

A copy of the list of the documents filed in Suit No. 206 of 1915 has been produced this case and marked Ex. No. 17. We have referred to some of the items in the list.

As stated above properties Nos. 1, 13, 17, 18, and 25 are identified with documents showing their *debutter* character, but the mass of *kabuliyats* and rent receipts, rent decrees and *amalnamas* have not been identified with the other properties claimed. But all the properties claimed are under the management of *debutter* staff, so that all the properties are separately managed and the income thereof appropriated to *deb sheba*. Hem Sarkar the *gomashta* says that he has been in the service of the *debutter* estate for the last 20 or 22 years and before him his elder brother made the collections. "I take my salary from the *debutter* estate. There are servants, priests, and *durwans* in the temple. They are also paid from the usufruct of the *debutter* estate. The temples are repaired with the said usufruct of the *debutter* estate. I pay rents and taxes for the properties. In the previous suit all the collection papers were filed by me in this Court. They were missing from the District Judge's Court.....I know all the *debutter* properties. There were rent suits regarding the *debutter* properties, *shebaits* used to inspect the collection papers and *jama-kharch* kept by me Defendant No. 1 and others signed them after inspecting them. In the previous suit I filed collection papers signed by the defendant No. 1... Court of Wards took charge of the estate of defendant No. 1 and Gopi Krishna Mondal in 1280 or 1282. Court of Wards did not take charge of the *debutter* properties. I did not make any payment to the Court of Wards. I do not manage their secular properties. Defendant No. 1 admitted those properties to be *debutter*. Defendant No. 1 now denies these properties to be *debutter*. Other co-sharers still admit the properties to be *debutter*.....I say that the properties are *debutter* as all along collections have been made in the name of the idol and as the usufruct of the properties has been spent for the worship of the idol."

Kishori Lall Mondal (one of the *shebaits*), aged 60 years, says thut the *sheba* is performed with the usufruct from *debutter* properties. The disputed lands are *debutter* properties.....The entire income of the *debutter* estate is spent for *deb sheba*. Gopal Chandra Chakravarty says he was the priest in the temple from 1279

to 12.5 and his son has been priest for the last 20 years. We have already referred to the evidence of Radha Benode the defendant No. 1. He says he signed plaints in suit for rents against tenants. "Hem Sarkar manages the disputed properties for all the co-sharers...Hem Sarkar sometimes showed me the collection papers and *jama-kharch*. I cannot re-collect if I signed them...Hem Sarkar realized 16 annas-share of the rents regarding the disputed properties...I never took any share of the usufruct of the disputed properties. *Puja* and *parban* have been performed there. I gave evidence in Suit No. 206. I said in the previous case "the worship is carried on now as before." I also said "there is no neglect or defect in the same." The worship is still carried on in the temple.....my father was a *shebait* of the idols as I am one of the *shebaits*. My father was a *shebait* of the *thakur*. My grandfather was also a *shebait*, After my father's death the estate was taken charge of by the Court of Wards. I cannot say if the Court of Wards took charge of the disputed properties. I did not enquire if Court of Wards took charge of the disputed properties."

It will be seen from the evidence on both the sides that the disputed properties have all along been treated as *debutter*, and the income applied to the *deb sheba*. The parties have been *shebaits* for generations. Hem Sarkar has been collecting rents of the disputed properties as *debutter* for at least 20 years and before him his brother used to make the collections. The Court of Wards took charge of the personal properties of Radha Binode in 1875, but not of the disputed properties. That was about half a century ago. The evidence of Kishori Mondal, aged 60 years, and Radha Binode, aged 57 years, shows that they never took the usufruct of the properties in dispute. Although, therefore, the properties (other than five) have not been connected with the documentary evidence, there is no doubt that they have all along been treated as *debutter*. We have the positive evidence of Hem Sarkar of such treatment for at least 22 years and there is no suggestion that the income of the properties in suit has at any time been applied for purposes other than *deb sheba*. There is also no doubt of the identity of the properties, because admittedly the income of all the properties have always been appropriated to *deb sheba*. It is true that the income of two properties not *debutter*, *viz.*, the rents realized from Sir Asutosh Mookerjee and Babu Dwarka Nath Chakravarti are applied for *deb sheba*. Hem Sarkar says that he appropriated the said rents for *deb sheba*, as the usufruct of the *debutter* properties are not sufficient to cover the expenditure of the *deb sheba*, and that the Mondals pay something from their funds, when necessary, to meet the expenses of the *deb sheba*. The two properties, however, are not claimed as *debutter*. It is said on behalf of the respondent that the properties applied to the *deb sheba* have varied from time to time. But, excepting a portion of holdings Nos. 20 and 21-C which were made *debutter* by the partition deed of 1872 (*i. e.*, about half a century ago), it does not appear that any other property was added as *debutter* since the time of the founders Peary Lall and Moni Mohun.

So far as the compensation money awarded under the land acquisition case of 1910, *viz.*, Rs. 4772-12-0 (Item No. 16 to the schedule to the plaint) concerned, it is still in deposit in the Collectorate, and Radha Binode says it was not allowed to be withdrawn because the award was in favour of the deities. That money can be withdrawn by the *shebaits* if a declaration be made that it is *debutter* property. But the compensation money awarded in respect of 99 and 103, Russa Road, *viz.*, Rs. 8,297 and Rs. 3,6,711-6-7 (Items Nos. 15 and 14 of the schedule to the plaint) have been withdrawn by each co-sharer according to his share. There is no prayer for recovery of the sum withdrawn by each from him. There being no prayer for consequential relief, wo do not see how we can make any declaration with respect to the said compensation, which, moreover, will be infructuous.

In the circumstances it is declared that all the properties mentioned in the schedule to the plaint except the Items Nos. 14 and 15 are *debutter* properties. Let the decree be drawn up accordingly. We direct that the parties do bear their own costs in both Courts.

The Government securities put in by Narendra Nath Mondal as security for costs of this appeal will be returned to him.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.
FULL BENCH.

REFERENCE No. 3 OF 1924.

May 6, 1925.

Present:—Justice Sir Hugh Walmsley, KT., Justice Sir Babington Newbould, KT., Mr. Justice C. C. Ghose, Mr. Justice Suhrawardy and Mr. Justice B. B. Ghose.

BECHARAM CHOUDHURI AND OTHERS—DEFENDANTS—APPELLANTS

versus

PURAN CHANDRA CHATTERJI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 109—Civil Procedure Code (Act V of 1908), s. 98, O. XXIII, r. 1—Letters Patent (Cal.), cl. 36—Application for settlement of rent—Withdrawal of application with leave to bring fresh suit, effect of—Suit, whether maintainable—Appeal—Difference of opinion—Procedure.

Held, by the majority (Suhrawardy, J. dissenting), that when an application under s. 105 of the Bengal Tenancy Act for the settlement of rent is withdrawn with liberty to bring a fresh suit, a suit for enhancement of rent is barred by the provisions of s. 109 of the Bengal Tenancy Act. [p. 642, col. 1.]

Per *Suhrawardy, J.*—The intention of the Legislature under s. 98 of the C. P. C. is to uphold a decision under appeal or review, where the Judges are equally divided in opinion as to its correctness thus giving effect to the concurrent view of two Judges in preference to that of one Judge though the latter may be the Senior Judge composing the Bench. [p. 641, col. 1.]

Per *Walmsley, J.*—In case of a difference of opinion between the Judges of a Division Court hearing an appeal the opinion of the Senior Judge prevails under cl. 36 of the Letters Patent of the Calcutta High Court. [p. 638, col. 1.]

Reference, in Letters Patent Appeals Nos. 2 and 3 of 1924 in Appeals from Orders Nos. 19 and 20 of 1923, against the orders of the Subordinate Judge, Third Court, 24-Pergannahs, dated the 7th August 1922, reversing those of the Munsif, First Court, at Baraset, dated the 8th October 1920.

JUDGMENT OF THE DIVISION BENCH.

Walmsley, J.—[*November* 22, 1924].—These appeals are preferred by the defendants and they arise from suits brought by the landlord for rent and for enhancement of the existing rents. The landlord's claim was made under s. 7 of the Bengal Tenancy Act.

In the Record of Rights the tenures were described as permanent, but *gair mokurrari.* The defendants asserted that the latter part of the entry was erroneous and that their rents were really fixed.

After the publication of the Record of Rights the landlord presented an application under s. 105 of the Tenancy Act for the settlement of a fair rent on these tenures: but he withdrew the application and obtained from the Settlement Officer an order permitting him to institute civil suits for the same purpose.

Both the Courts below have held that s. 109 of the Tenancy Act does not bar the suits, on the ground that the application under s. 105 was withdrawn with permission to bring civil suits. On the merits, however, they disagreed, in so far as the claim for enhancement is concerned. The First Court found that the defendants were entitled to a presumption under s. 50 of the Act, while the Appellate Court held that the defendants could not claim the benefit of that presumption. The result was that the latter Court remanded the suits to the First Court for the determination of fair rents. It is against these orders of remand that the appeals are directed.

The principal argument on behalf of the defendants is that s. 109 of the Tenancy Act does bar the suits. Two other arguments were put forward, namely, that the status of the defendants was that of *raiyats* and that in Suit No. 2 at any rate the evidence as to uniformity of rent is conclusive; but on examination of the record it appears that one of these arguments was not set out in the memorandum of appeal, and that the other is disposed of by the Judge's acceptance of the landlord's *jama wasil baki* papers.

On the principal question, reliance is placed by the landlord on the case of *Saraj Kumar Acharji* v. *Umed Ali* (1). That case, however, is in opposition to other decisions of an earlier and a later date. There is the case of *Abeda Khatun* v. *Majubali Chowdhury* (2), followed by the case of *Dino Nath Sikdar* v. *Anadi Krishna Dutt* (3) in which the judgment was delivered by one of the Judges who decided *Abeda Khatun's case* (2). This later case is important because it shows that in the earlier case no emphasis was placed upon the absence of permission to withdraw, the point upon which *Abeda Khatun's case* (2), was distinguished in *Saraj Kumar Acharji's case* (1). Again there is the case of *Susi Kanta Acharjya* v. *Salim Sheikh* (4). I think, therefore, that

(1) 63 Ind. Cas. 954; 35 C. L. J. 19; 25 C. W. N. 1022; (1922) A. I. R. (C.) 251.

(2) 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304.

(3) 83 Ind. Cas. 873; 28 C. W. N. 703; (1924) A. I. R. 854.

(4) 74 Ind. Cas. 1001; 50 C. 626; 27 C. W. N. 987; (1923) A. I. R. (C. 624.

the current of authority is against the view taken by the lower Appellate Court. So far as I am myself concerned, morever, I am in the position that I was a party to the judgments in the case of *Dino Nath Sikdar* v. *Anadi Krishua Dutt* (3) and *Sasi Kanta Acharjya* v. *Salim Sheikh* (4), and I have not heard any argument which would induce me to change my views.

It is said that we ought to refer the case to a Full Bench, but I venture to think that the decisions to which I have referred make that course unnecessary.

In my opinion the appeals should be allowed, and the order of remand set aside.

My learned brother is of opinion that the appeals should be dismissed with costs. According to s. 36 of the Letters Patent as explained in the case of *Bhaidas Shivdas* v. *Bai Gulab* (5), my opinion prevails with the result that the appeals are allowed with costs and the plaintiff's suits for enhancement of rent are dismissed. The hearing fee in this Court is assessed at one gold *mohur* in each case.

Suhrawardy, J.—[*November* 22, 1923.]—I adhere to the view adopted in the case of *Saraj Kumar Acharji* v. *Umed Ali* (1), to which decision I was a party. The matter was further considered on review from that decision and the same view was upheld. It is not necessary to repeat the reason on which our opinion was based.

I would, therefore, dismiss these appeals with costs.

Walmsley, J.—[*January* 8, 1924].—After we had delivered our judgments and intimated that, under s. 36 of Letters Patent, the opinion of the Senior Judge would prevail, we were asked to hear arguments on this last point. It was urged that the decision which I have mentioned related only to appeals from the Original Side of this Court. It is true that the decision was in such an appeal, but I can find nothing in the wording of the judgment to indicate that the rule is applicable to one kind of appeal and not to another.

My learned brother has examined the authorities with elaborate care, and come to a different conclusion. It is only on account of the clearness, as I think, of the decision by their Lordships that I venture to differ.

We cannot continue to differ *ad infinitum* as to the effect of our difference, so with my learned brother's assent, I direct that my opinion shall prevail, and that the appeals shall be allowed.

Suhrawardy, J.—[*Januray* 8, 1924].—We have differed as to the order to be passed in this case, my learned brother being for allowing the appeal while in my view it ought to be dismissed. Apparently and in accordance with the unvarying practice of this Court as well as all the other High Courts of India, this appeal should be dismissed under s. 98 C. P. C., but it is argued, on the authority of the recent judgment of the Judicial Committee in the case of *Bhaidas Shivdas* v. *Bai Gulab* (5), that this appeal should be decreed in accordance with the judgment of the Senior Judge under cl. 36 of the Letters Patent of 1865 governing this High Court.

Before considering the Privy Council judgment above referred to, it will be profitable to try and find the law as is to be found in the Letters Patent and the C. P. C.

Clause 15 of the Charter provides for appeals within the High Court *viz.*, from the judgment of a Judge of the High Court to a Bench of the same Court. Clause 16 invests the High Court with appellate jurisdiction over the Provincial Courts. Clause 36 regulates the procedure to be followed in the case, among others, of difference of opinion between two Judges of the Court forming a Division Bench in the exercise of either appellate or original jurisdiction. If this provision stood alone the appellant's contention must prevail but cl. 44 makes all the provisions of the Letters Patent subject to the legislative power of the Indian Legislature which was vested with similar authority by s. 22 of the Indian Councils Act, 1861. It is, therefore, necessary to determine if the Legislature has by any subsequent enactment modified or superseded the provisions of cl. 36 of the Letters Patent.

Section 96 of the C. P. C., allows appeal not only from one Provincial Court to another but from a Provincial Court to the High Court which derives this jurisdiction under cl. 16 of the Charter. It has been held that s. 96, C. P. C., concerns itself with cases not covered by cl. 15 of the Charter but in the application of the jurisdiction

(5) 60 Ind. Cas. 822; 48 I. A. 181; 25 C. W. N. 605; 45 B. 718; 40 M. L. J. 519; 33 C. L. J 488; 19 A. L. J. 409; 23 Bom. L. R. 623; 2 U. P. L. R. (P. C.) 22; 14 L. W. 7; (1921) M. W. N. 408; 29 M. L. T. 350; 30 M. L. T. 149 (P. C.).

vested in the High Court by cl. 16: *Debendra Nath Das* v. *Bibudhendra Mansingh* (6). If s 96, C. P. C., refers to the jurisdiction vested in the High Court by cl. 16 of the Letters Patent, s. 98 which is in the same Part as s. 96 and a corollary to it *a fortiori* applies to such appeals. Section 117 of the C. P. C., makes Part VII of the Code which includes s. 98 applicable to the High Court and s. 120 which excludes the applicability of certain sections to the High Court does not mention s. 98 as one of them. It is, therefore, legitimate to suppose that to the extent to which s. 98, C. P. C., is inconsistent with cl. 36 of the Letters Patent, the former has, by virtue of the power conferred on the Indian Legislture by cl. 44 of the Letters Patent superseded or modified the latter. No doubt s. 4, C. P. C. saves provisions of other laws, in the absence of specific provision in the Code abrogating or superseding them. Such specific provision, so far as appeals to which the Code applies are concerned, is to be found in s. 98 read with ss. 117 and 120 of the Code. This view has been consistently held by all the High Courts in India and formed subject of consideration by the Full Benches of Calcutta, Bombay and Allahabad: *Gossami Sri Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* (7), *Bhuta Jayatsing* v. *Lakadu Dhansing* (8) and *Husaini Begam* v. *Collector of Muzaffarnagar* (9). The Madras High Court has also adopted this view: *Narayanasami Reddi* v. *Osuru Reddi* (10). It is redundant to observe that this practice has been invariably and uniformly followed by all the High Courts since the provision as now embodied in s. 98, C. P. C., found its way into the law of procedure of the Civil Courts of the land. In almost every volume of the Law Reports, instances of the application of s. 98, C. P. C., are to be found. In the cases of *Ahmadi Begum* v. *Mahasy Tarak Nath Ghosh* (11) the question of procedure was considered by Jenkins, C. J., at page 424* and in *Krishen Dayal Gir* v. *Irshad Ali Khan* (12), Mookerjee, J., at page 538†, accepted the same view. I may quote a few instances in this Court to show that the practice has been uniform since the Full Bench decision of *Gossami Sri Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* (7) the authority of which has to some extent been weakened by *Bhaidas's case* (5) but has not been departed from even after the promulgation of the Privy Council judgment in that case: *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli* (13), *Lala Suraj Prosad* v. *Golab Chand* (14), *Asutosh Roy* v. *Harinarain Singh Deo* (15), *Ahmadi Begum* v. *Mahasy Tarak Nath Ghosh* (11), *Krishen Dayal Gir* v. *Irshad Ali Khan* (12), *Amrita Lal Roy* v. *Secretary of State for India* (16), *Ram Narain Singh* v. *Chhota Nagpur Banking Association* (17), *Chairman, Cossipore and Chitapore Municipality* v. *Corporation of Calcutta* (18), *Promotha Nath Pal Chowdhury* v. *Sonrao Dasi Chowdhurani* (19), *Anilabala Chowdhurani* v. *Direndra Nath Saha* (20), *Mohini Kanta Saha* v. *Preo Nath Neogy* (21), *Biman Chandra Dutta* v. *Promotha Nath Ghosh* (22) and *Udoy Kumar Das* v. *Katyani Debi* (23)

It is now necessary to consider the judgment of the Privy Council in *Bhaidas' case* (5). The suit out of which the appeal arose was tried on the Original Side of the Bombay High Court There was an appeal under cl. 15 of the Letters Patent and the Division Bench, composed of two Judges, which heard it, was divided in opinion, the Chief Justice being for allowing the appeal while the other learned Judge was for dismissing it. The Court apparently in view of the provisions of s. 98, C. P. C., dismissed the appeal. In this state of the facts, their Lordships of the Judicial Committee were of opinion, that s. 36 of the Letters Patent applied to the case and s. 98 of the Code. The essence of their Lordships' opinion is that in the appeal before them, s. 36 of the

(6) 33 Ind. Cas. 745; 43 C. 90 at p. 93.
(7) 10 C. 814; 5 Ind. Dec. (N. S.) 545.
(8) 50 Ind. Cas. 715; 43 B. 433; 21 Bom. L. R 157.
(9) 11 A. 176; A. W. N. (1889) 27; 13 Ind. Jur. 316; 6 Ind. Dec. (N. S.) 540.
(10) 25 M. 548.
(11) 21 Ind. Cas. 233; 18 C. L. J. 399; 17 C. W. N. 1173.
(12) 31 Ind. Cas. 965; 22 C. L. J. 525.

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(13) 20 C. 762; 10 Ind. Dec. (N. S.) 514.
(14) 28 C. 517; 5 C. W. N. 640.
(15) 3 C. L. J. 143.
(16) 46 Ind. Cas. 447; 35 C. L. J. 221; 22 C. W. N. 769; 28 C. L. J. 51.
(17) 36 Ind. Cas. 321; 43 C. 332.
(18) 54 Ind. Cas. 337; 46 C. 910; 23 C. W. N. 727.
(19) 58 Ind. Cas. 327; 47 C. 1108; 31 C L. J. 463; 24 C. W. N. 1011.
(20) 65 Ind. Cas. 57; 48 C. 577; 25 C. W. N. 178.
(21) 67 Ind. Cas. 381; 49 C. 661; 36 C. L. J. 309; (1922) A. I. R. (C.) 141.
(22) 68 Ind. Cas. 94; 49 C. 886; 36 C. L. J. 295; (1922) A. I. R. (C.) 157.
(23) 69 Ind. Cas. 126; 49 C. 948; 35 C. L. J. 92; (1922) A. I. R. (C.) 87.

Letters Patent should have been applied. Though that opinion was expressed in wide and unrestricted terms, it must be taken to be confined to the fact of the case before them. It has been repeatedly urged, to avoid abuse of application of precedents, to read a decision in conjunction with the facts of the case on which it is founded. The danger of regarding a decision based on a particular set of circumstances which were before the Judge's mind and formed the mould on which the proposition of law, however, broadly stated, was shaped cannot be overrated and the law on the matter has been authoritatively laid down in *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.* (24) and *Quinn* v. *Leathem* (25). The Judicial Committee were considering a case under the Letters Patent and it would, according to the accepted canons of application of precedents, be misconstruction of their decision to extend its authority to appeals under the C. P. C. which were not then under their Lordships' consideration. This is patent from the arguments of Counsel at the bar who cited authorities relating only to that particular class of appeals. This is also apparent from their Lordships remark that the proposition they were laying down was not novel in India. Had their Lordships intended that the view they were expressing was intended to qualify the interpretation put by the Indian High Courts on s. 98, C. P. C., they would have surely expressed themselves in quite a different language, for as I have observed, all the High Courts in India had been unanimous in construing s. 98, C. P. C. contrary to their Lordships' supposed opinion. Futhermore, their Lordships referred in support of their view, to three Indian cases the facts of which undoutedly invoked the operation of cl. 36 of the Letters Patent. No reference is made to the Full Bench decision of the High Courts in India holding s. 98, C. P. C., applicable to cases from the *mofussil* specially that of the Bombay High Court (from which the appeal in *Bhaidas'* [*case* (5) was taken to the Privy Council] passed shortly before. *Bhuta Jayatsing* v. *Lakadu Dhansing* (8) in which the learned Chief Justice has so ably and thoroughly discussed the question as to put it beyond cavil.

(24) (1914) A. C. 25 at p. 40; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

(25) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749.

Now, with regard to the cases on which reliance is placed by the Judicial Committee the cases from Allahabad and Madras were of appeals under cl. 15 of the Letters Patent. The reference to the Calcutta case, namely, the case of *Nundeeput Mahta* v. *Alexander Shaw Urquhart* (26) which was an appeal from the *mofussil* presents on the face of it some difficulty. But on closer examination it will be abundantly clear that the case supports the view pronounced by their Lordships while it does not militate against the view I am advocating. That case was decided in 1870. The C. P. C., then in force was Act VIII of 1859 which contained no provision in case of difference of opinion between the Judges hearing a case. This omission was supplied by the supplementary enactment of Act XXIII of 1861, s. 23 of which for the first time laid down the procedure similar to that in s. 98, C. P. C. That Act was passed before the High Court's Letters Patent of 1862 or 1865 and is headed as not to be applicable to Courts established by Royal Charter. After the establishment of the High Court, therefore, there was no provision governing such cases except s. 36 of the Letters Patent. Though Act XXIII of 1861 was made by the rules of the High Court framed under its general powers applicable to it, there was no enactment as contemplated by cl. 44 of the Letters Patent by the Indian Legislature modifying cl. 36. Norman, C. J., was, therefore, right in saying that the case before him was governed by cl. 36 of the Letters Patent. The provision contained in s. 23 of the Act XXIII of 1861 was included in the C. P. C., of 1877, carried over to the Code of 1882 and reproduced in s. 98 of the present Code. It is, therefore, clear that when *Nundeeput's case* (26) was decided, cl. 36 of the Letters Patent was the only provision of law in force even in cases coming from *mofassil*. This case, therefore, is no authority for the proposition that cl. 36 of the Letters Patent is still applicable to *mufassil* cases.

I may add that the right to prefer a second appeal to the High Court is granted by s. 100 of the C. P. C., and is also restricted in some cases by that Code, thus virtually qualifying the general appellate jurisdiction of the High Court over Provincial Courts conferred by cl. 16 of the

(26) 13 W. R. 209; 4 B. L. R. A. 181.

Letters Patent. Section 117 of the Code makes all the provisions relating to appeals as contained in the Code applicable to the High Court and s. 120 does not exclude this specific provision.

In this connection reference may be made to r. 6 of O. XLVII relating to reviews where similar procedure is laid down. It is evident that the intention of the Indian Legislature is to uphold a decision, under appeal or review, where the Judges are equally divided in opinion as to its correctness thus giving effect to the concurrent view of two Judges in preference to that of one Judge though the latter may be the Senior Judge composing the Bench.

For the reasons given above I am of opinion that under s. 98, C. P. C. these appeals ought to be dismissed.

Letters Patent Appeals came before Justice Sir N. R. Chatterjea, Kt., Justice Sir Ewart Greaves, Kt., and Mr. Justice Panton, and they referred the cases to the Full Bench by the following

ORDER OF REFERENCE.—[*December* 1, 1924].—One of the questions which arises in this appeal is whether s. 109 of the Bengal Tenancy Act operates as a bar to a suit for enhancement of rent by reason of a previous application under s. 105 having been withdrawn with liberty to bring a fresh suit. There is a conflict of decisions on the point. See *Saraj Kumar Acharji* v. *Umed Ali* (1) and *Abeda Khatun* v. *Majubali Chowdhury* (2) and *Dino Nath Sikdar* v. *Anadi Krishna Dutt* (3). We think the question should be referred to a Full Bench for decision and we accordingly refer the following question to the Full Bench. When an application under s. 105 of the Bengal Tenancy Act for settlement of rent is withdrawn with liberty to bring a fresh suit, whether a suit for enhancement of rent is barred by the provisions of s. 109 of the Bengal Tenancy Act. As the question arises in a second appeal (Miscellaneous) the whole appeal is referred to the Full Bench.

This order governs the connected Appeal No. 3 of 1924.

Babu *Shib Chandra Palit* (assisted by Babu *Sarasija Kanta Palit*), for the Appellants.

Babu *Rupendra Kumar Mitter* (with him Babu *Dharmadas Sett*), for the Respondents.

JUDGMENT OF THE FULL BENCH.

Walmsley, J.—[*May* 6, 1921].—The question referred is as follows:—"When an application under s. 105 of the Bengal Tenancy Act for settlement of rent is withdrawn with liberty to bring a fresh suit, whether a suit for enhancement of rent is barred by the provisions of s. 109 of the Bengal Tenancy Act."

There have been several conflicting decisions on the question but I do not think it would serve any useful purpose to discuss them or even to enumerate them. It is enough to say that one set of decisions favours the view that an application under s. 105 (or s. 106) of the Tenancy Act, if withdrawn by permission of the Court, is to be regarded as not having been made, while the other set proceeds on the footing that the making of an application under either of those sections, whatever be its fate afterwards, brings into operation the prohibition contained in s. 109 of the Tenancy Act.

The words of s. 109 are these: "Subject to the provisions of s. 109A a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, [suit instituted or proceedings taken under ss. 105 to 108 (both inclusive)."] The provisions of s. 109A have no bearing on the present matter.

The words 'subject of an application made' seem to me so clear as to admit of only one interpretation, and that is that once an application is made, the Civil Court cannot entertain an application or suit in respect of the same matter. It is of no consequence what happens to the application: it may be prosecuted to a conclusion, or abandoned, or dismissed for default, or withdrawn by leave of the Court or without the leave of the Court. It is the fact of the application being made, and not the manner of its disposal that has to be considered.

The view that the presiding officer can prevent the making of the application from producing the result by permitting its withdrawal, involves the necessity of adding a gloss to the words of the section, and offends against the principle that the words of a Statute must be understood in their plain and ordinary meaning.

In my opinion, therefore, it is the making of the application that brings into play the prohibition of s. 109, and the answer that

I would give to the reference is to that effect, namely, that if an application is made under s. 105 of the Bengal Tenancy Act, and subsequently withdrawn whether with or without the permission of the Court, a suit on the same subject-matter is barred by the provisions of s. 109 of the Tenancy Act; and as concerns the appeals which have given rise to the reference, I would allow them and dismiss the suits as not maintainable. The plaintiffs must pay the costs of the other side in all the Courts. The hearing fee in this Court for all the hearing is assessed at ten gold *mohurs* for the two appeals.

Newbould, J.—[*May* 6, 1925].—Iagree that the question referred to this Full Bench should be answered in the affirmative for the reasons given by my learned brother Walmsley, J. in the judgment which he has just delivered.

I was one of the Judges who held in the case of *Mohammed Ayejuddin Mia* v. *Prodyot Kumar Tagore* (27), that a suit lies to correct an entry in a finally published Record of Rights and that the fact that an application under s. 106 of the Bengal Tenancy Act was withdrawn does not bar the jurisdiction of the Civil Court to deal with the matter. In the judgment in that case no reasons are given for that decision. I have no doubt that the reason is that, at the time of hearing, the decisions of this Court were all one way. In the case of *Chiodith* v. *Tulsi Singh* (28), it had been held that an application under s. 105 which had been withdrawn must be treated as non-existent. That decision appears to have been followed without question until doubt was thrown on it by the judgment in the case of *Abeda Khatun* v. *Majubali Chowudhury* (2). This case was decided a short time before the hearing of the case of *Mohammed Ayejuddin Mia* v. *Prodyot Kumar Tagore* (27), and had not been reported. Had we been aware of that decision our judgment would certainly have contained some reference to the law on this point. The point is mentioned as subsidiary to the question whether a civil suit lies to correct an entry in the Record of Rights. It was contended on behalf of the appellant in that appeal that s. 106 of the Bengal Tenancy Act provided an exclusive remedy. After discussing the rulings on this point we decided it against the appellant without any further mention of the subsidiary question which is identical with the subject of the present Full Bench Reference. Now that I have considered this question more carefully and am no longer bound by the authority of previous decisions I have no doubt as to the meaning of s. 109 of the Bengal Tenancy Act. It clearly bars a suit for enhancement of rent in a Civil Court after an application has been made under s. 105 of the Bengal Tenancy Act for settlement of rent even though that application has been withdrawn with liberty to bring a fresh suit.

I also agree with my learned brother Walmsley, J. that the appeals should be allowed and the order of remand set aside.

C. C. Ghose, J.—[*May* 6, 1925].—The facts of the case giving rise to this Full Bench Reference are set out in the judgments of Mr. Justice Walmsley and Mr. Justice Suhrawardy dated the 22nd November, 1923, and it is, therefore, unnecessary for me to set out the same again. The learned Judges differed as to the proper construction of s. 109 of the Bengal Tenancy Act and thereupon there was an appeal under s. 15 of the Letters Patent. The learned Judges who heard the Letters Patent appeal were of opinion that having regard to the conflict of decisions on the question of the proper interpretation of s. 109 of the Bengal Tenancy Act, the following question should be referred to the Full Bench: "When an application under s. 105 of the Bengal Tenancy Act for settlement of rent is withdrawn with liberty to bring a fresh suit, whether a suit for enhancement of rent is barred by the provisions of s. 109 of the Bengal Tenancy Act." This Reference came on for hearing before us on the 27th April. There is no doubt that there has been a conflict of decisions on the question: [see the cases mentioned in the order of the referring Judges and the case of *Sasi Kanta Acharjya* v. *Salim Sheikh* (4).]

The question depends on the proper construction of s. 109 of the Bengal Tenancy Act which runs as follows:—

"Subject to the provisions of s. 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, [suit instituted or proceedings taken under ss. 105 to 108 (both inclusive)."]

Now, it is settled law that in construing

(27) 61 Ind. Cas. 503; 48 C. 359; 25 C. W. N. 13.
(28) 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 467.

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Jammu & Kashmir

the words of a Statute one must give to them their plain, grammatical, natural and ordinary meaning and, in my opinion, construing this section according to the rule indicated above, it would follow that once a matter is or has been the subject of an application made under s. 105 of the Bengal Tenancy Act a Civil Court cannot entertain an application or suit in respect of the same matter. In my view, it is wholly immaterial for the purposes of construction of s. 109 whether the application referred to above has been withdrawn with or without the leave of the Revenue Officer under s. 105 or whether the application has been disposed of on its merits by the Revenue Officer. I, therefore, agree with Mr. Justice Walmsley in the answer which he proposes to give to the question referred to the Full Bench and in the order made by him.

Suhrawardy, J.—[*May* 6, 1925].—I have the misfortune to differ from my learned brothers in the answer proposed to be given to the Reference.

The sole question before us is, where an application under ss. 105 to 108, Bengal Tenancy Act, is made before the Revenue Officer and withdrawn with leave to bring a fresh 'suit', can the matter in dispute form the subject of a civil suit. I am not concerned with cases of withdrawal without leave or dismissal for non-prosecution of such application. I shall, therefore, confine myself to the consideration of the law as applicable to the facts of the present suit.

By giving liberty to bring a fresh 'suit' I take it that the Revenue Officer meant to permit the applicant to present a fresh application before him. What is the effect of such an order? When a suit is allowed to be withdrawn with leave to bring a fresh suit under O. XXIII, C. P. C., it should be regarded as never brought. It is available for no purpose. It does not save or give fresh start to limitation; nor does it afford a fresh cause of action.

Now, s. 109, Bengal Tenancy Act, shows, as it has been held, that the aggrieved party has under the law two alternative remedies. He can apply under ss. 105 to 108 before the Revenue Officer or he can bring a civil suit for the same purpose. By obtaining leave to make a fresh application, he has lost none of these remedies. He can, therefore, if he does not exercise his right to apply to the Revenue Officer, have recourse to the Civil Court.

The policy of the law seems to be that a party should not have two co-existing rights; he may either apply to the Revenue Officer or bring a civil suit. Where both the rights exist and the former right is not exercised, there is no reason why the latter right should be denied to him. In my opinion the answer to the Reference should be in the negative. The second appeal should accordingly be dismissed.

B. B. Ghose, J.—[*May* 6, 1925].—I agree with my learned brother Mr. Justice Walmsley, that the answer to the question referred to us should be in the affirmative. I had expressed my opinion previously in the case of *Sasi Kanta Acharjya* v. *Salim Shaikh* (4), that the plain meaning of the words in s. 109 of the Bengal Tenancy Act should be given effect to, and the argument addressed to us has not convinced me that I should alter my opinion and that the ordinary rule of construction of a Statute should be departed from in this instance.

Z. K. *Appeals allowed: Suits dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 553 OF 1923.
January 27, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

LIMBAJI RAVJI HAJARE—PLAINTIFF—APPELLANT
versus
RAHI RAVJI HAJARE—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 64, 65—Specific Relief Act (I of 1877), s. 41—Minor—Alienation of minor's property by unauthorised person—Suit by minor to recover property—Refund, whether can be directed—Discretion of Court—Hindu Law—Guardianship—Step-mother, position of.

Sections 64 and 65 of the Contract Act are not applicable to cases of contracts which are void *ab initio*. [p. 644, col. 2.]

When an alienation which a minor seeks to avoid on coming of age has been made by some one who was *prima facie* entitled to bind the minor, he is bound to refund the purchase-money when his estate has benefited by it, or to hold the property charged with the amount of the debt from which it has been freed by the sale. [*ibid.*]

Under the Hindu Law the step-mother is not a person *prima facie* entitled to bind her minor stepson's estate. A transaction by her with respect to the minor's property is not voidable but void. [*ibid.*]

Where a minor seeks to recover property alienated by an unauthorised person, the Court has a discre-

tion to direct that the minor should refund that portion of the consideration for the alienation by which his estate or himself had benefited. [p. 645, col. 2.]

(Case-law considered.)

Second appeal from a decision of the District Judge, Satara, in Appeal No. 578 of 1921, confirming the decree passed by the Subordinate Judge at Islampur, in Civil Suit No. 528 of 1920.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff filed this suit to recover possession of the plaint land which had belonged to his father, and had been mortgaged by him to one Tatya Dada. On his father's death the plaintiff, then a minor came under the protection of his step-mother. She redeemed the mortgage and sold the land to the father of defendants Nos. 2 and 3 who in his turn sold it to defendant No. 4. Plaintiff claimed that his step-mother had no authority to dispose of his property.

Defendant No. 4, who alone contested the suit, pleaded that the step-mother was the guardin of the plaintiff during the minority, that the lands were sold for legal necessity to pay off the mortgage and provide for the marriage expenses of the plaintiff, and consequently the sale was binding on the plaintiff. If it was held to be not binding, the defendant should be awarded Rs. 800 the consideration for the sale deed and Rs. 100 spent by him on improvements. The Trial Judge held that the step-mother was not the natural guardian of the minor that the sale-deed was effected for legal necessity that Rs. 100 had not been spent on improvement that the suit was in time, and on those findings dismissed the suit with costs. In appeal the only issue argued was whether the sale was for the minor's benefit. The District Judge found the issue in the affirmative and dismissed the appeal with costs. We are of opinion that as the sale was by an unauthorised person the plaintiff was entitled to have it set aside.

The issue whether the sale was for legal necessity was irrelevant. But then the question arises whether the plaintiff should recover the property without restoring to the present purchaser the benefit which had accrued to him by the sale effected by his step-mother.

We have been referred to ss. 64 and 65 of the Indian Contract Act, and it has been argued that on the analogy of those sections a minor who seeks to avoid a sale of his property by some one who had no power to sell must restore any benefit he has received from the unauthorised sale. But when a contract is void *ab inito* as in this case, these sections are not applicable. There is the following passage to the notes under s. 64 in the latest Edition of Pollock and Mulla at page 355: "It does not follow however that a minor is entitled to both repudiate his agreement and to retain specific property which he has acquired under it, or to recover money after receiving for it value which cannot be restored. General principles of equity seem incompatible with such a result and it would certainly be contrary to English authority." But in one of those authorities, *Nottingham Permanent Benefit Building Society* v. *Thurstan* (1) it was held by the House of Lords, approving the decision of the Court of Appeal, that the mortgage by the female in fact was void under the Infants Relief Act and that the Society was not entitled to any re-payment of the advances made to her. Lord Romer, L. J., in the Court of Appeal said "the short answer is, that a Court of Equity cannot say it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void."

When, however, the sale or mortgage which a minor seeks to avoid on coming of age has been made by some one who was *prima facie* entitled to bind the minor, he is bound to refund the purchase-money when his estate has benefited by it, or to hold the property charged with the amount of the debt from which it has been freed by the sale. Mayne, 9th Edition, s. 220 and the authorities there cited. But the step mother of the minor cannot be said to be a person *prima facie* entitled to bind him; and her transaction with the minor's property was not voidable but void.

In *Mohori Bibee* v. *Dharmodas Ghose* (2) it was held by the Privy Council that a minor was incompetent to contract on the true construction of the Indian Contract Act, so that a mortgage made by a minor was void. The general current of decisions in India had been that the contracts of

(1) (1903) A. C. 6; 72 L. J. Ch. 134; 67 J. P. 129; 51 W. R. 273; 87 L. T. 529; 19 T. L. R. 54.

(2) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114; 8 Sar. P. C. J. 374 (P. C.).

infants were voidable only. Their Lordships then considered whether the minor on avoiding the mortgage should be ordered to refund the mortgage money in the following passage at page 549*: "Another enactment relied upon as a reason why the mortgage-money should be returned, is s. 41 of the Specific Relief Act (I of 1877), which is as follows:—'Section 41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.' Section 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court, but the Court of first instance, and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

In *Nathu* v *Balwantrao* (3) a Hindu mother while her adopted son was a minor and had a guardian of his property appointed to him by the Court, alienated some of the minor's property, treating it as her own. At the instance of the minor on attaining majority the sale was set aside and though it was proved that the purchase money had been applied by the mother in payment of debts for which the plaintiff was liable, the Court refused to order him to refund the purchase money to the defendant. Chandavarkar, J., referred to *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (4) where their Lordships said: "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation, express or implied, to repay." But the Specific Relief Act had not been enacted when that case was decided, and it was not referred to in *Mohori Bibee* v. *Dharmodas Ghose* (2).

In *Dattaram* v. *Vinayak* (5) it was held that the administrator of a minor, appointed under Act XX of 1864, could not sell immoveable property held by the minor as a mortgagee in possession without the previous sanction of the Court. But on the question whether the minor on avoiding the transaction should restore the benefit accruing to him thereunder, Chandavarkar, J., referred to the decision in *Mohori Bibee* v. *Dharmodas Ghose* (2), as an authority for the proposition that the circumstances of a case may be such that having regard to s. 41 of the Specific Relief Act the Court may on adjudging the cancellation of an instrument require the party to whom such relief is granted to make any compensation to the other which justice may require. We think, therefore, that we have a discretion in this case when setting aside the sale of the suit property to make it a condition that the plaintiff should refund Rs. 800, which is the amount by which his estate and himself were benefited. The plaintiff would have been responsible on his coming of age for the repayment of the mortgage debt and he has certainly benefited by the amount spent by his step-mother on his marriage. It was not unnatural that his step-mother should have thought that she was entitled to act as she did in his interest, and she could not have been expected to know that she ought to have applied to the District Court for the appointment of a guardian. If she had made the application she would have had to pay the costs out of the minor's estate. Therefore, in the exercise of our discretion we impose on the plaintiff as the condition on which he is entitled to recover the suit property from the defendant that he should refund Rs. 800 within two months after the record reaches the Trial Court. The appeal is allowed and a decree will be issued in terms of our judgment. In the circumstances of the case there will be no order as to costs throughout.

Crump, J.—I agree.

Appeal allowed.

Z. K.

(3) 27 Bom. 390; 5 Bom. L. R. 301.

(4) (1875) 2 I. A. 131 at p. 143; 23 W. R. 305; 15 B. L. R. 208; 3 Sar. P. C. J. 477; 3 Suth. P. C. J. 133 (P. C.).

(5) 28 B. 181; 5 Bom. L. R. 916.

*Page of 30 C.—[*Ed.*]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 136 OF 1921.
November 6, 1924.
Present:—Mr. Justice Ramesam.

KANDALAM KRISHNAMACHARYLU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SATHULARI VIJAYASARATHI MINOR BY MOTHER AND GUARDIAN RANGAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 32, 35—Relationship, proof of—Inam *statement, admissibility of—Inam Register—Presumption of inquiry by Commissioner.*

An *inam* statement is irrelevant and inadmissible in evidence for proving relationship, where the person making the statement was in no way related to the family concerned and is not proved to have had any special means of knowledge. [p. 646, col. 2.]

Shahzadi Begam v. *Secretary of State for India*, 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.), *Sangram Singh* v. *Rajan Bahi*, 12 C. 219; 12 I. A. 183; 4 Sar. P. C. J. 676; 6 Ind, Dec. (N. S.) 149 (P. C.), *Jagatpal Singh* v. *Jageshar Baksh Singh*, 25 A. 143; 7 C. W. N. 209; 30 I. A. 27; 8 Sar. P. C. J. 367 (P. C.) and *Sham Lall Singh* v. *Radha Bibee*, 4 C. L. R. 173, distinguished.

An *Inam* Register embodies the conclusions of the Inam Commissioner on such enquiry as he chooses to make upon the statements filed before him. The presumption is that Inam Registers embody the findings of the Inam Commissioner after such investigation. There is no rule prescribing the extent of the investigation to be made by him. [p. 647, col. 1.]

Pir Pacha Sahib v. *Mohammad Ruhim-ud-din Sahib*, 77 Ind. Cas. 777; 19 L W. 174; 46 M L. J. 245; (1924) M. W. N. 217; (1924) A. I. R. (M.) 491; 34 M. L. T. 347 and *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal*, 53 Ind. Cas. 288; 43 M. 253; 37 M. L. J. 460; (1919) M. W. N. 850; 17 A. L. J. 1097; 10 L. W. 642; 26 M. L. T. 479; 24 C. W. N. 249; 46 I. A. 204; 22 Bom. L. R. 457 (P. C.), relied on.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Ellore, in A. S. No. 83 of 1920, preferred against that of the Court of the Additional District Munsif, Narasapur, in C. S. No. 105 of 1917.

Mr. *G. Lakshmanna*, for the Appellants.

Messrs. *A. Krishnaswami Iyer*, *M. Narasimham* and *V. Govindarajachari*, for the Respondents.

JUDGMENT.—The plaintiffs are the appellants before me. The suit was brought by them as reversioners to recover possession of certain properties alienated by the widow of last male owner. The last male owner was one Vijayasaradhi who died in 1867. He died while he was a minor. In the year of his death, the two alienations in question were effected on behalf of the widow by her father by Exs. I and II. Two points arose for decision in the case (1) whether the plaintiffs are the reversioners of Vijayasaradhy, and (2) whether the alienations are binding on the reversioners. The District Munsif decided both the points in favour of the plaintiffs and gave a decree. On appeal the Subordinate Judge found both the issues against the plaintiffs and dismissed the plaintiffs' suit. Hence the plaintiffs have filed this second appeal.

In second appeal both the findings of the Subordinate Judge are attacked before me. Taking the first point, namely, that of reversionership, the Subordinate Judge found that two of the *inam* statements relied on by the District Munsif, namely, Exs. A and C were irrelevant and were wrongly admitted by the District Munsif. I think the Subordinate Judge is right in this. These *inam* statements, Exs. A and C, purported to be filed on behalf of Butchamma, but were actually signed by Komandur Krishnamachari, her brother's son. It is true that one of these Ex. C contains statements purporting to be made by her, but the fact remains that Exs. A and C were signed only by him and there is no other evidence to show that she actually dictated the contents to him or got them written under her directions and so on as in *Shahzadi Begam* v. *Secretary of State for India* (1). Krishnamachari is not a member of the Kandalam family with which we are concerned, nor has he married a member of the Kandalam family. That being so, his statement, unless there is other evidence that he has special means of knowledge, is not relevant. *Vide Sangram Singh* v. *Rajan Bahi* (2) and *Jagatpal Singh* v. *Jageshar Baksh Singh* (3) and Taylor on Evidence. s. 636. The case of *Sham Lall Singh* v. *Radha Bibee* (4) relied on by Mr. Lakshmanna cannot help him. There it was shown that the person whose statement was sought to be admitted was a family priest. This corresponds to evidence that he had special means of knowledge. In *Suraj Bali* v. *Tilok Chand* (5) the deponent was the son-in-law of the family. That falls within the rule stated above and cannot help in this case, where the person was

(1) 34 C 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.).

(2) 12 C. 219; 12 I. A. 183; 4 Sar. P. C. J. 676; 6 Ind. Dec. (N. S.) 149 (P. C.).

(3) 25 A. 143; 7 C. W. N. 209; 30 I. A. 27; 8 Sar. P. C. J. 367 (P. C.).

(4) 4 C. L. R. 173.

(5) 36 Ind. Cas. 66; 3 O. L. J. 327.

only connected or related through the marriage of some other and not his own marriage to the family in question.

The next complaint made against the Subordinate Judge's judgment on the first point is the manner in which he dealt with Ex. B. Exhibit B is an Inam Register. As to this the Subordinate Judge says: "There is obsolutely nothing to show that there was an enquiry by the Inam Commissioner as to the correctness of the pedigrees produced on behalf of Butchamma and that any decision was arrived at by him." I think the Subordinate Judge is wrong in this statement As pointed out in *Pir Pacha Saheb* v. *Mohammad Ruhim-ud-din Saheb* (6) the Inam Register embodied the conclusions of the Inam Commissioner on such enquiry as he chooses to make upon the statements filed before him. The presumption is that Inam Registers in the country embody the findings of the Inam Commissioner after such investigation. There is no rule prescribing the extent of the investigation to be made by the Inam Commissioner. In *Arunnachellam Chetty* v. *Venkatachalapathi Guruswamigal* (7) the Privy Council have pointed out that the Inam Register is "a great act of state" and is entitled to very great weight. It may be in particular cases some reasons may be given why the Inam Register might be discounted; but the particular reason given by the Subordinate Judge in this case is no reason at all, for he expects some proof that the Inam Commissioner made some actual enquiry, a proof which is impossible and a proof which cannot be adduced; whereas, as pointed out in *Pir Pacha Saheb* v. *Mohammad Ruhim-ud-din Sahib* (6) the presumption is that he made such an enquiry. Secondly, the Subordinate Judge says: "There is absolutely nothing to connect the plaintiffs with Kandalam Raghavacharyulu referred to in the 4th sheet of Ex. B." In this again, I think, he is wrong and he has not applied his mind to the facts and documents in the case. Raghavacharyulu is another co-sharer according to Ex. B. The evidence on behalf of the plaintiffs shows that the share then enjoyed by Raghavacharyulu and his brother Ananthacharlu are now enjoyed by the two plaintiffs, and unless these witnesses are disbelieved, it is impossible to say that the Raghavacharyulu in the Inam Register is not connected with the present plaintiffs.

I am, therefore, constrained not to accept the finding of the Subordinate Judge on the first issue. If the case cannot be disposed of otherwise, I would be compelled to send the case back and call for a finding on this issue. But it seems to me that the second appeal must fail on account of the findings on the second point.

The second point, as I have already stated, is whether the alienations were for purposes binding on the reversioners. The Subordinate Judge refers to *Chintamanibhatla Venkata Reddi* v. *Rani Sahiba of Wadhwan* (8) also *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhury* (9) and to the evidence of the defendants witnesses Nos. 1 and 5 and then says: "It is proved that the alienations were for discharging antecedent debts binding on the reversioners." It is true there are several peculiar features in this case which are not to be found generally in alienations by widows. In this case the alienations were not actually made by the widow but on her behalf by her father. The first sale was to her brother, that is, her father, was selling the property to his own son. The second sale was also to a relation. The Subordinate Judge does not specifically advert to this circumstance. He does not also refer to unsatisfactory features in the evidence of the defendants' 1st and 5th witnesses. The evidence of the first witness turns out to be mostly hearsay in cross-examination. These features of his judgment which I have pointed out have produced in me the impression that his judgment is very unsatisfactory, and probably he has conceived a bias against reversioner's suits. But in spite of all the circumstances, I am not able to reject the finding of the Subordinate Judge on the second point. It is legally arrived at and, however, much one may feel dissatisfied

(6) 77 Ind. Cas. 777; 19 L. W. 174; 46 M. L. J. 245; (1924) M. W. N. 217; (1924) A. I. R. (M.) 491; 34 M. L. T. 347.

(7) 53 Ind. Cas. 288; 43 M. 253; 37 L. J. 460; (1919) M. W. N. 850; 17 A. L. J. 1097; 10 L. W. 642; 26 M. L. T. 479; 24 C. W. N. 249; 46 I. A. 204; 22 Bom. L. R. 457 (P. C.).

(8) 55 Ind. Cas. 538; 43 M. 541; 38 M. L. J. 393; 11 L. W. 451; 18 A L. J. 367; (1920) M. W. N. 315; 22 Bom. L. R. 541; 47 I. A. 6; 2 U. P. L. R. (P. C.) 77; 28 M. L. T. 457 (P. C.).

(9) 36 Ind Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

with it, I do not think I am justified in rejecting it, though I regret my inability to interfere with it.

Accepting, therefore, the finding only on the second point, I dismiss the second appeal with one set of costs.

V. N. V. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 826 OF 1923.

January 29, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

RAMSING HARISING—PLAINTIFF—APPELLANT

versus

BAI DHANBA—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 107—Lease—Rent-note, execution of, by tenant—Possession not delivered—Suit to recover possession, whether maintainable.

The execution of a rent-note by a person in favour of the owner of the land does not constitute a transfer of any interest in the land to the former so as to entitle him to sue for possession of the land. Even if the rent-note is registered and is accepted by the owner of the land, it remains only a contract between the parties which can be enforced by a suit for specific performance. Where, however, possession is delivered under such a rent-note, the tenant would in equity be entitled to retain possession against the owner seeking to eject him.

Ajam Sahib v. *Meenatchi Devastanam*, 8 Ind. Cas. 663; 35 M. 95; (1910) M. W. N. 766; 8 M. L. T. 437; 21 M. L. J. 202, referred to.

Second appeal from a decision of the District Judge at Broach, in Appeal No. 56 of 1922, reversing a decree passed by the Subordinate Judge at Jambusar, in Civil Suit No. 128 of 1922.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

Macleod, C. J.—This suit was brought by the plaintiff for possession of certain lands alleging that he was a permanent tenant thereof under the lease dated July 1, 1912. The document is a rent-note and by itself does not purport to transfer an interest in the land, so that the execution of the rent-note by the plaintiff to the owner of the land could not be said to constitute the transfer of any interest to him. Even if it had been accepted by the present defendant as alleged, as no possession had been given under it to the plaintiff, it would still remain a contract between the parties, so that the plaintiff would have to file a suit within three years from the time when the plaintiff had notice that performance was refused, for the performance of the contract. After the arguments were closed we were referred to the decision in *Ajam Sahib* v. *Meenatchi Devastanam* (1), in which it was held that the registered instrument which under s. 107 of the Transfer of Property Act is necessary to create a lease within the section need not necessarily be an instrument signed by the lessor. Such a lease might be created by the registered instrument signed by the lessee and accepted by the lessor. With all due respect I cannot think that the document in this case can operate as a transfer of an interest in the property to the lessee. It would have been otherwise if the lessee had obtained possession. Such possession would then be attributable to the document he had signed, which had been registered and accepted by the lessor, so that in equity he would be entitled to retain his possession against the owner seeking to eject him. The plaintiff not having obtained possession has not, in my opinion, such a title as would support a suit for possession. This appeal, therefore, must be dismissed with costs.

Coyajee, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 8 Ind. Cas. 668; 35 M. 95; (1910) M. W. N. 766; 8 M. L. T. 437; 21 M. L. J. 202.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 435 OF 1923.

January 8, 1925.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

RAMASWAMI NAYADU—DEFENDANT No. 1—APPELLANT

versus

K. N. S. SUBBARAYA THEVAR AND OTHERS—ASSIGNEE DECREE-HOLDER AND DEFENDANTS NOS. 2 TO 4 AND PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, O. XXXIV, r. 5—Execution of decree—Money-decree creating charge on land—Decree, whether can be executed—Final decree, whether necessary—Compromise decree—Terms not relating to suit, whether can be enforced.

Where in a suit for money, a decree is passed creating a charge on certain properties, the provisions of O. XXXIV of the C. P. C. do not apply to the case and the decree is capable of execution without the necessity of having a final decree passed in the matter. [p. 650, col. 2.]

Where the terms of a compromise decree which do not relate to the suit appear either directly or indirectly as considerations on which the settlement of the claim is based, such terms may be considered as part of the decree and executable with it; and the whole compromise decree is enforceable in execution proceedings without a separate suit. [p. 652, col. 1.]

Appeal against the orders of the Court of the Subordinate Judge, Tanjore, dated the 23rd April and 7th September 1923, in E. P. No. 4 of 1923, in O. S. No. 80 of 1918.

Messrs. *S. Muthiah Mudaliar* and *A. V. Visvanadha Sastri*, for the Appellant.

Messrs. *C. V. Anantakrishna Iyer* and *K. P. Ramakrishna Iyer*, for the Respondents.

JUDGMENT.—This civil miscellaneous appeal arises in connection with the execution of a *razinama* decree passed in O. S. No. 80 of 1918 on the file of the Court of the Subordinate Judge of Tanjore. The appellant is the first defendant in the suit. The first respondent is the assignee decree-holder and the other respondents are the remaining three defendants in O. S. No. 80 of 1918 who are the sons of the first defendant and the plaintiff the decree-holder. The compromise decree was assigned by the next friend of the plaintiff-decree-holder to the present first respondent and he presented E. P. No. 4 of 1923 praying for the recognition of the assignment and for the recovery of the amount of Rs. 58,235-12-0 by the sale of the properties as per terms of the decree. The defendants in the suit opposed the application. The Subordinate Judge passed an order recognising the assignment subject to certain conditions and also allowing the execution of the decree. It is this order that is now appealed against by the first defendant-appellant.

In order to understand the contentions put forward on his behalf, it is necessary to state the facts relating to the compromise decree in detail. Original Suit No. 80 of 1918 on the file of the Court of the Subordinate Judge of Tanjore on which the *razinama* decree was passed was instituted by the minor plaintiff Kamachai Pillai represented by his adoptive mother for specific performance of contract by the present appellant and his sons, defendants Nos. 1 and 4 in pursuance of the agreement dated 5th December 1915 for recovery of the amount of advance together with interest thereto, *i. e.*, for Rs. 25,586-1-10. At that time there were two suits pending on the file of the Court of the Subordinate Judge of Tanjore in which the present parties were interested and also there was a decree in existence against the late adoptive father of the minor plaintiff passed by the Trichinopoly Sub-Court. One of these suits, *viz.*, O. S. No. 82 of 1918 was instituted by one Natesa Pillai who had obtained an assignment *benami* of a promissory-note alleged to have been executed by the first defendant (the present appellant) in the name of one Chockalingam, the father of the adoptive mother and next friend of the minor plaintiff in O. S. No. 80 of 1918. Original Suit No. 83 of 1918 the other suit—was instituted by the minor plaintiff in O. S. No. 80 of 1918 for recovery of the amount due under the three *othi* deeds executed for Rs. 35,000 by the defendants in O. S. No. 80 of 1918 and the deceased Varadarajulu Naidu in favour of the adoptive father of the minor plaintiff and for delivery of possession in accordance with the aforesaid *othi* deeds and for recovery of *swamibogam*. The decree against the late adoptive father of the minor plaintiff was passed by the Trichinopoly Sub-Court in O. S. No. 98 of 1918 on its file. It was passed on promissory-notes which had been executed by him. Besides compromising the present suit, namely, O. S. No. 80 of 1918 it was arranged by the *razinama* that the minor plaintiff should cause the heirs of Natesa Pillai not to prosecute the suit O. S. No. 82 of 1918 and that he should withdraw the suit O. S. No. 83 of 1918. The defendants in consideration of the compromise of these suits agreed to pay to the plaintiff (*a*) Rs. 53,000 in quit of all claims and that out of the sum of Rs. 53,000 they agreed to execute in favour of the minor plaintiff a promissory-note for Rs. 3,000 with interest and out of the balance pay Palaniappa Chetty the decree-holder in O. S. No. 98 of 1918 mentioned above and thus discharge his claim against the adoptive father of the plaintiff within a specified period. It was stated in the compromise that "if the defendants in this suit (O. S. No. 80 of 1918) make any default in paying the said amount within the stipulated period aforesaid the plaintiff is to proceed against the suit properties and to execute the *razinama* decree that may be passed in the suit, and to sell the properties and

recover the amount with costs of execution. The last paragraph of the compromise contains the provision that the parties in this suit and in Suit No. 83 of 1918 are to bear themselves their respective costs. On these terms O. S. No. 80 of 1918 was adjusted by the *razinama* and a decree was passed in accordance therewith so far as it related to the suit.

The defendants in O. S. No. 80 of 1918 (the appellant and his sons respondents Nos. 2, 3 and 4) not having complied with their obligation in accordance with the *razinama* decree to pay up the amount due under the decree in O. S. No. 98 of 1918, it was apprehended by the adoptive mother of the plaintiff that the properties of the minor would be brought to sale in execution of the decree unless some arrangement was made for assigning the *razinama* decree in O. S. No. 80 of 1918, and discharging the debts due to Palaniappa Chetty in O. S. No. 98 of 1918. For the purpose of safeguarding the interest of the minor, an assignment of the *razinama* decree was, therefore, made in favour of the present first respondent for a consideration of Rs. 55,000. It is not here necessary to go into details of the consideration and the obligations which the assignee-decree-holder undertook under the assignment. As already mentioned, E. P. No. 4 of 1918 was filed by the assignee-decree-holder for recognising the assignment and for executing the *razinama* decree.

The learned Vakil for the appellant in the course of a lengthy argument has emphasised three points for our consideration; (1) That the *razinama* decree taken in its entirety is only in the nature of a preliminary decree and is incapable of execution in the absence of a final decree. (2) The *razinama* was made into a decree of the Court only so far as it relates to O. S. No. 80 1918. The terms of the *razinama* relate to matters not covered by O. S. No. 80 of 1918 and inasmuch as these do not fall strictly within the scope of suit as it is not possible to determine how far it relates to the subject-matter of the suit the whole decree is incapable of execution. As regards the terms comprised in the *razinama* but not covered strictly by the scope of O. S. No. 80 of 1918 no relief can be given unless the decree-holder institutes separate suits upon the agreements contained therein and obtains decree; (3) The assignment is not *bona fide* and has not been made in the interest of the minor plaintiff.

We will now deal with these points separately; (point No. 1). It is argued that the decree passed in O. S. No. 80 of 1918 is only in the nature of a preliminary decree and the parties should obtain a final deceee before taking out execution. We cannot uphold this argument. The decree in the present case was not passed upon a mortgage. A perusal of the plaint makes it clear that the suit is for specific performance or for damages. Paragraph 21 (*a*) of the plaint containing the prayer portion runs as follows: "The plaintiff prays for a decree directing the execution of a usufructuary mortgage, mortgaging the undermentioned lands for Rs. 20,113 plus interest as detailed below and subject to the previous usufructuary mortgages as undertaken in the agreement dated 5th December 1915, or, in the alternative, directing the defendants to pay the plaintiff the undermentioned amounts with subsequent interest". The utmost that can be said in favour of the appellant is that the suit was one for money in which a charge has been created by the decree. This does not convert the suit into a mortgage suit and make the provisions of O. XXXIV of the C. P. C. applicable. There was clearly no mortgage suit pending before the Court and, therefore, there can be no question of a preliminary decree and a final decree. This argument must be overruled (Point No. 2). The argument on this point has been pressed upon us with great force, by the learned Vakil for the appellant. It is based upon the wording of O. XXIII, r. 3 and in essence is this; the decree is executable, if at all, only so far as it "relates to the suit" and as it is not possible to discriminate between the component part of the decree and to find out how far it relates to the subject-matter of the suit the entire decree is inexecutable; and as regards the matters comprised in the decree which do not strictly come within the scope of the suit relief cannot be given to the plaintiff unless separate suits are instituted in enforcement of agreements. This argument is pressed with special force with reference to O. S. No. 83 of 1918 the withdrawal of which by the plaintiff is referred to as one of the terms of the compromise. The answer to this contention is two-fold; (*a*). The provisions of O. XXIII, r. 3 do not lend any support to the argument; and (*b*) the parties

treated the various terms of the compromise as essential parts of the decree and as considerations for the compromise and acted upon the decree in that light. Order XXIII, r. 3, runs as follows: "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit". Reliance is placed on the words "so far as it relates to the suit" for emphasising the argument that the *razinama* decree which the Court has to pass can have reference only to the subject-matter of the suit and can have nothing to do with other matters which do not strictly come within the purview of it. The decisions of this Court which have been brought to our notice by the learned Vakil for the respondents show that the language of the section is wide and general and that these terms of the section are not to be understood in the way contended for by the appellant. In *Joti Kuruwetappa* v. *Izari Siruseppa* (1), it was held that "In a suit for money where the plaint prays for a simple money-decree, an agreement by which the parties agrees that the amount decreed according to the compromise should be a charge upon certain properties, relates to the suit so as to be embodied in the decree." It was argued in that case that the claim of the plaintiff was only for money due under bonds which gave no charge on the defendant's property, and that it was, therefore, not competent to the Court to give a decree creating a charge even though the defendants agreed to such a charge as one of the terms of compromise to be embodied in the decree. In dealing with that argument, the learned Judges say with reference to s. 375 of the old C. P. C. corresponding to O. XXIII, r. 3: "We see nothing in this language to preclude the Court from embodying in the decree the charge which the parties agreed to as secruity for the debt. The agreement was 'lawful', and it 'relates to the suit' that is, to the matter of the claim in the case. In the claim as made in the plaint there was, it is true, no prayer to have the amount charged on the property, but there is nothing in principle or in the language of the section which we have quoted to restrict the relief to be granted in accordance with a compromise to what is prayed for in the plaint or less. If that were the intention of the Legislature it would have found no difficulty in expressing the intention in suitable language. On the contrary, the language used is wide and general, and it is obvious that it would be highly inconvenient if the parties should not be allowed to settle their disputes on such lawful terms as they might agree to without being restricted to such relief as one of the properties has chosen to claim in the plaint." It has been decided in *Sabapathi Pillay* v. *Vanmahalinga Pillai* (2) that the terms in a *razinama* decree which formed considerations for the compromise of the suit must be deemed to be part of the decree and can be enforced in execution proceedings. In that case their Lordships referred to the decision of the Calcutta High Court reported as *Purna Chandra Sirkar* v. *Nil Madhub Nandi* (3) which held that a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions, and that, if those other conditions are the consideration for the compromise of the subject-matter of the suit, they must be incorporated in the decree. The question for consideration, therefore, is whether these terms which are stated to go beyond the strict purview of the suit were considered by the parties as considerations for the compromise of Suit No. 80 of 1918 in which the *razinama* was passed. This leads us on to the second answer to this argument. There can be no doubt that the parties to O. S. No. 80 of 1918 considered these terms as considerations for the compromise and acted themselves subsequent to the passing of the decree in that view. It is not the appellant's case that the terms of the compromise decree so far as the plaintiff was concerned were not carried out. As a matter of fact O. S. No. 82 of 1918 was dismissed and O. S. No. 83 withdrawn by the plaintiff; only, the appellant has not acted up to the terms of the compromise so far as he was concerned and the appre-

(1) 30 M. 478.

(2) 23 Ind. Cas. 581: 38 M. 959; 15 M. L. T. 203; 26 M. L J. 331; (1914) M. W. N. 256.

(3) 5 C. W. N. 485.

hended trouble arising from such non-compliance was the reason as already indicated for the assignment of the decree. The cases relied on by the learned Vakil for the appellant do not lend any substantial support to his argument. The decision in *Subbanarayana Aiyar* v. *Maya Thevan* (4), referred to by him, really supports the argument advanced on behalf of the respondents. That decision suggests that if the terms of the compromise decree which do not relate to the suit appear either directly or indirectly as considerations on which the settlement of the plaint was based, then such terms may be considered as part of the decree executable with it. In *Ariyaputhra Goundan* v. *Ettiya Goundan* (5) the present question did not arise for consideration. The question for determination in that case was whether the *razinama* filed in the suit required registration in respect of the portion in the *razinama* which were not given effect to in the decree. The learned Judges, following *Pranal Anni* v. *Lakshmi Anni* (6), held that the Court by its decree accepted the whole *razinama* and in consequence of such acceptance passed a decree in accordance therewith so far as the suit property was concerned and that the whole of the *razinama* was embodied in the decree of the Court and consequently required no registration, even with respect to immoveable properties not comprised in the decree. The same observation has to be made about the decision in *Hemanta Kumari Debi* v. *Midnapore Zemindari Co.* (7), relied upon by the appellant's learned Vakil, in that case also the question for consideration was the necessity for registration for being admissible in evidence of a *razinama* decree which contains terms which do not come strictly within the purview of the suit which was compromised. In dealing with the question whether the decree can be given in evidence to affect matters not coming within the scope of the suit for want of registration the learned Judges no doubt make the remark that it may be that as a decree it is incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents. The present question was not raised in that case and the opinion was expressed in a very hesitating manner. In this connection we may also draw attention to the decision of this Court reported as *Manager of Sri Meenakshi Devastanam* v. *Abdul Kasim Sahib* (8), which says that the argument that the *razinama* decree contained in the suit after it had been tried affords no ground for questioning the decree in execution. According to this decision this argument must be taken by way of appeal and not in execution of the decree. We, therefore, hold that the compromise decree in its entirety in this case is executable and that it is not necessary for the plaintiff to institute separate suits as argued by the appellant's Vakil. This also meets the argument specially advanced with regard to O. S. No. 93 of 1918.

(Point No. 3). The last argument addressed to us relates to the *bona fides* of the assignment and to the question whether it was made in the interest of the minor plaintiff. The consideration mentioned in the assignment deed (Ex. A) is made up as follows: (1) the assignee-decree-holder is directed to pay R. 43,700 to the decree-holder in O. S. No. 98 of 1918 on the file of the Trichinopoly Sub-Court. (2) He is also directed to pay Rs. 10,475 to one Sundararaja Pillai in payment of debts coverd by Exs. F and G (3) Rs. 825 were *padi* for the execution of the document. The consideration in all, thus amounted to Rs. 55,000 mentioned in the deed. It is proved by Exs. B. C, and D (see also B1, C1 and D1) that the assignee-decree-holder has paid Rs. 17,000 in partial discharge of the decree in O. S. No. 98 of 1918 after the assignment. As regards the amount due to Sundararaja Pillai it arose in this way. Plaintiff's adoptive father Adinarayana Pillai executed a promissory-note (Ex. G) for Rs. 5,000 to Sundararaja Pillai and in renewal of it another promissory-note (Ex. F) was executed to the same individual by the minor plaintiff's next friend Thangathammal. Exhibit F contains an endorsement of discharge

(4) 30 Ind. Cas. 263; 2 L. W. 608.

(5) 42 Ind. Cas. 223; 6 L. W. 635; (1917) M. W. N. 751; 33 M. L. J. 615.

(6) 22 M. 508; 1 Bom. L. R. 394; 3 C. W. N. 485; 26 I. A. 101; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.).

(7) 53 Ind. Cas. 534; 47 C. 485; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240 (P. C.).

(8) 30 M. 421; 2 M. L. T. 349; 17 M. L. J. 255.

from Sundararaja Pillai. The genuineness and the *bona fides* of Exs. F and G have been questioned by the appellant. The decree-holder does not dispute the payment. The learned Subordinate Judge did not consider it necessary to go into the question of the *bona fides* and genuineness of these documents as he safeguarded the interests of the minor against all possible loss by the order which he eventually passed. The order shows that the learned Judge was not wrong in the procedure which he adopted. The order runs as follows: "The assignee-decree-holder shall not recover any amount from the judgment-debtor except through Court. Out of the amount that may be deposited by the judgment-debtor into Court he (assignee-decree-holder) shall draw whatever amount he pays in discharge of the decree in the said O. S. No. 98 of 1918 after satisfying the Court that he has made such payments. In this connection he is at present entitled to draw the amounts covered by Exs. B,C, and D with further interest 6 per cent. per annum. The balance of the decree amount he shall be entitled to draw after production of the vouchers, *viz.*, receipts obtained from the decree-holder in the said suit and certified copy or copies of applications filed into Court certifying satisfaction. As regards the amount over and above the said decree amount the assignee-decree-holder shall be entitled to draw the same upon furnishing security to the satisfaction of the Court." The provision that the assignee-decree-holder shall not recover from the judgment-debtor any amount through Court affords a general protection to the interests of the minor. His payment of Rs. 17,000 in partial discharge is proved conclusively by Exs. B, B1, C, C1, D; D1. No exception can be taken to the permission granted to the assignee-decree-holder to draw this amount with further interest. Then, he is given permission to draw from Court from the amounts deposited by the judgment-debtor whatever further amounts he pays in discharge of the decree in O. S. No. 98 of 1918 after satisfying the Court that such payments have been made. This also cannot be objected to as it keeps in view he interests of the minor. As regards the amount over and above the decree amount, namely, those covered Exs. F and G the assignee-decree-holder is not entitled to draw the same from the amount deposited by the judgment-debtor except upon furnishing security to the satisfaction of the Court. As he is bound to give security no harm is done to the interest of the minor, if Exs. F and G are at any time not found to be genuine, as contended for by the appellant. An analysis of the order thus shows that in recognising the assignment the learned Judge kept prominently, before him the interests of the minor-decree-holder. It is evident that the assignment was made by the minor's next friend to safeguard his interests as otherwise owing to the non-payment of the decree-debt in O. S. No. 98 of 1918 by the appellant according to the *razinama* decree the minor's properties were in danger of being sold. That calamity was averted by this assignment. We have been taken through the evidence of P. W. Nos. 1 and 2. There is really no evidence on the side of the appellant challenging the payment of consideration by the assignee-decree-holder. On a consideration of the evidence, in the case we think that the assignment has been made *bona fide* by the next friend of the minor decree-holder and the interests of the minor are safe-guarded by the conditions imposed upon the assignee-decree-holder by the Subordinate Judge. His order recognising the assignment subject to the specified conditions and allowing the assignee-decree-holder to execute the decree must be upheld, and this civil miscellaneous appeal must be dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 105 OF 1924.

May 5, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

MADHORI SARAN—OPPOSITE PARTY—APPELLANT

versus

Musammat PARBATI—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (w), O. XLVII, rr. 4, 7—Review of judgment on ground of discovery of new evidence—Appeal, grounds for—Objection that new evidence does not refer to

property in dispute, whether can be taken—New case, whether can be set up in review.

The right of appeal conferred by O. XLIII, r. 1 (*w*) against an order allowing a review is not an unlimited right but is subject to the conditions laid down in r. 7 of O. XLVII of the Code.

A review of judgment was granted on the ground of discovery of new and important evidence which the party applying for review could not by the exercise of due diligence have discovered earlier. The new and important evidence consisted of a certified copy of a sale-deed. In an appeal against the order allowing the review it was contended that it was not clear on the face of the sale-deed that it related to the property in dispute:

Held, that the objection did not come within the scope of r. 7 of O. XLVII of the C. P. C., and that consequently the order allowing the review could not be upset.

A party ought not to be allowed in review to raise a case which was never raised at the trial and on which no evidence was adduced.

First appeal from an order of the Subordinate Judge, Furrukhabad, dated the 6th February 1924.

Mr. *I. B. Banerji*, for the Appellant.

JUDGMENT.—This is an appeal from an order granting a review of judgment on the ground of the discovery of new and important evidence which the defendant could not by exercise of due diligence have discovered earlier. The new and important evidence consisted of a certified copy of a sale-deed of the year 1878 alleged to relate to the land in suit. The question arises whether the appeal comes within the terms of O. XLVII, rule 7, of the C. P. C. The right of appeal conferred by O. XLIII, r. 1 (*w*), is not an unlimited right, but is subject to the conditions of O. XLVII, r 7 [*vide*, *Khurshed Alam Khan* v. *Rahmat-ullah Khan* (1) and *Nund Lal Mullick* v. *Punchanan Mukerjee* (2)]. In this case the appeal, if allowable at all, comes under clause (*b*) of r. 7 of O. XLVII on the ground that the review was admitted in contravention of r. 4. Now, the learned Pleader for the appellants has not been able to dispute the finding of the learned Subordinate Judge that it was not within the power of the applicant in spite of due diligence to produce at the trial the evidence on which she now relies. His contention is that it is not clear on the face of the sale-deed that it relates to the land in suit. This is a point which the learned Subordinate Judge has not decided. He evidently considered *prima facie* that it did appear to refer to this land, for he says that the admission of the document changes the whole aspect of the case. At the same time he recognized that it was not fair to decide the point as an Appellate Court without giving the other side an opportunity to rebut the evidence. He accordingly sent back the case for decision of the issue on the merits after allowing the respondent to produce rebutting evidence. This appears to us under the circumstances to have been a proper order to pass. The question can only be decided when the document is read along with the other evidence in the case. The evidence has not been laid before us, and we are not in a position at this stage to express any opinion on the question.

In one respect the order of the Court below is open to objection. At the hearing of the appeal the defendant raised a point as to the effect of a certain partition on the plaintiff's claim. This was a new point raised in appeal, and the learned Subordinate Judge had held in deciding the case that it could not prevail in the absence of the evidence necessary to substantiate it. In his order admitting the review the learned Subordinate Judge has permitted the defendant to adduce evidence on this question also. For this there is no justification. The point was never raised at the trial at all, and the defendant ought not to be allowed in review to raise a case which was never raised at the trial, and on which no evidence was adduced. We accordingly set aside that portion of the lower Court's order which allows the defendant an opportunity of establishing her contention regarding the partition. In other respects the appeal is dismissed. We make no order as to costs as the rospondent is not represented.

Z. K. *Appeal dismissed.*

(1) 43 Ind. Cas. 490; 40 A. 68; 15 A. L. J. 899.
(2) 42 Ind. Cas. 484; 45 C. 60; 21 C. W. N. 1076; 26 C. L. J. 187.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1703 OF 1924.

February 27, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerjee.

SIVA DAS DUTTA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BIRENDRA KRISHNA DUTTA—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 52, 188—Rent suit by co-sharer landlord—Abatement of rent, question of, whether can be raised.

In a suit for the recovery of rent by a co-sharer landlord who, under an arrangement between himself, his co-sharers and the tenants, is entitled to collect his share of the rent separately, the tenants are entitled to raise the question of abatement of rent, inasmuch as such a suit is not one for rent under the Bengal Tenancy Act, but in fact a suit for money and the decree that would be obtained would be merely a money-decree in which the right, title and interest only of the judgment-debtor might be brought to sale and consequently neither the provisions of s. 188 nor of s. 52 of the Bengal Tenancy Act are applicable to the suit.

Kesho Prasad Singh v. *Ramdeni Singh*, 74 Ind. Cas. 454; 2 Pat 183; (1923) A. I. R. (Pat.) 397; 4 P. L. T. 689, relied on.

Bhoopendra Narain Dutt v. *Romon Krishna Dutt*, 27 C. 417; 4 C. W. N. 107; 14 Ind. Dec. (N. S.) 275, distinguished.

Appeal against a decree of the Subordinate Judge, First Court, 24-Parganas, dated the 15th of April 1924, affirming that of the Munsif, First Court at Baruipur, dated the 28th of November 1921.

Messrs. *B. Jogesh Chandra Roy* and *B. Pankaj Kumar Dutta*, for the Appellants.

Messrs. *B. Hira Lall Chakraverty* and *B. Shama Das Bhattacherjee*, for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the defendants against a decision of the Subordinate Judge of the First Court of the 24-Parganas confirming a decision of the Munsif, First Court, Baruipur. The plaintiff who is a co-sharer landlord sued the defendants for his share of the rent of their holding for the years 1324 to 1327. The defendants' allegation was that on the construction of the *patta* the plaintiff was not entitled to claim the rent at the rate for which he sued but that there should be a deduction. A written statement was filed by the defendants on the 7th April 1921 and subsequently they applied for measurement of the land and the application was rejected on the 8th July 1921 as having been made at a late stage of the proceeding.

Three points have been urged before us in this appeal. The first point deals with the decision of the learned Judge in the Court below that when a co-sharer landlord sues a tenant for his share of rent the question of abatement of rent cannot be gone into in a suit so constituted having regard to the fact that the other co-sharer landlords are not before the Court. The second contention raised before us is that the learned Judge was wrong in holding that in any case the defendants were precluded from raising the question of abatement by virtue of a decision given in Suit No. 49 of 1887; and thirdly it was urged that the Judge in the Court below was also wrong in holding that another decision in Suit No. 447 of 1919 operated as *res judicata* on the question of abatement, it being stated that by that decision it was in fact decided that the decree in Suit No. 49 of 1887 did not operate as *res judicata* between the parties on the question of abatement and it was urged that the plaintiff could not now contend that the decree in Suit No. 49 of 1887 in fact precluded the raising of the question of abatement of rent by the defendants.

So far as the first point is concerned, this point has never been, so far as we can find, actually decided in this Court. In the case of *Kesho Prasad Singh* v. *Ramdeni Singh* (1) it was decided by a Division Bench of that Court that in a suit by a co-sharer landlord who under an arrangement between himself, his co-sharers and the tenants is entitled to collect his share of the rent separately the tenants are entitled to apply for an abatement of rent. It is urged on behalf of the respondent that the matter has in fact been decided by a decision of a Full Bench of this Court in the case of *Bhoopendra Narain Dutt* v. *Roman Krishna Dutt* (2). We do not, however, think that that decision really covers the point which is now before us. That was a suit brought by some joint landlords against one of the several joint tenants for recovery of the plaintiff's share of rent payable on account of the defendant's share of the tenure under a previous arrangement and it was held there that the tenant defendants could not claim abatement under the provisions of s. 52 of the Bengal Tenancy Act. That, however, was a different suit from the present one as one out of a number of tenants was alone being sued and not as here all the tenants of the holding. There are, it is true, expressions in the judgment of the learned Chief Justice Sir Francis Maclean which would go to uphold the contention urged before us. by the respondent. But those observations were not necessary for the decision of the suit and we do not think that that decision can be taken as an authority governing the proposition which is now before us. I agree with the decision to which I have referred

(1) 74 Ind. Cas. 454; 2 Pat. 183; (1923) A. I. R. (Pat.) 397; 4 P. L. T. 689.

(2) 27 C. 417; 4 C. W. N. 107; 14 Ind. Dec. (N. S.) 275.

in *Kesho Prasad Singh* v. *Ramdeni Singh* (1) and it seems to be founded on good sense. This is not a suit for rent under the Bengal Tenancy Act but in fact suit for money and the decree that would be obtained would be merely a money-decree in which the right title and interest only of the judgment-debtor might be brought to sale and consequently neither the provisions of s. 188 nor of s. 52 of the Bengal Tenancy Act really apply to the question which is now before us and it is difficult to see on general principles why in a suit of this nature the tenants should be debarred from raising the question of their right to abatement of rent and no decision that could be given in favour of the tenants could effect the shares of the other co-sharer landlords who were not before the Court and this being so it is difficult to see how any prejudice can arise by the question of abatement being raised and decided in a suit of this nature. It is said that an anomalous position would be created, namely, that the rate of rent in respect of one part of the tenure would be so much and the rent in respect of another part would be a different amount. But we do not see, however, anomalous the position may be, that it is any reason for depriving the tenants of their right of raising a question of this nature. Then it is stated that although there are now separate collections there is nothing to prevent a subsequent suit by all the co-sharer landlords for the whole rent of the tenure and it is stated that if the question of abatement is raised and decided in a suit of this nature prejudice may accrue to the other co-sharer landlords if it is ever necessary to bring a joint suit of the nature which I have indicated. But here again it is difficult to see how a decision in this suit of the question of abatement can in any way prevent a subsequent suit by the co-sharers or prejudice them in any way with regard to the decree they may obtain in a suit brought by the whole body of co-sharers and on general principles therefore, if there is no prejudice to the absent co-sharers it is difficult to see why the tenants should be precluded from raising the question as to abatement in a suit brought by one of the co-sharers. We think, therefore that the learned Judge was wrong in saying that the tenants were precluded by the nature of the suit from raising the question of abatement of rent. So much then for the first point.

So far as the second point is concerned it appears that Suit No. 49 of 1887 was a suit by the holders or owners of a 3-annas and 15 *gandas* share and the claim in the suit was for the whole 13-annas rent. Haridas Dutta, who is the predecessor-in-interest of the plaintiff in this suit, was originally a defendant in that suit and Mr. Miller the Official Trustee of Bengal was the predecessor-in-interest in that suit of the present appellants. Now the suit constituted as I have indicated went on for some time. There was a decision in the Court below and an appeal by some of the parties in the course of which by consent a remand order was passed. At the time when the consent order was passed Haridas Dutta was still in the category of defendants. Subsequently, however, after the consent order had been passed he was transferred to the category of plaintiffs at his own request and ultimately a consent decree was passed for rent at the old rate. At the time the suit was remanded by consent. Haridas did not appear and he was not a party to the remand order that was made by consent of the appearing appellants and the respondent. It is stated that he subsequently took an active part in the remand proceedings and that ultimately a decree was passed by consent for the rent at the old rate that he was at that time a plaintiff in the suit and that, therefore, the decree passed in that suit by consent which is before us should operate as *res judicata* between the present defendants who were represented by Mr. Miller and the present plaintiff who was represented by Haridas. But the materials before us are not clear on the point and we very much doubt whether in the circumstances as I have indicated the decree in Suit No. 49 of 1887 operates as *res judicata* between the present parties to the appeal. The decree passed 40 years ago may be of considerable evidentiary value as it was mere told acted on by the parties or rent was paid at that rate for a considerable number of years. But this is not the point. The point is whether the present appellants are debarred by reason of that decree from urging their right to abatement of rent. We think that they are not. The other decisions to which we were referred were clearly not *inter partes* and have no bearing on the question of *res judicata*.

The result, therefore, is that the appeal succeeds and we hold that it is open to the

appellants to raise in this suit the question of abatement and that they are not precluded by any previous decisions either in Suit No. 49 of 1887 or otherwise. The suit will accordingly be remanded to the First Court in order that that Court may decide as to the rate of rent payable by the present appellants in respect of their holding after measurement and that Court will finally dispose of the suit.

Costs of this appeal will abide the result in the First Court.

Mukerjee, J.—I agree.

Appeal allowed;
Case remanded.

Z. K.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 107 OF 1924.
March 16, 1925.
Present:—Mr. Justice Heald and Mr. Justice Chari.

U PE GYI—APPELLANT
versus
U PYO AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Succession—Father's younger sister, whether to be preferred to mother's sister's son.

Under the Burmese Buddhist Law a father's younger sister is a preferential heir as against a mother's sister's son and is consequently entitled to Letters of Administration in preference to the latter. [p. 658, cols. 1 & 2.]

Appeal from an order of the District Court, Myaungmya, in C. M. No. 14 of 1924.

Mr. *Kyaw Din* (with him Mr. *Ba Shin*), for the Appellant.

Mr. *Paw Tun*, for Respondents Nos. 1 to 4.

Mr. *Villa* (with him Mr. *E. Maung*), for Respondent No. 13.

JUDGMENT.—Appellant claimed Letters of Administration to the estate of Ma On who died without issue. Her parents and grandparents had died before her and she had no brothers or sisters. Appellant, who was her cousin, being a son of her maternal aunt, claimed to be one of her heirs.

Caveats were filed by appellant's own brother, Maung Pyo, by one Po Saung, who also was a son of a maternal aunt, and by Ma Me, a paternal aunt.

The District Court held that Ma Me excluded the others because she was one step nearer in relationship to Ma On, and was, therefore, Ma On's sole heir.

Appellant alleges in appeal that Ma Me, being a younger sister of Ma On's father, cannot be one of Ma On's heirs, because the father's younger sister and the mother's younger brother are not mentioned in the *dhammathats* in the lists of the six relatives of the father and mother, that is the six kinds of uncles and aunts who are heirs to a nephew or niece who dies without nearer relatives.

The six words which are used in Burmese to denote the six kinds of uncles and aunts specifically refer to the father's elder and younger brothers, the mother's elder and younger sisters, the father's elder sister, and the mother's elder brother. It is clear that there are really eight and not six kinds of uncles and aunts, the other two being the father's younger sister and the mother's younger brother, and the question to be decided is whether these two were for any reason intended to be excluded from inheriting like the other six. According to the *dhammathats* the six uncles and aunts share equally as heirs, no distinction being made between brothers and sisters or between younger and elder or between the brothers or sisters of the mother and those of the father. Under these circumstances there seems to be no reason for discrimination against the father's younger sister and the mother's younger brother, and no reason whatever is given in the *dhammathats*, or has, so far as I am aware, even been suggested. I think it probable, therefore, that no real discrimination was intended. The compilers of the early law books were extremely fond of enumeration into classes and the compilers of the Burmese Buddhist *dhammathats* habitually accepted the numbers which they found in the older books on which the *dhammathats* were based, and sometimes found difficulty in adopting those numbers to the facts which they found in Burmese Buddhist society. Thus there are six kinds of sons who are entitled to inherit and six kinds who are not entitled to inherit, but the lists of the six given in the different *dhammathats* do not agree. Similarly there are six kinds of wives and six kinds of concubines, as well as six kinds of uncles and aunts, the numbers in each case being undoubtedly taken from the earlier law books. It seems probable that in the language or languages in which the earlier books were written six terms were

sufficient to include all uncles and aunts, that is, all the brothers and sisters of either parent. But in Burmese eight different words are used, and the compilers of the Burmese *dhammathats* had somehow or other to include eight members into a class which, according to the authorities, could contain only six. The only way in which they could do so was by omitting two and regarding the description of two others as extended so as to cover the two who were omitted. It seems probable, therefore, that the list of the "six relatives" given in the *dhammathats* was intended to include all uncles and aunts, and that the omission of the father's younger sister and the mother's younger brother was only apparent and was not intended to exclude those particular uncles and aunts from the inheritance.

However that may be, it is certain that no such exclusion has ever been judicially recognized. In the case of *Kan Gyi* v. *Ma Ngwe Nu* (1), it was held that surviving uncles and aunts exclude the children of deceased uncles and aunts. It is true that in that case there seems to have been no younger brother of the mother, but the rule was laid down generally without any qualification and it was expressly based on the principle of Burmese Buddhist Law that the nearer relative excludes the more remote.

In the case of *Ko Kan Gyi* v. *Ma Pyu* (2) which dealt with the same estate, it was held that the surviving uncles and aunts, whether paternal or maternal, share equally in the estate of a deceased nephew or niece who has left no nearer relatives, and the father's younger sister was actually included as being entitled to share in the estate.

In the case of *Ma Ma Gale* v. *Ma Me* (3), it was said that, in the case of collateral succession, the general principle, that the nearer relative excludes the more remote, takes full effect, and the general rule, that failing descendants and ancestors the estate goes to the "six relatives," was mentioned and was interpreted as meaning that the estate goes to the paternal and maternal uncles or aunts without any such exclusion as that suggested in this case.

In these circumstances, I do not think that the exclusion alleged is established, and I would hold that the lower Court was right in finding that in this case Ma Me, being a sister of Ma On's father, excluded appellant, who was only a son of a sister of Ma On's mother, and in dismissing appellant's application for Letters.

I would, therefore, dismiss the appeal and would order appellant to pay Ma Me's costs in both Courts, Advocate's fee in this Court to be ten gold *mohurs*.

The Administrator *pendente lite* should be discharged.

Z. K. *Appeal dismissed.*

(1) 3 Ind. Cas. 680; 5 L. B. R. 70.
(2) 18 Ind. Cas. 497; 6 L. B. R. 164; 5 Bur. L. T. 283.
(3) II U. B. R. (1904-06), Buddhist Law, Inheritance, 5.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 817 OF 1923.
February 5, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

GAFUR IMAM—DEFENDANT—APPELLANT
versus
AMIR ISAB SAUDAGAR—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 95—Mortgage—Redemption by co-mortgagor—Charge on shares of other mortgagors—Interest, whether can be claimed—Notice.

Under s. 95 of the Transfer of Property Act a redeeming co-mortgagor is only given a charge for his portion of the expenses properly incurred in so redeeming and obtaining possession of the mortgaged property. He is not ordinarily entitled to interest in respect of the amount for which he has a charge on the property unless he gives notice to his co-mortgagors that he would claim interest against them in respect of their share of the mortgage-money paid by him if they wished to redeem their shares. [p. 659, col. 2; p. 660, col. 1.]

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Nasik, in Appeal No. 104 of 1922, reversing the decree of the Subordinate Judge at Nasik, in Civil Suit No. 144 of 1922.

Mr. *S. Y. Abhyankar*, for the Appellant.
Mr. *S. R. Gokhale*, for the Respondent.

JUDGMENT.—The plaintiffs sued to obtain possession by partition of their one-third share in the suit property, and for recovering contribution from the defendants for money paid by the plaintiffs for redeeming the other two-thirds in the same.

The Trial Judge held that the plaintiffs could claim one-third share in the suit property; that they had redeemed the mortgages on the property and obtained pos-

session; and that the plaintiffs were entitled to a sum of Rs. 66-10-8 from the defendants as their contribution towards the expenses incurred in redeeming the property. He did not allow the plaintiffs any interest on that amount.

The third defendant alleged that he had repaired the house at a cost of Rs. 350 after he had purchased the interest of the first defendant, one of the original mortgagors. The Judge found that he had spent Rs. 350 and held that the plaintiffs were liable to pay one-third of that amount.

In appeal the Appellate Judge held that plaintiffs were entitled to interest on the amounts which they had spent in paying off the mortgagee, and considered twelve per cent. as a reasonable rate, but he differed from the Court below with regard to the money spent by the third defendant in making repairs, and found he could not be considered a *bona fide* purchaser, and consequently passed a decree for the plaintiffs that their one-third share should be equitably separated and given in their possession and the third defendant should pay to the plaintiff No. 1, Rs. 154 as his share of the mortgage-money with interest at six per cent. thereon from the date of suit till payment within two months from the date of the decree.

The third defendant has appealed. He contends that he ought to have been allowed proportionate costs of repairs made by him to the house situated in the suit land, and that the Judge erred in law in awarding interest to the plaintiff on the amounts spent by him in redeeming the property. We do not think that the third defendant in the circumstances of the case is entitled to charge the plaintiff with his proportion of the cost incurred by him in executing repairs to the property.

On the question whether he is liable to pay interest to the plaintiffs on his proportion of the expenses properly incurred in redeeming the property, there is no direct authority. Section 95 of the Transfer of Property Act says:—

"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

In a note in Mitra's work on the Transfer of Property Act (2nd Edition) to s. 95 we find the following passage at page. 511:— "The redeeming co-mortgagor has a right to claim interest on the money paid by him. The rate of interest must be reasonable. The fact that he had to borrow redemption money at a high rate of interest is not a ground for charging the same rate from the other co-mortgagors." The authority for that proposition is *Jago* v. *Arjun* (1). In *Raushan Ali Khan Chowdhury* v. *Kali Mohan Moitra* (2), the Court allowed interest at twelve per cent. We have been referred, however, to the case of *Malik Ahmad Wali Khan* v. *Shamsi Jahan Begam* (3). The principal question argued was whether the redeeming co-mortgagor could claim contribution from his co-mortgagors if he had not obtained possession of the mortgaged property. The Privy Council held that the section should be construed distributively, and that the charge followed on redemption; the condition of obtaining possession applied only to cases in which its fulfilment was from the nature of the mortgage possible. The plaintiff claimed during the argument that he was entitled to recover two-thirds of the amount paid by him, with interest at the stipulated rate, and to have a charge declared in his favour on the respondents' interests in the mortgaged property. The judgment of their Lordships does not deal with this contention. But the decree passed by them declared that the plaintiff was entitled to recover against the defendants two-thirds of the sum paid by him to redeem the mortgage, with interest at six per cent. per annum from the date of the institution of the suit. We must take it, therefore, that the claim for interest from the date of redemption was disallowed. It seems to us reading s. 95, that the redeeming co-mortgagor is only given a charge for his portion of the expenses properly incurred in so redeeming and obtaining possession of the mortgaged property. Consequently his claim to interest on the expenses so incurred must arise, if at all, not from the section, but from some other ground. If, for instance, he gave notice to the co-mortgagors that he had redeemed the property, and that he had a statutory charge for his pro-

(1) 49 Ind. Cas. 230.
(2) 4 C. L. J. 79.
(3) 33 I. A. 81; 8 Bom. L. R. 397; 10 C. W. N. 626; 3 A. L. J. 360; 3 C. L. J. 481; 1 M. L. T. 143; 16 M. L. J. 269; 28 A. 482; 8 Sar. P. C. J. 918 (P. C.).

portion of the expenses so incurred, he might also give them notice that he would claim interest against them on that amount if they wished to redeem their shares. But, if no such notice is given, it is difficult to see on what the claim for interest could be founded, or from what authority the Court could derive the power to exercise a discretion to allow interest.

We think, therefore, that we must allow the appeal to this extent, that defendant No. 3 must pay the plaintiff Rs. 66-10-8 as his share of the mortgage-money with interest at six per cent. thereon from the date of suit till payment. Defendant No. 3 can have three months to pay the amount from the time the proceedings are returned to the Trial Court.

No order as to costs of the appeal.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 190 OF 1923.

February 20, 1925.

Present:—Mr. Justice Devadoss.

R. PALAVESAM CHETTIAR—PLAINTIFF—PETITIONER

versus

NARAYANA IYER—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 15, 16—Arbitration—Arbitrator importing personal knowledge into consideration of case—Evidence taken in absence of party—Misconduct—Award, legality of.

The question whether an arbitrator can import his own personal knowledge into the consideration of a case before him depends upon the terms of the submission to arbitration. If the submission simply asks him to decide a case, that would not give him a right to import his own personal knowledge into the consideration of the case. But where the submission gives him an option either to take evidence or to decide the case upon his own personal knowledge, he is entitled to import into the consideration of the case his own personal knowledge. [p. 660, col. 2.]

Lachhmi Narain v. *Sheo Nath Pandey*, 54 Ind. Cas. 443; 42 A. 185 at p. 187; 1 U. P. L. R. (A) 177; 18 A. L. J. 78, relied on.

It is illegal for an arbitrator to take evidence in the absence of a party. [p. 661, col. 1.]

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Ambasamudram, in S. C. S. No. 1738 of 1921.

Mr. *S. Ramaswami Iyer*, for the Petitioner.

Mr. *T. L. Venkatrama Iyer*, for the Respondent.

JUDGMENT.—This is a petition to revise the order of the District Munsif of Ambasamudram declining to set aside an award passed by the arbitrators in S. C. S. No. 1738 of 1921. The first contention urged by Mr. Ramaswami Iyer, against the judgment of the lower Court is that the arbitrators imported into the consideration of the case matters within their own personal knowledge. In giving grounds for their decision the arbitrators say: "And we also know that whenever he came here he may have purchased oil from this plaintiff or other oil mongers only upon the payment of ready cash and that otherwise there was no necessity for him to have such large dealings." The District Munsif dealing with this objection says:—"No doubt the arbitrators have imported personal knowledge. They are entitled to do so and parties who consented to the arbitration would clearly have known that the arbitrators must have some local knowledge and would import such knowledge in deciding the case." Whether the arbitrators could import their own personal knowledge into the consideration of the case before them would depend upon the terms of submission to arbitration. If the submission simply asks the arbitrators to decide a case that would not give them a right to import their own personal knowledge into the consideration of the case. But where the submission to arbitration gives them an option either to take evidence or to decide the case upon their own personal knowledge they would be entitled to import into the consideration of the case their own personal knowledge. This is the view of Mr. Justice Lindsay in *Lachhmi Narain* v. *Sheo Nath Pandey* (1). The learned Judge observes: "This matter has to be determined in the light of the language of the agreement by which this dispute was referred to arbitration. If the parties agreed that the arbitrator should decide the dispute between them on his own knowledge, and further agreed that there was no need for him to take any evidence, no misconduct can be imputed." In this case, the reference to the arbitration does not say that the arbitrators were to decide the matter in controversy upon their own personal knowledge. On the other hand the reference to arbitration simply asks them to decide the dispute between the plaintiff and the defendants. That being

(1) 54 Ind. Cas. 443; 42 A. 185 at p. 187; 1 U. P. L. R. (A.) 177; 18 A. L. J 78.

so, they cannot import into the consideration of the case anything derived from their own personal knowledge.

Apart from this objection, there is a more serious objection to the award. In para. 5 of the grounds attached to the award they say: "It is learnt that this defendant lived along with his wife at Sankarankoil on those occasions. It does not appear that they lived in this village or made any celebration on those dates." They do not say from whom they learnt or had this information and it does not appear that they enquired of anybody in the presence of the plaintiff. Taking evidence in the absence of the plaintiff is illegal. Another objection urged by Mr. Ramaswami Iyer is that his client wanted the arbitrators to take evidence and went to them on several occasions and they put him off with some excuse or other. The District Munsif does not deal specifically with this objection, but the respondent's Vakil wants to rely upon the last paragraph of his judgment in which he says: "The arbitrators have arrived at their decision after due and careful and *bona fide* enquiry and there is nothing to vitiate the award." This does not amount to a finding that the statement of the plaintiff that he asked the arbitrators several times to take evidence on his side and they put him off with some excuse or other, is not true. On the whole, I am not satisfied that the arbitrators acted according to law, and, therefore, their award is bad. The District Munsif's order accepting the award is set aside and he is directed to restore the suit to file and dispose of it according to law. The costs of this petition will be provided for in the decree which may be passed by the District Munsif.

V. N. V. *Order set aside.*

Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 19 OF 1925.

May 14, 1925.

Present :—Mr. Justice Sulaiman and Mr. Justice Daniels.

FAQIR ULLAH—PLAINTIFF —APPELLANT

versus

HIKMAT ULLAH—DEFENDANT —RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 35—Civil Procedure Code (Act V of 1908), s. 99—Suit instituted in and evidence recorded by Small Cause Court—Decision by Court not having powers of Small Cause Court—Appeal, whether lies—Evidence, failure to record in full—Irregularity.

A suit was originally instituted in a Small Cause Court and the evidence was recorded by that Court. The Presiding Officer of the Court ceased to have jurisdiction over the case and it was taken up by his successor who had no Small Cause Court powers and was tried as an ordinary suit:

Held, (1) that the omission of the officer who decided the suit to record the evidence over again as in a regular suit was an irregularity to which s. 99 of the C. P. C. applied and which could not be made a ground for setting aside the decree unless it had affected the decision on the merits; [p 662, col. 1.]

(2) that in view of the provisions of s. 35 of the Provincial Small Cause Courts Act the decision in the suit must be treated as one given in a regular suit and was open to appeal. [p. 661, col. 2.]

Sarju Prasad v. *Mahadeo Pande*, 29 Ind. Cas. 996; 37 A. 450; 13 A. L. J. 639, *Lachhman Das* v. *Ahmad Hasan*, 38 Ind. Cas. 105; 39 A. 357; 15 A. L. J. 305 and *Zamirul Hasan Khan* v. *Imdad Ali Khan*, 64 Ind. Cas. 573; 44 A. 59; 19 A. L. J. 838; (1922) A. I. R. (A.) 161, followed.

Civil revision from an order of the Third Subordinate Judge of Moradabad, dated the 25th November 1924.

Mr. *G. Agarwala*, for the Appellant.

Mr. *S. A. Haider*, for the Respondent.

JUDGMENT.—This is a revision against an order of the learned Subordinate Judge of Moradabad dismissing the plaintiff's suit on appeal. The grounds of revision are these. The suit was originally instituted before a Munsif having Small Cause Court powers. This Munsif ceased to have jurisdiction, and the case was taken up in the ordinary way by his successor who had no Small Cause Court powers. The evidence had been recorded by the First Munsif. The case was decided in favour of the plaintiff by the Second Munsif. On appeal the learned Subordinate Judge to whom the appeal was made over took a different view and dismissed the suit. The plaintiff's first contention is that the suit continued to be a Small Cause Court suit, and, therefore, no appeal lay to the District Judge. This contention is contrary to s. 35 of the Provincial Small Cause Courts Act, and the fact that a case which is decided under that section by an officer not having Small Cause Court powers must be treated as a regular suit in which an appeal lies, is supported by a long string of authorities, *e.g.*, *Sarju Prasad* v. *Mahadeo Pande* (1) *Lachhman Das* v. *Ahmad Hasan* (2), and *Zamirul Hasan Khan* v. *Imdad Ali Khan* (3).

(1) 29 Ind. Cas. 996; 37 A. 450; 13 A. L. J. 639.
(2) 38 Ind. Cas. 105; 39 A. 357; 15 A. L. J. 305.
(3) 64 Ind. Cas. 573; 44 A. 59; 19 A. L. J. 838; (1922) A. I. R. (A.) 161.

The applicant's second contention is that the Munsif who decided the case should have re-heard the evidence and recorded it in full as in a regular suit. Even if the Munsif should have done this, his omission to do so is merely an irregularity in procedure to which s. 99 of the C. P. C. applies and which cannot be made a ground for setting aside the decree unless it has affected the decision on the merits. In this case we find on examining the record that the learned Munsif who heard the evidence recorded unusually full notes. That the shortness of the notes did not prejudice his successor against the plaintiff is evident from the fact that the case was actually decided in his favour. In appeal before the learned Subordinate Judge the applicant took no objection to the form in which the evidence had been recorded. He had, of course, taken none before the Trial Court. We further find that the decision turned on a question of limitation, which depended on whether the true date of the pro-note was 1920 or 1921. It is quite obvious that the date originally written was 1920 and has been altered into 1921. The point on which the Courts differed was whether that alteration was made immediately, at the time when it was first written, or was made subsequently in order to bring the case within limitation. We find, therefore, that the error in procedure, if there was any, has not in any way affected the result of the case.

The revision accordingly fails, and we dismiss it with costs.

Z. K. *Revision dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 413 OF 1923.

December 5, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

A. L. V. R. P. VEERAPPA CHETTIAR, REPRESENTED BY HIS AUTHORISED AGENT M. V. SOMANATHA IYER—PLAINTIFF—PETITIONER

versus

MUNICIPAL COUNCIL, PALNI, REPRESENTED BY ITS CHAIRMAN—DEFENDANT—RESPONDENT.

Madras District Municipalities Act (V of 1920), ss. 93, 95—"Residence," meaning of—Agent for collection from lands outside Municipality residing within Municipal limits—Liability to pay profession tax—"Inside Municipal limits, scope of.

The expression "or any source other than houses or lands inside the Municipal limits" in s. 95 of the Madras District Municipalities Act is used in order to exempt a person from paying profession tax on rent from property inside the Municipality, since he is already taxed on that under s. 81; but a person residing within the Municipality and drawing income from rent of houses outside it is bound to pay profession tax and is not entitled to any exemption. The words "inside the Municipal limits" in s. 95 qualify the words "houses and lands" and not the word "source." [p. 663, col. 1.]

Section 93 of the Madras District Municipalities Act only lays down the qualification for liability to tax and has nothing to do with the conditions under which the tax becomes payable. [*ibid.*]

The word 'residence' in s. 95 of the Madras District Municipalities Act must be interpreted in the sense of personal residence, and a person who neither himself personally resides nor maintains a residence for himself or his family within a Municipality, but merely maintains an office for the collection of his rent cannot be said to "reside" within the Municipality. [p. 663, col. 2.]

A money-lender who exercised his profession in one *taluk* purchased in another *taluk* a *zemin* situated wholly outside the limits of a Municipality but maintained within the Municipal limits a resident collection agent who collected his *zemin's* rent for him. He did not, however, himself ever reside or maintain a house for the residence of himself or his family within the Municipal limits:

Held, that although the money-lender through his agent was in receipt of income within the Municipality he was not liable to pay profession tax inasmuch as he did not "reside" within the Municipality within the meaning of s. 95 of the Madras District Municipalities Act. [p. 663, col. 1.]

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree and judgment of the Court of the District Munsif, Palni, in S. C. No. 306 of 1922.

Mr. *T. L. Venkatrama Iyer*, for the Petitioner.

Mr. *K. V. Krishnaswami Iyer*, for the Respondent.

JUDGMENT.—The petitioner seeks for the revision of the decree of the lower Court in a Small Cause Suit instituted by the plaintiff to recover from the defendant, the Municipal Council of Palni, the amount of profession tax levied on him by the Council for the half-year ending 31st March 1922. The facts appear to be as follows:—The plaintiff is a Nattukottai Chetti, whose profession is money-lending and he exercises that profession at Devakottai. He has purchased the *zemindari* of Rattiampadi in the Palni *taluk*. This *zemin* is situated wholly outside the limits of the Palni Municipality. The plaintiff maintains in the Palni town a resident collection agent

who collects his *zemin's* rent for him. In these circumstances the lower Court has held that the plaintiff has through his agent been in receipt of income within the Municipality and is, therefore, liable to be taxed for profession tax.

The legal correctness of this decision depends on the interpretation of ss. 93 and 95 of the Madras District Municipalities Act. It is contended for the petitioner that he or his agent is not a person in receipt of income from "any source other than houses or lands inside the Municipal limits", and it is sought to make the words "inside the Municipal limits" qualify 'source' and not 'houses and lands'. This view is untenable. There is no reason whatever why a person residing within the Municipality and drawing income from rent of houses outside it should not pay profession tax as he obtains the benefit of Municipal activities in the same manner as any other resident. The phrase is clearly used in order to exempt a person from paying profession tax on rent from property inside the Municipality, since he is already taxed on that under s. 81.

We cannot say that the petitioner is not *in receipt* of this income. He admits that his agent collects it and remits it to him. He is, therefore, *prima facie* liable under s. 93, if he has been in receipt of that income within the Municipality for the period laid down in s. 95. Section 95 lays down that, though a person may be liable for the tax under s. 93, it is not payable unless he resides in the Municipality for sixty days in the half-year in question. This proposition is not affected by the principle laid down in Illustration (3) of s. 93, because s. 93 is only laying down the qualification for liability to tax and has nothing to do with the conditions under which the tax becomes payable. That is dealt with under s. 95. This point has been overlooked by the lower Court and it has thus fallen into an error.

Now, the plaintiff in his plaint clearly stated that he never resided in Palni for sixty days in the half-year. In the written statement the Council did not controvert that statement. Had the plaintiff resided for 60 days in the half year it would have been the most obvious answer to the plaintiff's suit. We must take it then that the plaintiff did not reside within the Municipality for sixty days in the half year in question.

The respondent has tried to argue that 'residence' will include 'the maintenance of an office' although the principal never appears there. No doubt the word 'residence' has been interpreted in various ways when it has been necessary to interpret its meaning in income-tax and other Statutes; but we think that its meaning in this Act may be decided by a consideration of the reported rulings under the old District Municipalities Act of 1884, and the consequent alteration of the provisions in the new Act. Under the old Act, s. 55, a person exercising a profession, etc., or holding an office was liable under s. 53 to the tax, and had to pay it, if he exercised the profession or held the office for sixty days in the half year. In the two rulings in *Chairman, Ongole Municipality* v. *Mounsey* (1) and *Hammick* v. *President, Madras Municipal Commission* (2) this Court held that a Government servant, whose Head Office was in the Municipality, was not, while he was himself outside the Municipality, holding his office within the Municipality. So that, unless he himself was for 60 days within the Municipality, he was not liable to the tax. To meet that difficulty, we presume, the Legislature provided in Sch. IV, r. 18 of the new Act that a person must be deemed to have exercised a profession or held an appointment for the period specified in s. 95 "if his principal office is within the Municipality and his connection therewith has lasted for the specified number of days". Under the old Act the test for liability in the case of a person holding an appointment was personal presence within the Municipality; under the new Act, in such a case personal presence is not necessary. Had the Legislature meant that, in the case of persons in receipt of pension or income, personal presence in the Municipality was equally not necessary, we think they would have made it equally clear. We think, therefore, that the test in such a case is personal presence within the Municipality, and that 'residence' in s. 95 has to be interpreted in the sense of personal residence and that one who neither himself personally resides nor maintains a residence for himself or his family within the Municipality but merely maintains an office for the collection of his rent cannot be said to reside within the Municipality. The petitioner, on this

(1) 17 M. 453; 6 Ind. Dec. (N. S.) 314.
(2) 22 M. 145; 8 M. L. J. 164; 8 Ind. Dec. (N. S.) 103.

ground, therefore, will not be liable to pay the profession tax.

The petitioner raised a further ground of objection, namely, that since all his *zemin* land rents are already taxed to a fixed—*peishkush*—this *peishkush* cannot be increased by any further tax by Government, either directly by Government itself or indirectly by Government authorizing a Municipality to tax such rent without a direct statutory declaration of its interference with his permanent *sannad* rights. He quoted *Secretary to the Chief Commissioner of Income Tax* v. *Zemindar of Singampatti* (3) in aid of his contention that the State cannot authorize a Municipality to levy a tax which it cannot itself levy. This question is not free from difficulty but need not be decided in this case.

On the ground that the petitioner has not resided for 60 days within the Municipality, the levy of a profession tax on him was contrary to law. We must hold that he was not liable for this tax and that the lower Court has made a mistake in law in dismissing this suit. We think this is a case in which we must interfere in revision. We reverse the decree of the lower Court and give the plaintiff a decree for the amount sued for with costs in both Courts.

V. N. V. *Decree reversed.*

Z. K.

(3) 70 Ind. Cas. 504; 45 M. 518; 15 L. W. 496; (1922) M. W. N. 353; 31 M. L. T. 21; (1922) A. I. R. (M.) 325.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 375 OF 1922.

February 17, 1925.

Present :—Mr. Justice Suhrawardy and Mr. Justice Duval.

BHOLA NATH MONDAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MOHESH CHANDRA BERA AND OTHERS—DEFENDANTS—RESPONDENTS.

Parties—Easement, suit on—Servient owner, who is.

In a suit for the removal of an obstruction to an easement, the servient owners against whom no relief is sought are not necessary parties. [p. 665, col. 1.]

'Servient owner' for the purpose of a suit on an easement is the owner who has raised objection to plaintiff's claim, against whom there is a cause of action, and does not refer to the owners of all the tenements subject to the easement. [p. 665, col. 1.]

Haran Sheikh v. *Ramesh Chandra Bhattacharjee*, 62 Ind. Cas. 425; 25 C. W. N. 249, relied on.

Appeal against a decree of the second Additional District Judge, Midnapur, dated the 23rd of April 1921, reversing that of the Munsif, Third Court at that place, dated the 11th August 1920.

Babus *Mohendra Nath Roy*, *Anil Chandra Dutt* and Mr. *Samarendra Kumar Dutt*, for the Appellants.

Babus *Joges Chandra Roy* and *Navadwip Saha*, for the Respondents.

JUDGMENT.—The case of the plaintiffs in the suit out of which this second appeal arises was that there is *khal* running along the eastern boundary of their *mouza* which continues along the northern and eastern boundaries of the neighbouring *Mouza* Beluria and then southwards; and that water from their *mouza* is discharged through certain sluices from the *khal* into a river lying further to the east; but that in 1918 the tenants of Beluria made two obstructions one at the point marked A in the map obstructing the *khal* where it entered into *mouza* Beluria and another at the point B obstructing it at its exit from that *Mouza*. The suit was brought by certain representative tenants of the *Mouza* Purusattampur against certain tenants of Beluria as representing all tenants of that village and notices were published under O. I, r. 8 in the local newspaper, on the spot and elsewhere.

The learned Munsif found in favour of the plaintiffs and gave a decree on certain terms. He found that the natural drainage of the village was through this *khal* and that the tenants of Beluria had wrongfully obstructed it at points A and B.

On the case coming up in appeal the only point decided is the question whether the suit could proceed owing to defect of parties. The case set up was that though no doubt the people of Beluria were the people who were said to have put up the obstructions, the plaintiffs had asked for a declaration that the whole *khal* must remain open, not only through the 7 *mouzas* lying successively to the south. The learned Additional District Judge accepted this contention and dismissed the suit on the preliminary ground that the suit was bad for defect of parties. He held that the principle laid down in the

case of *Haran Sheikh* v. *Ramesh Chandra Bhattacharjee* (1) was applicable to the case and did not follow the observations in the case of *Madan Mohan Chakravarty* v. *Sashi Bhusan Mukherjee* (2). The facts of this case according to the pleadings are that the people of Beluria alone had put up these obstructions at points A and B and no obstruction had been made in the *khal* at any point further south where it passed along the east side of the other *mouzas*; and the prayer in the plaint was for a declaration of prescriptive and natural right of easement and easement of necessity by cutting these *bunds* so as to discharge water through the *khal* as delineated in the map and for a permanent injunction restraining the tenants of Beluria from putting any further obstructions in the *khal*. No relief, therefore, appears to us to have been sought against the tenants of any of the other *mouzas* lying further to the south. This case on its pleading is, therefore, in our opinion, clearly distinguishable from the case of *Haran Sheikh* v. *Ramesh Chandra Bhattacharjee* (1). In that case one of the persons interested in the servient tenement not having been made a party it was held that his non-joinder as a party to the suit was a fatal defect in the case. But in this particular case no relief is asked for in the plaint against any one else except the tenants of Beluria. It is remarked in the case of *Mudan Mohan Chakravarty* v. *Sasi Bhusan Mukherjee* (2) that servient owner means the servient owner who has raised objection to a plaintiff's right against whom there is a cause of action and does not refer to the owners of all the tenements over which a way passes. In our view, therefore, it was not necessary to make the tenants of the other *mouzas* to the south parties in the particular litigation.

At the hearing before us a further point has been raised, *i. e.*, that, as a matter of fact, the obstructions put up at the points A and B are on land in the *khas* possession of the *zemindar* who should be a party. This point appears to be only raised at this stage. No where in the pleadings does it appear that the landlord was considered to be a necessary party to this case. In fact we do not know whether these two *mouzas* are under the same landlord or not. We hold that this point cannot be raised at this stage.

In the result, therefore, this appeal is allowed, the decree of the learned Additional District Judge is set aside and the case remanded to the Court of the District Judge of Midnapur for re-hearing of the appeal on the merits. Costs will abide the result.

N. H. *Appeal allowed.*

(1) 62 Ind. Cas. 425; 25 C. W. N. 249.
(2) 31 Ind. Cas. 549; 19 C. W. N. 1211.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 785 OF 1923.
September 16, 1924.
Present:—Mr. Justice Jackson.

JAVVADI CHINNA VENKATRAMAYYA AND ANOTHER—DEFENDANTS Nos. 12 AND 13—PETITIONERS

versus

BANDI VEERASAMI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—"Other sufficient grounds," meaning of—Withdrawal of suit, leave for—Alternative cause of action.

"Other sufficient grounds" in sub-cl. (*b*) of r. 1 of O. XXIII of the C. P. C. must be *ejusdem generis* with the formal defect in sub-cl. (*a*). A Court has no power under O. XXIII, r. 1 to grant permission to a plaintiff to withdraw from the suit with liberty to institute a fresh suit, in a case where the evidence adduced by the defendant is such as to cause the plaintiff's suit to fail and the plaintiff thereafter asks leave to withdraw the suit with a view to institute a fresh suit on an alternative cause of action, especially after a prayer for amendment of the plaint to introduce the alternative cause of action had been refused. [p. 666, col. 2.]

Kali Prasanna Sil v. *Panchanan Nandi*, 33 Ind. Cas. 670; 44 C. 367; 23 C. L. J. 489, 20 C. W. N. 1000, relied on.

Where a Court in such a case grants leave to the plaintiff to withdraw the suit with liberty to bring a fresh suit it acts with gross irregularity in the exercise of its jurisdiction so as to call for interference under s. 115, C. P. C. [*ibid.*]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise a decree of the Court of the Subordinate Judge, Narasapur, in O. S. No. 26 of 1922, dated the 20th February 1923.

Mr. *P. Somasundaram*, for the Petitioners.

Mr. *C. Rama Rao*, for the Respondent.

JUDGMENT.—The petitioners seek to set aside the order of the Subordinate Judge of Narasapur, in O. S. No. 26 of 1922, dated the 20th February 1923.

The petitioners and counter-petitioner both claimed to be alienees from reversioners to the suit estate. The counter-petitioner filed with his plaint in O. S. No. 26 of 1922 a genealogy showing that Subbarayudu the grandfather of his alienors was son of Rajayya under whom the petitioners claim through another branch. A year and more after filing his plaint, the counter-petitioner put in an affidavit to the effect that Venkiah should be inserted between Rajayya and Subbarayudu. "The word was omitted by mistake." It was not a clerical error for the plaint merely copied the recital in plaintiff's document (judging from the affidavit of petitioners). But the petitioners (who are also suing on the strength of their conveyance by other reversioners) had made it plain that the grandfather of plaintiff's alienors was not Rajayya but Venkayya. It was to avoid this difficulty and not owing to clerical error that plaintiff sought to amend his plaint. The Subordinate Judge who dealt with the petition for amendment in I. A. No. 744 of 1922 correctly appreciated the point. "The relationship," he states "of each was definitely given in the plaint and in the written statements and because the defendants have produced some documents to show the connexion of the plaintiff's predecessor-in-title to be not true, the plaintiff wants to have it altered. I think this cannot be allowed now."

The case then proceeded and when the plaintiff attempted to prove the relationship otherwise than stated in his plaint, the evidence was disallowed by a fresh Subordinate Judge. The plaintiff then applied in I. A. No. 227 of 1923 for review of the order refusing amendment ostensibly because his petition to amend had been obscure but, of course, really because his evidence had been ruled out. The new Subordinate Judge examined the case and found, quite rightly, that his predecessor had disallowed the amendment on the ground that the plaintiff was only asking for it because the documentary evidence adduced by the rival claimants showed that Subbarayudu's father was not Rajayya but Venkayya.

But on the same day he gave plaintiff leave to withdraw the suit and file a fresh one, holding that it was open to plaintiff to make allegations in the plaint comprehending an alternative case (that Subbarayudu was either son of Rajayya or Venkayya) and the case came within the purview of O. XXIII, r. 2. Accordingly the decree was passed against which the present petition is directed allowing the plaintiff to withdraw his suit with leave to bring a fresh one. There is no indication that the Subordinate Judge ever directed his mind to O. XXIII, r. 1, and considered whether the suit must fail by reason of some formal defect, or whether there was other sufficient ground for allowing the plaintiff to institute a fresh suit. The 'defect' of alleging Rajayya to be the father of Subbarayudu instead of Venkatayya was not a formal defect; it went to the root of plaintiff's claim. What then was the other ground which would justify the order? Apparently it was the extraordinary proposition that if plaintiff had known that his first case would be proved false by the counter-petitioners, he might have presented an alternative case which would get over the difficulty. It has long been held that 'other sufficient grounds' in sub-cl. (*b*), O. XXIII, r. 1, must be *ejusdem generis* as the formal defect in sub-cl. (*a*) [*Cf. Kali Prasanna Sil* v. *Panchanan Nandi* (1).] Furthermore as is well-summarized in D. F. Mulla's commentary on the C. P. C. (7th Edition, page 678) the effect of numerous rulings is that the Court has no power under this rule to grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit in a case where issues have been joined and the plaintiff fails to produce evidence in support of the issues, or where evidence has been adduced but the evidence is not such as to support the plaintiff's case; the reason is that in cases of this character, the suit must fail, not by reason of some formal defect, but on the merits and the apprehension of failure of the suit cannot be said to constitute 'a sufficient ground' for allowing the plaintiff to institute a fresh suit. The point is succinctly put by Scott, C. J., in *Mahipat Shamla* v. *Nathu Vithoba* (2): "The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant."

The order of the Subordinate Judge is, therefore, bad in law, and it is bad in every other respect. He knew the merits

(1) 33 Ind. Cas. 670; 44 C. 367; 23 C. L. J. 489; 20 C. W. N. 1000.

(2) 4 Ind. Cas. 252; 33 B. 722; 11 Bom. L. R. 1109.

of the case, and his predecessor's order thereon, and must have known that in these circumstances an order under O. XXIII, r. 1 would require a most carefully reasoned justification. I must find that the irregularity of his order is not only material but gross.

The counter-petitioner contends that this order need not be set aside because the parties have already embarked on the fresh suit; and the petitioner has unduly delayed the present petition. It seems that he obtained copy on 14th July 1923 and filed this petition on 4th September 1923. Having regard to the general course of litigation in this Presidency, I am not prepared to hold that this delay is inordinate. Each case must be considered on its merits and *Bansi Singh* v. *Kishun Lal Thakur* (3) in which the Court declined to interfere establishes no absolute rule. The same remark applies to *Jhunku Lal* v. *Bisheshar Das* (4). It is always a nice question whether a Court which has acted erroneously has acted irregularly. Had the Subordinate Judge addressed himself to the question whether the permission to withdraw was to be granted on account of a formal defect, and had then erred in his estimation of what defect could be described as formal, the ruling in *Jhunku Lal* v. *Bisheshar Das* (4) might apply. But the Subordinate Judge has granted permission for no reason contained in the Statute but for one of his own imagining that if the plaintiff knew that the defendants would defeat his first plea, he might have provided an alternative.

Accordingly I allow this petition with costs and reverse the decree in O. S. No. 26 of 1922 on the file of the Subordinate Judge of Narasapur. Presumably from what has already occurred (though this remark must not prejudice the trial) O. S. No. 26 of 1922 will fail for want of evidence, so it will be sufficient if petitioners pay into Court the amount of costs which they have already received under the decree now reversed, to be paid out to the successful party in O. S. No. 26 of 1922. Time for payment six weeks.

V. N. V. *Petition allowed.*

Z. K.

(3) 26 Ind. Cas. 203; 41 C. 632.
(4) 46 Ind. Cas. 71; 40 A. 612; 16 A. *L. J.* 495.

CALCUTTA HIGH COURT.

CIVIL RULES Nos. 629 AND 1090 OF 1924.
February 16, 1925.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

Maharaja SHASHI KANTA ACHARJYA BAHADUR—PETITIONER

versus

MANU SHEIKH, MINOR BY HIS GUARDIAN RAJU SHEIKH—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 153—Rent-decree—Execution proceedings—Special Judge, order of—Appeal, if lies.

No appeal lies under s. 153, Bengal Tenancy Act against an order passed by a Special Judge on an application to set aside a sale held in execution of a rent-decree for an amount not exceeding Rs. 50, on the ground of irregularity and fraud. [p. 668, col. 1.]

Rule against an order of the Sub-Judge, Mymensingh, dated the 16th February 1924, in Miscellaneous Appeal No. 283 of 1923.

ORDER.—This Rule was obtained at the instance of the petitioner to set aside an order of the Subordinate Judge, dated the 16th February 1924. A decree for rent was obtained by the petitioner the amount being under Rs. 50. In execution of the decree the petitioner brought the property to sale on the 20th February 1922 and himself purchased the property. The opposite party who is a minor on the 9th April 1923 applied through his father as his natural guardian to set aside the sale alleging in his application a fraudulent suppression of notices in respect of the sale. The matter came before the Munsif on the 29th September 1923 and he rejected the application to set aside the sale on the ground that there was no irregularity and that the application was barred by limitation. An appeal was preferred against the Munsif's order to the Subordinate Judge who reversed the order of the Munsif stating that on the evidence he was satisfied that the opposite party did not come to know of the order until the delivery of possession was made. This Rule was granted as I have stated against the order of the Subordinate Judge.

Three points are urged before us. Firstly, it is stated that having regard to the provisions of s 153 of the Bengal Tenancy Act, the Subordinate Judge had no jurisdiction to entertain the appeal against the order of the Munsif. Secondly, it is stated that the application which was made more

than a year after the sale was barred by limitation unless fraud was shown which was not found by the Subordinate Judge, and there was a third point made that the application should have been made by the guardian *ad litem* of the infant who had been appointed and not by his father as his natural guardian. It seems to us that the Rule must succeed on the first point, namely of jurisdiction. Section 153 of the Bengal Tenancy Act provides that an appeal shall not lie from any decree or order passed whether in the first instance or on appeal in any suit instituted by a landlord for the recovery of rent (*b*) where the decree or order, as here, is passed by a Judicial Officer especially empowered by the Local Government to exercise final jurisdiction under this section and the amount claimed in the suit does not exceed Rs. 50. An appeal is allowable in case a decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting terms thereto or a question of a right to enhance or vary the rent of a tenant or a question of the amount of rent annually payable by a tenant and the explanation appended to the section which was attached after the decision by this Court in the case of *Kali Mandal* v. *Ramsarbaswa Chakravarti* (1) provides that a question as to the regularity of the proceeding in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. It seems to us, therefore, that if this point had been taken it would be complete answer to the application. But it is urged before us that we should interfere on the ground that the opposite party has been prejudiced because this point was not taken before the Subordinate Judge, it being urged that if the objection had been taken in that Court the matter might have come before the District Judge under the proviso which appears in s. 153. It seems to us that there is no substance in this contention having regard to the terms of the proviso itself and we do not think that the District Judge could have exercised any jurisdiction in the matter even if this point had been taken before the Subordinate Judge. Consequently, it seems to us that the order of the Subordinate Judge was without jurisdiction as there was no appeal from the order of the Munsif having regard to the provisions of s. 153 to which I have referred.

The result is that we make the Rule absolute with costs hearing-fee, one gold *mohur* and the order of the Subordinate Judge is set aside.

Rule No. 1090 is discharged.

N. H. *Rule made absolute.*

(1) 32 C. 957; 9 C. W. N. 721; 1 C. L. J. 476.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 805 OF 1923.

February 5, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

GOVIND VASUDEO KULKARNI—PLAINTIFF—APPELLANT

versus

NARAYAN BALWANT KULKARNI—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13—Suit to recover share in allowance for kulkarni watan, *nature of—Suit of Small Cause nature.*

A suit by the plaintiff to recover from the defendants his share of an allowance received by the latter from the Government in respect of the commutation of a *kulkarni watan* is a suit for the recovery of money had and received by the defendants for the plaintiff's use and does not fall within the purview of Art. 13 of Sch. II to the Provincial Small Cause Courts Act. Such a suit is, therefore, a suit of the nature of a Small Cause.

Damodar Gopal Dikshit v. *Chintaman Balkrishna Karve*, 17 B. 42; 9 Ind. Dec. (N. S.) 28, followed.

Bhikaji Hari v. *Radhabai*, 21 Ind. Cas. 181; 37 B. 700, 15 Bom. L. R. 803, referred to.

Second appeal from the decision of the District Judge at Ahmednagar, in Appeal No. 140 of 1922, reversing a decree of the Subordinate Judge at Rahuri, in Civil Suit No. 339 of 1921.

Mr. *P. V. Kane*, for the Appellant.

Mr. *P. B. Shingne*, for Respondent No. 1.

JUDGMENT.—We think this case comes within the decision in *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve* (1), cited with approval in *Bhikaji Hari* v. *Radhabai* (2). In the latter case the plaintiff sued the defendants alleging that they were both sharers in the *kulkarni watan*, and that the defendants had received profits of the office and had not paid to

(1) 17 B. 42 9 Ind. Dec (N. S.) 28.
(2) 21 Ind. Cas. 181; 37 B. 700; 15 Bom. L. R. 802.

the plaintiff her share for a certain number of years. The defendant admitted that he had received the profits, and admitted that the plaintiff was a sharer, but only disputed the quantum of her share. The suit was held to be a suit for money had and received by the defendant for the use of the plaintiff, and was a suit of a Small Cause Court nature in respect of which no second appeal lay.

In this case we are asked to hold that the suit came within Art. 13 of the Second Schedule of the Provincial Small Cause Courts Act as it was a suit to enforce payment of the allowance or fees respectively called *malikana* and *hakk*, or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immoveable property, or in an hereditary office or in a shrine or other religious institution. This is not a suit to enforce payment of the allowance for which the *kulkarni watan* in question was commuted. That allowance has been recovered from its source, and this is only a dispute between persons claiming to divide it. The plaintiff was entitled to sue the defendant for money had and received. Consequently there was no appeal to the District Court if the Trial Judge had Small Cause Court powers, and if he had not such powers then although the District Court was competent to hear an appeal, there would be no second appeal. In any event the second appeal, should be dismissed with costs in favour of respondent No 1.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 333 OF 1922.

May 20, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice and Mr. Justice Macpherson.

DAROGA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGHUNANDAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Mortgage-decree—Appeal—Death of one respondent—Legal representatives not brought on record—Abatement, extent of.

During the pendency of an appeal against a mortgage-decree one of the respondents, who were all members of a joint Hindu family, died and his sons were not brought upon the record within the prescribed period:

Held, that the respondents being all jointly interested in the mortgage-decree obtained by them and the sons of the deceased respondent being necessary parties to the appeal, the whole appeal abated as the result of their not having been brought upon the record within limitation.

Appeal against a decision of the Subordinate Judge, First Court, Muzafferpur, dated the 21st December 1921, reversing that of the Munsif, Hajipur, dated the 20th August 1920.

Mr. *Rai T. N. Sahay*, for the Appellants.

Mr. *A. B. Mukherji*, for the Respondents.

JUDGMENT.

Miller, C. J.--In this case the plaintiffs who are members of a joint family obtained a decree in a mortgage suit against the defendants before the Subordinate Judge of Muzafferpur. The defendant Daroga Singh has instituted the present appeal and some of the respondents who were the plaintiffs in the suit have died pending the appeal. Raghunandan Singh, who was apparently the *karta* of the family and the respondent No. 1, died on the 28th September, 1923. Nothing turns upon that because his interest would devolve upon the other members of the family by survivorship. Jagdeo Singh, his son, died on the 28th July, 1923, leaving two minor sons Kalika Prasad Singh, and Chandrika Prasad Singh. Although Jagdeo died on the 28th July 1923, no steps were taken to bring his sons on the record, who certainly were interested in the decree obtained on behalf of their father as one of the members of the joint family. No application even has been made for setting aside the abatement although it must have been known long ago that Jagdeo Singh was in fact dead and had two sons surviving him. As this is a mortgage suit and the plaintiffs are all jointly interested in the decree it seems to us that it is a case in which the whole appeal abates as all the parties are not brought upon the record. No authority has been called to our attention by the learned Vakil for the appellants and it seems to us that this appeal abates and ought to be dismissed. The respondents are entitled to their costs against the appellant.

Macpherson, J.—I agree.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 10 OF 1925.

February 17, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

KANAK KANTI ROY CHOUDHURY —PLAINTIFF—PETITIONER

versus

SRISHTIDAR MONDAL AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), ss. 46, 111—Record of Rights, preparation of—Ejectment suit, whether maintainable—"Entertain", meaning of.

A suit under s. 46, Bengal Tenancy Act, is not merely a suit for ejectment, in the sense of ejecting a trespasser, but it involves a determination by the Court of the class of tenant and also the fixing of a fair and equitable rent. Such a suit comes under the express words of s. 111 of the Act and cannot be maintained after a declaration for the preparation of a Record of Rights has been made. [p. 670, col. 2; p. 671, col. 1.]

The words "entertain a suit or application" in s. 111, Bengal Tenancy Act, merely mean the consideration of a suit or application, and are equally applicable to a suit or application instituted before the declaration and after. [p. 671, col. 1.]

Pramada Nath Roy v. *Basiruddin Quanji*, 81 Ind. Cas. 993; 28 C. W. N. 631; 51 C. 230; 40 C. L. J. 177; (1924) A. I. R. (C.) 704, followed.

Rule against an order of the Munsif, Second Court, Basirhat, 24-Pargana, in Rent Suit No. 7 of 1924.

Messrs. *Ram Chandra Majumdar* and *B. Anilendra Nath Roy Choudhry*, for the Petitioner.

Mr. *Mohendra Nath Roy* and Moulvi Syed *Nashim Ali*, for the Opposite Party.

JUDGMENT.

Greaves, J.—This Rule was issued on the 2nd January 1925 at the instance of the plaintiff in the suit. On the 11th January 1924 the petitioner who is the plaintiff in the suit instituted this suit in the Court of the Second Munsif at Basirhat under s. 46 of the Bengal Tenancy Act "for enhancement of rent and for *khas* possession of the holding after ejectment of the tenant in case of refusal by the latter to agree to pay the rent which might be determined by the Court to be fair and equitable." I am quoting the actual words of the petitioner as it will show the nature of the suit in the plaintiff's view. For, it has been argued before us that the suit being one merely for ejectment does not fall within the provisions of s. 111 of the Bengal Tenancy Act. But it will be seen from the statement of the case itself as taken from the petition as indeed from the words of s. 46, that the suit although in one sense it is a suit for ejectment is not merely one for such a relief. The written statement was filed in the suit on the 11th March 1924 and on the 24th September in the same year a declaration was issued under s. 101 of the Bengal Tenancy Act notifying the preparation of the Record of Rights in respect of the area in which the land in suit was situated. On the 24th November 1924 the Munsif passed an order staying the Suits Nos. 8, 9, 10, 11, 12, 13 and 30 of 1924 under the provisions of s. 111 of the Bengal Tenancy Act until the final publication of the Record of Rights. It is against this order of the Munsif that the Rule is directed.

Two points have been argued before us on behalf of the petitioner the first is that s. 111 has no application to a suit brought under the provisions of s. 46 of the Bengal Tenancy Act. It is said that the provisions of s. 111 relate to such suits as are brought under the provisions of s. 30 or s. 52 of the Tenancy Act or such like and not to a suit brought under s. 46. It was urged before us that the object of s. 111 was to prevent a conflict of decisions between the Revenue Officer and the Civil Court and that inasmuch as in the present case the Revenue Officer could not be called upon to fix a fair and equitable rent there was no chance of a conflict and, therefore, s. 111 had no application.

Now, s. 46 provides for the ejectment of a non-occupancy *raiyat* in certain events, that is to say, if the non-occupancy *raiyat* has failed to execute the agreement tendered to him for the payment of enhanced rent under the provisions of s. 46 within three months. In case of such refusal the landlord is entitled to institute a suit to eject the tenant. But no order for ejectment can be passed until a fair and equitable rent has been fixed by the Court and the tenant has refused to pay the rent so determined by the Court. It is then and then only that a decree for ejectment can be passed. Consequently as I have already stated a suit under s. 46 is not merely a suit for ejectment in the sense of ejecting a trespasser, but it involves a determination by the Court of the class of the tenant and also the fixing of a fair and equitable rent. In the present case the landlord asserts that the tenant is a non-occupancy *raiyat*. The tenant asserts that he is a occupancy *raiyat*. Now, s. 111 provides that "when an order has been made under s. 101 directing the preparation of a Record

of Rights then subject to the provisions of s. 104-H a Civil Court shall not, ...(b) where (as here) a Settlement of land revenue is not being made or is not about to be made —until three months after the final publication of the Record of Rights, entertain any application made under s. 158, or any suit or application for alteration of the rent or the determination of the status of any tenant in the area to which the Record of Rights applies." As I have already stated a suit under s. 46 involves determining of the status of a tenant and also involves the fixing of fair and equitable rent and it seems to me, therefore, that a suit under s. 46 comes under the express words of s. 111 of the Bengal Tenancy Act. It was urged before us that a suit under s. 46 being more than what a Revenue Officer would entertain and the object of s. 111 being to prevent a conflict between the Civil Court and the Revenue Officer the provisions of s. 111 have no application to such a suit as the present one. But, for the reasons which I have indicated I think they have. Having regard to the fact that there is a suit under s. 46 it is necessary to determine the status of the tenant and to fix fair and equitable rent. This was the first point which was urged before us.

The second point was that inasmuch as this suit had been instituted before the declaration under s. 101 was made the provisions of s. 111 had no application and it was sought to narrow the meaning of the word "entertain" to some such meaning as "to receive", that is, to make the provisions of s. 111 applicable to suits instituted after the declaration under s. 101 had been made. I see no reason to give so narrow an interpretation to the word "entertain." To entertain a suit or application to my mind merely neans the consideration of a suit or application and equally applies to a suit instituted before the declaration is made and to suits instituted after such a declaration has been made. I respectfully agree with the reasoning contained in the judgment in *Pramada Nath Roy* v. *Basiruddin Quanji* (1), where this point was considered.

The result is that we think both the reasons urged against the decision of the Munsif fail and that the Rule must be discharged with costs hearing-fee two gold *mohurs*.

Mukerji, J.—I agree.

N. H. *Rule discharged.*

(1) 81 Ind. Cas. 993; 28 C. W. N. 631; 51 C. 230; 40 C. L. J. 177; (1924) A. I. R. (C.) 704.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 661 OF 1922.

May 25, 1925.

Present:—Mr. Justice Das and Mr. Justice Ross.

MAHABIR PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BASUDEO NARAYAN—DEFENDANTS—RESPONDENTS.

Co-operative Societies Act (II of 1912), s. 43 (2) (b) —Rules framed by Local Government—Dispute between society and estate of deceased member—Arbitration—Award made by Registrar—Legal representative made personally liable—Award, validity of—Jurisdiction of Civil Court to set aside award.

A Co-operative Society has complete power under the rules framed under sub-s. (2) (b) of s. 43 of the Co-operative Societies Act to refer any matter in dispute between it and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member. [p. 672, col. 1.]

An award made by the Registrar of Co-operative Societies against the legal representatives of a deceased member in respect of a liability incurred by the latter which purports to make the legal representatives personally liable is in excess of the authority of the Registrar and a Civil Court has jurisdiction to set aside the award. [p. 672, cols. 1 & 2.]

Appeal against a decision of the Subordinate Judge, Second Court, Gaya, dated the 5th June 1922, reversing that of the Munsif, Third Court, Gaya, dated the 30th September 1921.

Mr. *Shiveshwar Dayal*, for the Appellants.

Messrs. *S. P. Varma* and *Devaki Prasad Sinha*, for the Respondents.

JUDGMENT.

Das, J.—Munshi Nath Sahay was a member of the Kamalpur Barawan Co-operative Society and, as such, he borrowed certain money from the Society on which he was liable to the Society. He died on the 30th of *Poos* 1323 F. S. The Society having a claim against Munshi Nath Sahay took proceedings under the Co-operative Societies Act, and the matter was referred to the arbitration of the Registrar

of the Society. The Registrar made an award against the present plaintiffs, who are the sons of Munshi Nath Sahay. The plaintiffs now bring the suit out of which this appeal arises for a determination of the question whether the Co-operative Society is entitled to a personal decree sgainst them. The Courts below have differed in opinion, the lower Appellate Court holding that the Society is entitled to such a decree.

The Act gives power to the Local Government to frame rules providing, *inter alia*, that

"Any dispute touching the business of a Society between members or past members of the Society or persons claiming through a member or past memer or between a member or past member or persons so claiming and the Committee or any officer, shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings befere the Registrar of such arbitrator or arbitrators and the enforcement of the decisions of the Registrar or the awards of arbitrators."

(See s. 43, sub-s. 2 (*l*) of the Co-operative Societies Act). At first sight it would seem unlikely that power should be given to the arbitrator to decide disputes between the Society and strangers to the Society. There is no doubt that the Co-operative Society has complete power to refer any matter in dispute between them and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operaive Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member The award of the Registrar is in form an award against the present plaintiffs personally, but in substance it is an award against them as representing the estate of their deceased father. This is conceded by the learned Counsel appearing on behalf of the Society. Now if that be so, clearly there is nothing to object in the award and the Civil Court has no jurisdiction to interfere with the decision of an independent Tribunal.

But the decision of the learned Judge in the Court below assumes that the award was against the present plaintiffs personally. If that be the construction of the award, then clearly the arbitrator acted in excess of his authority and the Civil Court has complete jurisdiction to set aside the award. It is now agreed between the parties that whatever the registrar may have done, the award will be treated as an award against the present plaintiffs as representing the estate of Munshi Nath Sahay and that it will be enforceable as against the estate of Munshi Nath Sahay in the hands of the present plaintiffs.

By consent of parties, therefore, the decree passed by the Court below is thus modified. There will be no order for costs.

Ross, J.—I agree.

Z. K. *Decree modified.*

CALCUTTA HIGH COURT.

APPLICATION UNDER THE INDIAN COMPANIES ACT.

April 28, 1925.

Present:—Mr. Justice C. C. Ghose.

In re A. E. ALEXANDER & Co., LTD. IN LIQUIDATION.

Companies Act (VII of 1913), s. 235—Managing Director of Company, position of—Money withdrawn by Managing Director from till of Company and invested in mortgage in his own name—Breach of trust—Examination, order for, when to be made.

The Managing Director of a Company was authorized to invest sums of money not immediately required by the Company, the Company's Solicitor being responsible for the investment. The Managing Director withdrew a certain sum from the till of the Company and advanced that sum together with money of his own to one *K* and obatined a mortgage of *K*'s property in the joint names of himself and his wife. In the balance-sheet of the Company the sum withdrawn by Managing Director was shown as having been invested in a mortgage taken from *K*:

Held, (1) that the Managing Director occupied the position of a trustee for the Company and that he was bound to exercise his powers for the benefit of the Company and for that alone; [p. 675, col. 2.]

(2) that the Managing Director could not in law withdraw from the till of the Company a sum of money and mix it with moneys belonging to himself and represent to the mortgagor that the entirety of the moneys advanced on the mortgage were moneys belonging to the Managing Director and his wife on a joint account; [*ibid.*]

(3) that the Managing Director was guilty of breach of trust and misfeasance. [p. 676, col. 1.]

An order under s. 235 of the Companies Act should only be made on a clear case being made out. [*ibid.*]

Mr. *A. A. Avetoon*, for the Applicants.

Sir *Binod Mitter*, for the Opposite Party.

JUDGMENT.—In this matter the ap-

plicants, who are the Liquidators of the above Company, apply for an order that the persons named in the prayer of the petition may be ordered to attend before this Court and be examined under the provisions of the Indian Companies Act as to certain charges made against them in the petition and be ordered to pay forthwith to the applicants as Liquidators the sums mentioned against their names, with such interest thereon as may be allowed.

As regards one of the said persons, namely, Mr.————the matter was gone into at some length before me on the 25th March 1925. On the next day, *i. e.*, the 26th March 1925, I was informed by Mr. Avetoon, Counsel for the applicants, that his clients had arranged with Mr.————certain terms of settlement and that they desired that the application as against Mr.——— should stand over till the 30th June 1925. One of the Liquidators, Mr. Law, made an affidavit to the effect that he had considered the terms of settlement between the Liquidators and Mr.————and was of opinion that they were in the best interests of the Company and thereupon the application, so far as Mr.————is concerned, was allowed to stand over.

The application so far as the other respondent, W. E. Alexander, is concerned, has been pressed before me and I have heard at considerable length learned Counsel on behalf of the Liquidators and on behalf of W. E. Alexander.

The facts are as follows:—The above mentioned Company Messrs. A.E. Alexander & Co., Ltd., was incorporated on the 2nd December 1919 under the provisions of the Indian Companies Act and its objects, *inter alia*, were to purchase, acquire and take over as a going concern the good will and the business carried on by A. E. Alexander & Co. at No. 2, Middle Road, Entally, in Calcutta, as manufacturers of leather goods and to carry on business as tanners and manufacturers of leather goods. Among other objects of the Company were the following (See cls. 23 and 24 of the objects in the Memorandum of Association):—

(23) To invest moneys of the Company not immediately required upon such securities as may from time to time be determined.

(24) To lend moneys to such persons and on such terms as may seem expedient; and in particular to customers of, and other persons having dealings with the Company and to guarantee the performance of contracts by members of or persons having dealings with the Company.

The capital of the Company was Rs. 15,00,000 divided into 1,50,000 shares of Rs. 10 each. It is stated that the Company went into voluntary liquidation in May, 1924, and that the applicants were appointed Liquidators of the Company. Subsequently an order was made on the 15th July 1924 by which it was directed that the Company should be wound up under the supervision of this Court, the applicants continuing to be Liquidators in such winding up. The applicants state that after they were appointed Liquidators, they have had an opportunity of inspecting the books and papers of the Company and from an examination of the books and papers of the Company they have discovered the following facts regarding the dealings of the respondent W. E. Alexander with the funds belonging to the Company. The applicants have produced before me the minute books of the share-holders and of the Directors and my attention was drawn to the matters stated below.

The Company as stated above was incorporated on the 2nd December, 1919, and the first meeting of the Directors was held on the 31st January, 1920, when the following resolution was passed by the Directors:—"That the powers conferred by Art. 108 of the Articles of Association on the Managing Director under cls. (*a*), (*e*), (*f*), (*g*), (*j*), (*k*) and (*l*) be and the same are hereby uncondionally delegated to him. The powers conferred under cls. (*b*), (*c*), (*d*), (*h*), (*i*), (*m*), (*n*), (*o*) and (*p*) should not be exercised by the Managing Director without the previous sanction of the Directors. In the case of (*o*), contracts in and for the ordinary course of business of the Company will be carried out by the Managing Director."

Of the various sub-clauses of Art. 108 mentioned above dealing with the powers of the Directors of the Company, the only clause material for the purposes of this application is cl. (*n*), which runs as follows:—"To invest and deal with any of the moneys for the Company not immediately required for the purposes thereof upon such securities or investments and in such manner as they may think fit and from time to time to vary or realize such securities and investments."

At the second meeting of the Directors

held on the 1st March, 1920, it appears, however, that the following resolution was passed by the Directors :- "That the sums of money not immediately required by the Company may be invested by the Managing Director to enable him to declare a dividend, the Company's Solicitor being responsible for the investment." It may be stated here that the Company's Solicitor was Mr. N. C. Bose of whose firm Mr.————was and is a member and to whom reference has already been made. It appears now from the books of the Company that a sum of Rs 23,000 was withdrawn from the till of the Company in July 1920 by the respondent W. E. Alexander, who was the Managing Director of the Company from its commencement until the date when the Company went into liquidation. Mr. Alexander's version is that in the month of July 1920 one Mr. Kerr, who was the proprietor of the Monteviot Estate in Kurseong, approached him and his wife for a loan on the second mortgage of the said estate. At that time he and his wife had not the full amount required by Mr. Kerr and it is alleged by Mr. Alexander that with the knowledge and approbation of the Directors of the Company he withdrew a sum of Rs. 23,000 from the till of the Company to enable him to make up the whole amount required by Mr. Kerr and that the said sum was advanced to Mr. Kerr along with other moneys on a second mortgage of the said Monteviot Estate in Kurseong. The mortgage by Mr. Kerr bears date the 8th July 1920, and a cerified copy thereof has been produced before me and it purports therefrom to be a mortgage between Mr. G. W. L. Kerr of the one part and Mrs. Alexander and Mr. W. E. Alexander of the other part. It appears that a first mortgage was executed on the 8th July 1920, by the mortgagor in favour of the Alliance Bank of Simla, Ltd, for a sum of Rs. 2,00,000 lent and advanced by the said Bank, re-payable with interest thereon at the rate of 8 per cent. per annum with half-yearly rests, the security being the said Monteviot Estate in Kurseong, and that on the same date a second mortgage of the said estate was executed in favour of Mr. and Mrs. Alexander to secure a further sum of Rs. 85,000, re-payable with interest thereon at 12 per cent. per annum with quarterly rests. It appears further that the mortgagees represented to the mortgagor that the said sum of Rs. 85,000 was paid to the mortgagor by the mortgagees, Mr. and Mrs. Alexander, out of moneys alleged to belong to them on a joint account.

Mr Alexander states in his affidavit that the Auditors were apprized of the fact that a sum of Rs. 23,000 belonging to the Company had been advanced on the security of the Monteviot Estate and that reference was made thereto in the balance sheet of Messrs. A. E. Alexander & Co,, Ltd., dated the 31st December 1922. The reference to the balance sheet is as follows:—

Investment:—

	Rs.	a.	p.
With Mr. ———, Company's Solicitor, per Directors' resolution dated 1st March, 1920, (Insecure)	1,30,597	6	0
Caldwell & Co., Sonada (Secure) ...	44,500	0	0
Monteviot Estate, Kurseong, (Jointly secure) ...	23,000	0	0
A. G. Manual (Insecure) ...	2,400	0	0
	2,00,497	6	0

Mr. Alexander's point is that the facts relating to the withdrawal of the said sum of Rs. 23,000 were fully disclosed and that the Directors knew of the facts which were referred to in the Auditor's report and that the said report was passed by the share-holders of the Company at a meeting held on the 31st October 1923. Mr. Alexander annexes to his affidavit a copy of the report of the Auditors, which contains among other things, the following :—"*Monteviot Estate.* The mortgage-deed in support of the above is in the name of Mr. and Mrs. Alexander. The Company advanced Rs. 23,000 through Mr. Alexander and Mrs. Alexander the latter advanced Rs. 62,000. No deed has, however, been seen between Mr. Alexander (Managing Director) and the Company, which, in our opinion, should be done in consultation with the lawyers." *Suspense.* The main item under this head is for interest due but not realized on investment account amounting to Rs. 28,605-23.

The above sum is made up as follows:—

"Name of party.	Due for 1921.	1922.	Total.
"——————, Esq. ..	——— ———	13,329-1-0	13,329-1-0
Caldwell & Co.	3,881-14-0	5,259-1-0	9,140-15-0
"Monteviot Estate. ..	2,833-4-0	3,242-3-0	6,075-7-0
"A. G. Manual, Esq. ...	——— ———	53-4-3	53-4-3
"Interest on G. P. Note. ...	——— ———	6-7-0	6-7-0
..	Rs. 6,715-2-0	21,890-0-3	28,605-2-3

"From the above it is seen that the interests from Caldwell & Co., and Monteviot Estate are not being realized regularly and they are in arrears. We would request you, therefore, to scrutinize the investment affairs with the help of your lawyers to ascertain whether they are in order and whether the amounts due from Caldwell & Co., and Monteviot Estate are realizable soon."

Mr. Alexander's point before me is that there was nothing wrong in what he did that no case has been made out for the order sought to be obtained by the Liquidators. The Liquidators state that on the 5th August, 1924, they wrote to Mr. Alexander making enquiries about the said sum of Rs. 23,000 which had been withdrawn from the till of the Company by Mr. Alexander. Mr. Alexander, replied on the 19th August, 1924, (The letter is set out in para. 16 of the petition of the Liquidators) and he said, among other things, as follows:—"There is no separate receipt of Mr. Linberry Kerr for Rs. 23,000. You are already aware that there is one mortgage-deed executed by Mr. Linberry Kerr for advances made by Mrs. Alexander and by the Company in my name. The advance made by the Company amounts to Rs. 23,000, which I shall claim in liquidation of moneys due to me by the Company." In passing I may state here that on the papers before me there is nothing to indicate that the said advance was made by the Company in Mr. Alexander's name as is suggested in the letter. On receipt of this letter the Liquidators addressed a letter to Mr. Linberry Kerr on the 15th August, 1924, in respect of the said sum of Rs. 23,000, in reply to which Mr. Kerr wrote to the Liquidators as follows.—"With reference to your letter of the 15th instant, I beg to inform you that, as far as I am aware, no moneys were advanced to me by Messrs. Alexander & Co., Ltd. The advances were made in the name of A. E. Alexander and his wife and I, therefore, cannot understand your writing to me on the subject. May I suggest your obtaining a copy of the mortgage bond in question ?"

These are all the facts relating to this transaction and I might mention in this connection that on the papers before me I can find no trace of Mr. Alexander having exerted himself to re-pay to the Company the moneys withdrawn by him as aforesaid.

Sir Binode Mitter on behalf of Mr. Alexander contended that, having regard to the facts set out in Mr. Alexander's affidavit, there has been no breach of trust on his part and that assuming that the Court takes an unfavourable view of Mr. Alexander's conduct, the utmost that can be said against him is that he has been guilty of an error of judgment and that, if that is so, he is not liable because of the provisions of Art 135 of the Articles of Association of the Company. In my view, Mr. Alexander, as Managing Director, occupied the position of a trustee for the Company and that he was bound to exercise his powers for the benefit of the Company and for that alone. He could not in law withdraw from the till of the Company the said sum of Rs. 23,000 and mix the same with moneys belonging to him and his wife and represent to the mortgagor, Mr. Kerr, that the entirety of the moneys advanced on the mortgage were moneys belonging to Mr. and Mrs. Alexander on a joint account. I am further of opinion that nothing in the Memorandum and Articles of Association of the Company and in the said two resolutions passed by the Directors authorized the withdrawal of the said sum of Rs. 23,000 from the till of the Company and the utilization of the same in manner indicated above, and that Mr. Alexander's conduct was something more than a mere error of judgment. The touchstone by which such cases are to be

tried is whether the trustee has been guilty of a breach of trust or not. If he has been guilty of gross negligence it is as bad in its consequences as fraud and is a breach of trust. Can it be denied on the facts set out above that Mr. Alexander, to put it as mildly as possible, has been guilty of gross negligence. It is all very well for Mr. Alexander to say that he has credited the Company with a certain amount of interest, (see, however, the Auditor's report) but I ask, is there any security for this sum of Rs. 23,000 upon which the Company can fall back? There is none because there was no investment on behalf of the Company and, in my opinion, it is idle to suggest that under the Memorandum and the Articles of Association the Directors had the power of ratifying what Mr. Alexander has done. The Directors could not ratify, however, much you may stretch the words of the Memorandum and the Articles of Association, a transaction of this nature on the part of the Managing Director and, in my opinion, the ratification, if there has been any is of no avail, the transaction being wholly *ultra vires*. At all times I am sensible of the fact that an order under s. 235 of the Indian Companies Act should only be made on a clear case being made out: [See *In re Property Insurance Co.*" (1)] but if this is not a clear case of breach of trust and misfeasance I have yet to know what would amount to a clear case. In my opinion, therefore, there are substantial grounds in support of the application which the Liquidators have made and that the rules of justice, equity and good conscience plainly require that I should make an order directing Mr. Alexander to attend before me to be examined as prayed for on Friday the 8th May 1925 at 11 A. M. under the provisions of s. 235 of the Indian Companies Act and I accordingly make an order in that behalf.

Z. K. *Application allowed.*

(1) (1914) 1 Ch. 775 at p. 780; 83 L. J. Ch. 525; 110 L. T. 973; 58 S. J. 472.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 6 of 1922.

April 6, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir Jwala Prasad, KT.

Babu KEDAR NATH GOENKA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

AMRIT MANDAL AND OTHERS—DEFENDANTS —RESPONDENTS.

Fishery, right of, proof of—Grant, absence of, effect of—Long user—Evidence, nature of—River-bed settled with owners of particular village—Presumption—Adverse user.

In order to establish a right of fishery it is not absolutely essential to prove an express grant after a considerable lapse of time. Plaintiff can establish his right by proof of uninterrupted user of the fishery prior to his dispossession by the defendant. The eivdence, however, must be clear and unambiguous showing the plaintiff's exercise of the right of fishery over the particular spot in respect of which he claims the right, particularly where the bed of that part of the river to which the claim relates belongs to the defendant. [p. 680, cols. 1 & 2.]

Where the bed of a public river is settled with the owners of a certain village it ceases to be Government property or a public domain, and ordinarily the owners of the bed of the river would be the owners of the right of fishery, and a person claiming the right of fishery as against such owners must show that he has been using the waters of the river in question for the purpose of catching fish and has been exercising his right of fishery to the exclusion of the owners of the bed of the river for the requisite period. [p. 680, col. 2.]

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 30th May 1921.

Messrs. *H. Imam, Naimutullah, S. N. Bose, N. C. Sinha* and *N. B. Ghosh*, for the Appellants.

Messrs *S. A. Sami* and *S. N. Rai*, for the Respondents.

JUDGMENT.

Miller, C. J.—The appellants are the proprietors of *taluka* Rasulpur Bhatauni together with a fishery known as *jalkar* Kamri and Dab appurtenant to the *taluka*. The respondents are some of the proprietors of *Mauza* Kapsia and certain of their tenants.

The plaintiffs instituted the suit out of which this appeal arises in April 1920 against the respondents claiming a declaration that the fishing rights in that part of the river Ghaghri which flows through or adjacent to the respondents' *mauza* are included in *jalkar* Kamri and Dab and that the defendants have no right to fish therein. They also claimed in the alternative a title by adverse possession.

Mauza Kapsia is admittedly outside the plaintiff's *taluka* and the bed of the river

Ghaghri where it flows past Kapsia forming its western and southern boundaries is recorded in the Record of Rights as belonging to the proprietors of that village up to its middle line the other side being apparently the proprietary interest of the riparian owners on the opposite bank in *Mauzas* Birbaus and Paikant which lie to the westward.

The initial difficulty in the way of the appellants and which to my mind is fatal to their case is that the limits of their *jalkar* have nowhere been clearly defined in their evidence. The eastern or south-eastern limit of their *jalkar* is claimed to be a place called Simaria *ghat* but this *ghat* is not shown on the only map produced by them and for aught that appears to the contrary it may be on a tributary or branch of the Ghaghri river and not on the main stream. It may be assumed that certain *phauris* or branches of the Ghaghri river and possibly parts of the river itself further to the westward are included in the appellants' *jalkar* which derives its name from two large *jheels* named Kamri and Dab situate in villages to the westward of Kapsia. It should be mentioned that the river Ghaghri runs generally in a south-easterly direction but follows a winding course. It forms the western boundary of Kapsia and then taking a curve through the east to the north flows back again to the southward and eastward thus forming also the southern boundary and part also of the eastern boundary of that village. The southern part of Kapsia thus lies in a roughly formed horse-shoe bounded by the river. The area included within the appellants' *jalkar* has been defined in certain *kabuliyats* granted by fishermen tenants of the appellants by reference to the north, south, east and west boundaries. The east boundary has been defined as "up to the boundary limit of Kapsia" and the south boundary as "*Mauza* Katmara from the boundary limit of Chawtim to *Mauza* Paikant near *ghat* Simaria" and the north as "*Mauza* Uzraha to *Mauza* Kapsia." All the villages named including Paikant lie to the westward of Kapsia and the river where it forms the western boundary of Kapsia divides that villaga from Paikant which is adjacent to the west or south-east. There is also a branch of the river near the south-west corner of Kapsia which turns away suddenly to the westward leaving the main stream and passing through Paikant and from the evidence as to the locality of Simaria *ghat* it is quite possible that this *ghat* lies on that branch at or near the place where it joins the main stream. If this is so it would also fit in with the description of the southern limit of the *jalkar* which is from *Mauza* Katmara to *Mauza* Paikant near Simaria *ghat* which implies that Simaria *ghat* is in Paikant to the west or south-west of Kapsia. If this is so it would seem that the river itself is excluded for even if Simaria *ghat* be on the Ghaghri river and not on the branch mentioned it is on that bank of the river which lies in Paikant. Moreover if the eastern limit of the *jalkar* is up to the boundary limit of Kapsia this is presumably the western boundary limit of Kapsia for it is not suggested that any of the *jheels* in Kapsia itself lie within the plaintiffs, *jalkar*. The appellants could have produced authentic documents to show the boundaries of their *jalkar* but they failed to do so. Apart from the verbal evidence which is too vague to be of any value they rely solely on the *kabuliyats* to which I have referred. Neither the original grant nor their *kabala* by which they purchased from the previous proprietors nor the *batwara khesra* or *batwara* maps when the *taluk* was partitioned some years ago nor the village notes or other survey records relating to the *jalkar* have been produced and the *kabuliyats* are at the best ambiguous. They produced some of their own village papers but these do not show any rents from *jalkar* rights in *Mauza* Kapsia.

The verbal evidence of the exercise of *jalkar* rights in the disputed locality is also very unsatisfactory. The appellants, *muharrir* their, first witness, admittedly knows nothing about it. The next witness Nabi Dbobi said to be a *ticcadar* at one time of the appellants, does not say definitely that he ever fished in the disputed part of the river and he produced no papers to prove that he ever had a lease. The next witness is equally vague and he produced no rent-receipts although he said they existed. The next witness says Simaria *ghat* is to the south of Kapsia 10 or 15 *rasis* (500 to 750 yards. If so it is not on the Ghaghri river. The next witness says the appellants' *jalkars* are to the west and north of Kapsia. Most of them say the Kapsia *maliks* do not fish in the river but one of them admits they do. Most of

them have no direct concern with the fishery. Even the plaintiffs' *patwari* cannot give the boundaries of the *jalkar*. He said they were in the *batwara* papers but these were not produced.

The learned Subordinate Judge considered this evidence too vague and inconclusive to act on and I see no reason after listening to the appellants' argument to take a different view.

It is not shown that the appellants were ever in exclusive possession of these disputed waters and their claim to title by adverse possession also fails. Even if their *mustajirs* committed a few acts of trespass from time to time no title by adverse possession can be presumed from such conduct.

It is unnecessary to consider the question of non-joinder of parties which was raised. It is at least clear that any declaration the appellants might be entitled to would not bind those who are not represented in the suit but in the view taken on the main question this point is of secondary importance. It may be added that the evidence adduced by the defendants shows that the *maliks* of Kapsia through their lessees have exercised fishing rights on the disputed waters for a long time, some of the older witnesses speaking to the exercise of such rights for the last 23 to 25 years. In my opinion no reason has been shown why we should disturb the judgment of the Trial Court and I would dismiss this appeal with costs.

Jwala Prasad, J.—This is an appeal from a decision of the Subordinate Judge of Bhagalpur, dated the 30th May 1921, dismissing the plaintiffs' suit. The subject-matter of the litigation is a *jalkar* or right of fishery. The plaintiffs have indicated the disputed *jalkar* in yellow colour on the Survey Map filed with the plaint. The *jalkar* is claimed in respect of that part of *nadi* Ghaghri which flows between two villages Kapsia and Beerbaus, the bed of which belongs to the proprietors of those two villages as part of their permanently settled estates.

The plaintiffs are proprietors of a permanently settled *taluka* called Rasulpur Bhatauni bearing *Touzi* Nos. 530 and 5715 and *sadar jama* Rs. 916. The *taluka* includes several *mauzas* and the *jalkar mahals* of Kamri and Dab together with all *phauris* and branches thereof. The plaintiffs as proprietors of the *taluka* are in possession of the aforesaid *jalkars* Kamri and Dab including the branches thereof and their names stand registered in the Collectorate with respect to the aforesaid *taluka* and the *jalkar mahals* of Kamri and Dab.

Briefly speaking the plaintiffs' case is that of the *phauris* and branches of *jalkars* Kamri and Dab there is a *jalkar* known as *jalkar nadi* Ghaghri which passes through *Mauza* Thutham and other villages in the District of Monghyr and towards east passing by the boundary of *Mauza* Kapsia *Touzi* No. 3052, *Pargana* Chhai, District Bhagalpur, extends up to Simaria *ghat* and the plaintiffs have been in possession thereof as proprietors of *taluka* Rasulpur Bhatauni from a long time. During the Survey and Settlement proceedings which began in 1902 and the record of which was finally published in December 1904, half the bed of river Ghaghri in the vicinity of *Mauza* Kapsia, bearing *Khasra* No. 494, was measured Kapsia village. In 1324 the *jalkar* of the said river Ghaghri was settled by the plaintiffs with the defendants Nos. 1 to 3 second party, but about the fishing season the first party defendants, *maliks* of *Mauza* Kapsia, set up defendants second party as their settlement-holders and cause a proceeding to be instituted in March 1917 in the Criminal Court under s. 145 of the Cr. P. C. in respect of the *jalkar* in question. The proceedings ended with the decision, dated the 18th April 1917, in favour of the defendants proprietors of *Mauza* Kapsia. A motion to the High Court on behalf of the plaintiffs' *mustajirs* was rejected on the 24th of July 1917. As a result of the criminal proceedings the plaintiffs were dispossessed of the *jalkar* from the 18th April 1917 and the defendants first party have been in possession since then. After the decision of the case under s. 145 the defendants third party who were the lessees of the plaintiffs, surrendered their lease and have gone over to the side of the defendants first party. The plaintiffs' case as summed up in para. 6 of the plaint is that, although they have nothing to do with the land situate in the bed of the river Ghaghri bearing Survey No. 494, yet the *jalkar* of the said river Ghaghri is a branch of the plaintiffs' *jalkar* Kamri and Dab which was settled with them along with the *taluka* Rasulpur Bhatauni, and that they have all along been in

possession of the disputed *jalkar* before they were dispossessed as aforesaid in 1917 and that even if they do not possess any right or title to the said *jalkar*, yet owing to adverse possession for more than 12 years before dispossession they have acquired absolute right to the said *jalkar* and the defendants first and second parties had no right to oust them from the possession of the *jalkar*. The plaintiffs further say that although the proceeding under s. 145 of the Cr. P. C. related only to half the *jalkar* of river Ghaghri the bed of which was measured with in Kapsia in *Khasra* No. 494, yet the defendants first party being emboldened by the decision of the Criminal Court dispossessed the plaintiffs of the entire *jalkar* of river Ghaghri including *Khasra* No 861 situate in *Mauza* Birbaus, *Pargana* Phirkia, District Monghyr, opposite Kapsia. Upon these allegations the plaintiffs claim a declaration of their right to the *jalkar* in dispute and recovery of possession thereof with mesne profits from the date of institution of the suit till recovery of possession.

The defendants Nos. 8, 9 and 12 to 14 are the chief contesting defendants They filed a joint written statement denying the plaintiffs' right, title and possession over the *jalkar* in question and asserting that the *jalkar nadi* Ghaghri bearing Servey *Khasra* No. 494 appertains to their *Mauza* Kapsia and not to the plaintiffs' *jalkar* Kamri and Dab and that the defendants and not the plaintiffs, have been in possession of the *jalkar* in question. They further state that the circuitous portion of the river Ghaghri towards the west of village Kapsia had entirely separated from *nadi* Ghaghri in *Asin* 1324 and from that time *nadi* Ghaghri has left that course which has become Maro Ghaghri having no longer any connection with the river Ghaghri except during rains, so that even if the plaintiffs have any concern with the river Ghaghri, which the defendants deny, still the plaintiffs have no right to fish in Maro Ghaghri. They also impugn the suit as being bad on account of having left out necessary parties and having impleaded some imaginary persons, such as defendants Nos. 2, 3 and 11. The defendants Nos. 1, 3 to 7 and 10 have filed one written statement and Rikhi Mahto defendant second party filed another written statement. They denied the plaintiffs' claim but did not contest at the trial.

Upon the pleadings the Trial Court framed the following issues:—

"1. Has the suit been overvalued?"

"2. Have the plaintiffs any cause of action against the defendants?"

"3. Is the suit bad for non-joinder and mis-joinder of parties as alleged by defendants?"

"4. Is the suit barred by limitation?"

"5. Have the plaintiffs any title in the disputed *jalkar*?"

"6. Have the plaintiffs acquired title to the *jalkar* in dispute by adverse possession?"

"7. Is the plaintiffs' allegation of possession and dispossession true?"

"8. Are the plaintiffs entitled to recover possession of the *jalkar* in dipute?"

"9. Are the plaintiffs entitled to mesne profits if so, to what extent?"

"10. To what relief, if any, are the plaintiffs entitled?"

Issue No. 1 does not arise not having been pressed in the Court below or in this Court. The remaining issues have been decided against the plaintiffs, with the result that their suit has been dismissed. The plaintiffs have come to this Court in appeal and impugn the decision of the Subordinate Judge on all the points decided against them.

The contest, however, principally centres round Issue No. 5: "Have the plaintiffs any title in the disputed *jalkar*?" and in fact the decision of the appeal rests entirely upon the decision of this issue.

The undisputed facts are that *taluka* Rasulpur Bhatauni formerly belonged to two brothers Maharaj Singh and Sheo Sahay Singh. They partitioned that *mahal* among themselves and subsequently by transfer and arrangement among themslves Maharaj Singh became the 16-annas proprietor of the *taluka* which included *jalkar* Kamri and Dab. The plaintiffs purchased the said *taluka* with the said *jalkar* from the heirs and representatives of Maharaj Singh and thus they are now the proprietors of the said *taluka* including *jalkar* including Kamri and Dab and their names are recorded in respect thereof in the Collectorate registers. The plaintiffs are thus the proprietors of *jalkar* Kamri and Dab. The question is whether the disputed *jalkar* appertains to and is included in the plaintiffs' *jalkar* Kamri and Dab. It is undis-

puted, and in fact the plaintiffs admit in para. 6 of their plaint, that the land situate in the bed of the river Ghaghri opposite *Mauza* Kapsia, bearing *Khasra* No. 494 belongs to the defendants proprietors of *Mauza* Kapsia. It is conceded in the argument on behalf of the plaintiffs that there is no document showing the grant of the disputed *jalkar* to the plaintiffs or their predecessor-in-interest or that the disputed *jalkar* is a part of the plaintiffs' *jalkar* Kamri and Dab included in their *taluka* Rasulpur Bhatauni. No record of the Settlement showing the disputed *jalkar* as having been settled with the predecessor-in-interest of the plaintiffs as part of their *jalkar* Kamri and Dab has been produced.

The plaintiffs have filed some papers relating to the partition of *taluka* Rasulpur Bhatauni among the then proprietors thereof (Exs. 7, 8, 9 and 10 from 1838 to 1854). These papers do not carry the case further than that *taluka* Rasulpur Bhatauni embraces two *jheels* or lakes called *jalkar* Kamri and Dab.

Certain judgments and *rubakari* of the Revenue Authorities of 1869 and 1870 (Exs. 17, 18 and 11) filed by the plaintiffs only show that the claim of the Government as owner of *khas mahal* as to the right of fishery in certain pools within the Government estate of Gowas and Moorassee was disallowed in favour of the *zemindar* of Rasulpur Bhatauni who claimed the right of fishery in those pools. These documents are of no assistance in the present case. There is, therefore, a total absence of any documentary evidence to prove that the plaintiffs' *jalkar* Kamri and Dab included the fishery rights in the part of river Ghaghri adjoining village Kapsia, the bed of which belongs to the *Maliks* of Kapsia as a part and parcel of their permanently settled estate. In fact, there is no definite evidence to show the extent of the plaintiffs *jalkar* Kamri and Dab.

The plaintiffs, therefore, in support of their claim to the *jalkar* in the particular spot in dispute in the river Ghaghri rely solely upon their having in the past exercised the right of fishery therein. It is now well-settled that it is not absolutely essential to prove an express grant after a considerable laps of time and the plaintiffs can establish their right by proof of an uninterrupted user of fishery prior to their dispossession: *vide Srinath Roy* v. *Dinabandhu Sen* (1). The evidence, however, must be clear and unambiguous showing the plaintiffs' exercise of the right of fishery over the particular spot in river Ghaghri, particularly when the bed of the part of the river in question belongs to the *maliks* of Kapsia as part of the village. The recent Survey has admittedly included the bed of the river half in village Kapsia and has allotted a *Khasra* number to it, namely, No. 494, and half in village Beerbaus, *Khasra* No. 861. The bed of the river having been settled with the owners of villages Kapsia and Beerbaus, it has ceased to be the Government property or a public domain, and ordinarily the owners of the bed of the river, namely, the Kapsia and Beerbaus *maliks* will have the right of fishery unless the plaintiffs established that they have been using the waters of the river in question for the purpose of catching the fish and have been exercising their right of fishery to the exclusion of the owners of the bed of the river. The plaintiffs have tried to prove the exercise of their right of fishery in the disputed spot by means of certain *kabuliyats* in respect of *jalkar* rights executed by lease-holders. These *kabuliyats* do not very much assist the plaintiffs in establishing that their *jalkar* extended to the spot in question. The *kabuliyats* 3 (*d*) of 1871, 3 (*c*) of 1873, 3 (*b*) of 1875, 3 (*f*) of 1880 and 4 of 1903 do not give any description of boundary of the *jalkar* taken Settlement of by the *mustajirs*. They do not expressly mention *jalkar* in the *nadi* situate in *Mauza* Kapsia and have not been seriously relied upon by the appellants in course of their arguments.

The *kabuliyats* 3 (*e*) of 1875, 3 (*a*) of 1880, 3 (*h*) of 1882, 3 (*i*) of 1888, 2 of 1902 and 4 (*a*) of 1915 attempt to describe the *jalkars* leased out but it is not possible from the description of the boundaries given therein to say for certain that the *jalkar* in dispute was included in the Settlement.

The plaintiffs rely upon two notes (Exs. 12 and 13) dated the 16th March 1903 and 10th May 1903 respectively, made by the Assistant Settlement Officer and a list of *jalkar* (Ex. 14) appertaining to the plaintiffs' *taluka* Rasulpur Bhatauni. Witness No. 12 for the plaintiffs, Ram Chandra Prasad, who

(1) 25 Ind. Cas. 467; 42 C. 489; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J 385; 16 Bom. L. R. 901; 41 I. A. 221 (P. C.).

was appointed to look after the Survey affairs of the plaintiffs, has been examined to prove that the aforesaid notes and the list were written and signed by Babu Kandhji Sahay, Assistant Settlement Officer. Babu Kandhji Sahay who made inquiries and prepared the notes and the list has not been examined. The witness says: "I had been the village notes of all the villages where *jalkars* are. I did not see the village notes of Kapsia as it did not belong to the plaintiffs. I saw the village notes of the villages which were in plaintiffs' possession." Further on he says "I went with Babu Kandhji Sahay in his inquiry."

"I cannot say about which *jalkar* there was dispute before Kandhji Sahay. I do not remember in which village Kandhji Sahay had gone to hold inquiry." The witness does not prove that the disputed *jalkar* has been either the subject of inquiry by the Assistant Settlement Officer or the aforesaid notes and list related to the *jalkar* in question. Strictly speaking these notes and list have not been properly proved and are not admissible in evidence. It is not known on what basis and upon what evidence they were prepared. The defendants were not parties to the dispute which led to the preparation of the notes and the list. They were prepared at the instance of the plaintiffs and as pointed out by them. They have not been incorporated into the finally published Record of Rights. Therefore they have no evidentiary value against the defendants.

Assuming that the list is admissible in evidence, from the description and the boundaries given therein as in the case of those given in the *kabuliyats* one cannot with certainty say that the disputed *jalkar* between Kapsia and Birbaus appertains to the plaintiffs' *jalkar* called Kamri and Dab. The eastern boundary is said to be Kapsia and the northern boundary Usraha. The southern boundary is said to extend from Kathmara to Paikant near *ghat* Simaria. *Ghat* Simaria has not been tracted on the map, and the plaintiffs have failed to show where this would be. Paikant is to the south-west of Kapsia, according to the evidence, at some distance. River Ghaghri surrounds village Kapsia on three sides. It enters the village on the west and turns towards the south and then goes upwards towards north, and then turns towards the east. Following the course of the *jalkar* as described in the aforesaid documents it would seem that the disputed portion on the western side of Kapsia is excluded from the plaintiffs' *jalkars* appertaining to the *taluka* Rasulpur Bhatauni. The plaintiffs' *jalkar* are called Kamri and Dab. According to their witness No. 8 Kamri is 1 or 1½ *koses* away from Dab. Kamri is in village Birbaus, and Dab in village Usraha. P. W. No. 9, plaintiffs' *patwari*, says that Kamri is a village, and the river opposite it is called Kamri. Dab is near Kathmara and is a big *nadi*. It is not a *kund*. Although these witnesses contradict each other as to which of them is a *nadi* and which is a *kund*, they agree that both Kamri and Dab are distinct *jalkars*. Witness No. 10 says "*jalkars* Kamri and Dab are branches of Ghaghri." He says that the principal *jalkar* is *nadi* Ghaghri. All the *jalkars* are its off-shoots and they take water from Ghaghri. Thus Kamri and Dab are themselves branches of river Ghaghri. The portion of river *nadi* Ghaghri which passes between Kapsia and Birbaus is geographically outside the limit of Kamri and Dab. The *jalkars* in Kamri and Dab belong to the plaintiffs as part of their *taluka* Rasulpur Bhatauni. They have to show that their *jalkar* right in Kamri and Dab extended beyond its geographical limit to the portion of river Ghaghri in dispute.

The plaintiffs' witnesses divide the *jalkar* into two parts *puchwari* (western) and *purwari* (eastern). The disputed *jalkar* is said to be situate in the *purwari patti* and Ex. 2 is the *kabuliyat* with respect thereto. Witness No. 2 says that the *puchwari patti* extends from Chautham on the west to Itmadi, and the *purwari patti* from Itmadi to Kapsia. He was the *thikadar* of *purwari patti*.

This witness states in his evidence "There was no *phauri* (branch) in village Kapsia which was under my Settlement." His evidence will, therefore, exclude the disputed *jalkar* in Kapsia from the plaintiffs' *jalkars* Kamri and Dab, as being its branch or *phauri* It is noteworthy that in the *kabuliyat* (Ex. 4-A) of 1915 the plaintiffs' *jalkar* with the aforesaid description and boundaries is said to bear Survey *Khasra* No. 144, whereas the *khasra* number of the disputed *jalkar* is No. 494. Therefore the disputed *jalkar* has nothing to do with the *jalkar* described in the plaintiffs' *kabuliyats* or in the list

prepared by the Survey Authorities (Ex. 14). Again, the plaintiffs have not filed the village notes nor have they filed the finally published Survey Record to show that the *jalkar* in dispute has been recorded in their names. The Court below has found that the village notes produced by the defendants show that they are entitled to get rents of village Kapsia. The plaintiffs do not challenge this finding and in fact have not even printed the village notes produced by the defendants, in order to show that the finding is incorrect. The plaintiffs have not also printed their village papers to dispute the finding of the Court below that those papers do not show that rents were ever realized by them in respect of the *jalkar* in question. As a matter of fact, the plaintiffs' witness No. 10 admits that the village papers do not show that they relate to the *jalkar* in suit.

The note of the Assistant Settlement Officer, dated the 16th March 1903 (Ex. 12) shows that on behalf of Baijnath Goenka, father of plaintiff No. 1 a map and *khasra* of *jalkars* Kamri and Dab were filed before him showing the villages to which their *jalkars* extended. On the basis of those papers he decided the dispute with regard to *jalkar* right in several villages. The cases in which the *khasra* showed the names of the villages in dispute as appertaining to the *jalkars* Kamri and Dab, were decided in favour of Baijnath Goenka. The plaintiffs are, therefore, in possession of the aforesaid documents. Their failure to produce them in this case raises the presumption against them that the disputed *jalkar* in Kapsia is not shown in the *khasra* as appertaining to the plaintiffs' *jalkar* Kamri and Dab. The plaintiffs have also omitted to produce the *batwara khasra* of 1854 whereby the *jalkars* of Kamri and Dab were partitioned among the co-proprietors. The *khasra* would have shown to whom the disputed *jalkar*, if at all it appertained to Kamri and Dab, was allotted.

The plaintiffs have examined 13 witnesses, out of whom two are formal witnesses and the rest are their servants, dependents and tenants. All of them came unsummoned and were brought by the plaintiffs' man to depose in the case. The plaintiffs have not examined their *Mustajirs*, and in their place the junior members or relations of the family have been brought.

Witness No. 1 is their *moharrir* since 1311 in village Baltora. He simply proves the execution of *kabuliyat* (Ex. 1) of 1915. He, however, has no personal knowledge of the *jalkar* in question, for he admits in cross-examination that he had never been to Kapsia or to Beerbaus. His knowledge is only hearsay.

Witness No. 2 is one of the executants of *kabuliyat* Ex. 2 of February 1902. He is a tenant of the plaintiffs.

He admits in his re-examination that there was no *phauri* in village Kapsia which was under his Settlement.

Witness No. 3 says that he had receipts for rents paid for the *jalkar* in question, but does not produce them. He admits that the northern and southern portions of the *jalkar* in question have become sandy, and the water which is between them is called Mur or Maro Ghaghri. He says he used to get fish caught through Gorhis on half the share in fish. Apparently this witness has not, therefore, himself fished in the *jalkar*.

Witness No. 4 is an ex-proprietor of village Beerbaus in which half the bed of the river has been included. He is a dependent of the plaintiffs.

Witness No. 5 was brought by the plaintiffs' *piada* to depose in the case. He does not prove that the plaintiffs or their *mustajirs* fished in the river in question. Saukhi Mahton witness No. 6 also does not prove it. He also admits that the *nadi* had become Mur Ghaghri since 8 or 9 years and it remains dry for four or five months in the year. Witness No. 7 also was called by the plaintiffs' man to depose. He says: "Since three or four years no fish is caught near Kapsia. Mur Ghaghri is to the west of Kapsia. The *maliks* of Kapsia catch fish in it."

Witness No. 9 Dahori Lal is the plaintiffs' *patwari*. He says that the *mustajirs* used to get receipts with one-anna stamp. These receipts have not been produced and an adverse inference may be drawn against the plaintiffs that the receipts, if produced, would not have shown the disputed *jalkar*. He says that he does not know if there is *phauri nadi* Ghaghri. The principal *jalkar* is *nadi* Ghaghri. He cannot give the boundaries of the *jalkars*. He says that in the *batwara* papers between Maharaj Singh and his brothers all the *jalkars* were entered. These *batwara* papers have not been produced.

Witness No. 10 says that the *jalkars*

Kamri and Dab are branches of Ghaghri. He admits that no paper has been filed on behalf of the plaintiffs to show that the entire *jalkar* was in their control. He never went to the locality and he cannot say which *phauris* are attached to river Ghaghri. His evidence is, threfore, worthless. He says that the diputed *jalkars* are nowhere shown in any papers of the plaintiffs and it would not appear from those papers that they related to the disputed *jalkar*. In the *seahas* and the *jamabandis* the *jalkar* in dispute is not separately shown. This witness also is the plaintiffs' servant.

Witnesses Nos. 11 and 12 are formal witnesses.

Witness No. 13 is a tenant of the plaintiffs and came to depose without any summons.

The defendants have examined 13 witnesses. D. W. No. 1 is a *jalkaria* or fisherman. He took a lease of the disputed *jalkar* from the defendants in 1314, caught fish in the river and paid rent and obtained a receipt (Ex. A).

D. W. No. 2 is a substantial man and his income from *zemindari* is Rs. 6,000 and he purchases fodder in Kapsia. He proves the possession of the Kapsia *maliks* over the disputed *jalkar* for the last 15 years.

D. W. No. 3 is a substantial cultivator, having 250 *bighas* of *jote* land. He proves possession of the Kapsia *maliks* for the last 20 or 25 years.

D. W. No. 4 is a *jalkaria* or fisherman. He along with his cousin had taken Settlement of the *jalkar* from Kapsia *maliks* in 1315 and fished in river. D. W. No. 5 has his house on the side of the *jalkar* in question. He proves possession of the Kapsia and Beerbaus *maliks* for the last No. 23 years.

D. W. No. 6 has a *bathan* by the side of the *jalkar* in question. He proves Settlement of the *jalkar* by the Kapsia *maliks* with different lessees and their possession from 1308 to 1324.

D. W. No. 7 prove Settlement of the fishery by Kapsia *maliks* with lessees from 1313 to 1324.

D. W. No. 8 proves possession of the Kapsia *maliks* for the last 22 to 23 years and he actually used to catch fish in the *jalkar* for the lessee Keri Gorhi.

D. W. No. 9 Rekhi Mahton is a *jalkaria* or fisherman. He verbally took Settlement in 1318 *Fasli*, and executed a registered *kabuliyat* in 1324. He paid rent and obtained receipts Ex. C to C (6) from 1318 to 1323. He was lessee for 16-annas of the fishery in 1325 and 1326.

D. W. No. 10 proves Settlement of the fishery with his father Prayag and the catching of the fish by him in the *jalkar*.

D. W. No. 11 had taken Settlement in 1316 from the Kapsia *maliks*. He caught fish in 16-annas of the *jalkar*.

D. W. No. 12 proves possession of Kapsia *maliks* since his *hoshe*.

D. W. No. 13 proves Settlement with the *mustajirs* by the Kapsia *maliks* from 1304 up-to-date. He proves the counterfoils of rent-receipts with respect to the fishery, Exs. E to E (13). He also proves the *seahas* and *jamabandis* (Exs. F to F-15 and G to G-14). He also proves that the *jamabandis* used to contain the names of the *jalkarwalas*. He himself had granted receipts (Exs. C 8 to C-10).

Some of the defendants' witnesses are plaintiffs' tenants and others are disconnected persons. Most of them have directly fished in the river on behalf of the Kapisa *maliks*. The learned Subordinate Judge has accepted the evidence of the defendants' witnesses as being satisfactory. He has rejected the plaintiffs' evidence.

We have carefully perused the evidence and we are convinced that the learned Subordinate Judge has taken a right view of the evidence in the case. The learned Subordinate Judge has accepted the *kabuliyats*, the rent receipts and the village papers filed on behalf of the defendants as showing their possession for a considerable period over the *jalkar* in question. The plaintiffs have not challenged the finding of the Subordinate Judge upon this point, inasmuch as they have not even printed the aforesaid papers proved on behalf of the defendants and have made no comment in this Court. The finding of the Subordinate Judge must, therefore, be accepted as correct. We must accept the conclusion to which the learned Subordinate Judge has arrived, namely, the plaintiffs have failed to show that they are the owners of the *jalkar* in question as part of their *jalkars* Kamri and Dab, or that they ever exercised the right of fishery over the *jalkar* in question.

Issues Nos. 2, 4, 6 and 7 must also be decided against the plaintiffs. They have failed to show that they have ever been in possession of the disputed land or that they acquired any right of adverse possession.

Dealing with issue No. 8 the learned Subordinate Judge has held "the *jalkar* in dispute has become Maro Ghaghri and both its ends have been closed and the Ghaghri water joins the Maro Ghaghri during floods and rains and it has changed its course." This finding is in accordance with the evidence in the case. The plaintiffs' witnesses have admitted that the river has changed its course and that the disputed portion is disconnected now. Both its ends remain closed for a considerable part of the year and is connected with it only for four months in the year, that is, during the flood season. Upon this finding the learned Subordinate Judge has held that the old dry course of the river must be taken to have become the private property of the defendants, the owners of the bed of the river. In support of his view the learned Subordinate Judge has referred to the case of *Sasi Kanta Acharjee* v. *Kunja Mohan Moitra* (2). Against this view the learned Counsel on behalf of the plaintiffs has cited the case of *Ahmadi Begum* v. *Mahasy Taranath Ghosh* (3). The point does not call for any decision in view of the plaintiffs having lost upon issue No. 5 as to their title or possession over the disputed *jalkar*. The same remark applies to issue No. 3 under which the learned Subordinate Judge has held that the plaintiffs have not made the *maliks* of Beerbaus or all the 16-annas *maliks* of village Kapsia parties to the suit, although the defendants took this objection at the earliest stage.

The defendants claim only half the bed of the disputed *jalkar* which lies in their village Kapsia, *Khasra* No. 494. They do not claim the western half which lies in village Beerbaus, being *Khasra* No. 861.

The plaintiffs say that on account of the decision in the case under s. 145 of the Cr. P. C., the defendants dispossessed them of the entire 16-annas *jalkar*. The Beerbaus *maliks* being not parties to the suit are not bound by the decision in the present case, nor are the *maliks* of Kapsia who have not been impleaded as defendants in the present case. Upon this view the learned Subordinate Judge holds that the plaintiffs' suit is bad for mis-joinder and non-joinder of parties. Under O. I. r. 9, C. P. C., the suit could not be defeated on account of defect of parties. The issue, however, does not deserve any serious consideration.

The result is that agreeing with the view taken by the learned Subordinate Judge, we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(2) 41 Ind. Cas. 425; 22 C. W. N. 63.
(3) 21 Ind. Cas. 233; 17 C. W. N. 1173; 18 C. L. J. 399.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 118 OF 1924.

May 7, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

GANGA CHAMAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

BINDESARI RAI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 167, 199—Ejectment suit—Question of title—Direction to institute Civil suit within a certain period—Failure to institute suit within period limited, effect of—Suit instituted after prescribed period, maintainability of.

Where in a suit for the ejectment of a tenant in a Revenue Court a question of title is raised, the Court before which the question is raised is given the option under s. 199 of the Agra Tenancy Act of deciding the question itself or of referring it to the Civil Court. If it adopts the former course it becomes a Civil Court for the time being and its decision will be *res judicata* for any Civil Court. If it adopts the second course it must direct the suit to be instituted within a limited time, namely, three months, and if the suit is not instituted within that time, it must decide the question of title against the party who was directed to bring the suit. This decision will also be a final decision between the parties. If the suit is instituted in the Civil Court beyond the time limited by the Revenue Court in its order, the Civil Court ought not to proceed with the determination of the suit inasmuch as any decision given by it in the suit would be infructuous and would not be binding upon the Revenue Court, it being the duty of the Revenue Court to decide the question of title against the party who has been directed to institute the suit in the Civil Court and has failed to institute the suit within the time limited by the Revenue Court. [p. 685, col. 2.]

First appeal from an order of the Subordinate Judge, Azamgarh, dated the 13th March 1924.

Mr. *P. L. Banerji*, for the Appellants.

JUDGMENT.

Daniels, J.—In this case an ejectment suit was brought in the Revenue Court against Bindeshar Rai, the present plaintiff-respondent, on the allegation that he was the sub-tenant of the present defendants. His defence was that he was the mortgagee and proprietor of the land. The Revenue Court

acting under sub-s. (1) (*b*) of s. 199 of the Tenancy Act ordered him to file a suit in the Civil Court within three months for a declaration of his title. The question is whether he is entitled to ignore that order and file a suit after the expiry of the three months' period, and if he does so whether the Civil Court should entertain it. The date of the Revenue Court's order was 19th November 1921. The period of three months expired on the 19th February 1922. The suit was filed two months later on 19th April 1922. It was subsequently withdrawn with liberty to file a fresh suit and a fresh suit was filed on 3rd January 1923. It may be taken as settled by the decision in *Randhir Singh* v. *Bhagwan Das* (1) that if the original suit had been filed in time there would have been a sufficient compliace with the Revenue Court's order. Here even the original suit was filed after three months. The lower Appellate Court holds that the plaintiff can maintain the suit because it was filed not in accordance with the Revenue Court's order but independently of it. The only reason it gives for this singular view is that the suit in the Revenue Court is still pending. If the suit had been filed within three months the Revenue Court would have been bound to allow the ejectment suit to remain pending till the civil suit was decided. As the suit, though filed after three months, has been entertained by the Civil Court, the Revenue Court appears to be awaiting the result of this appeal.

The question is really concluded by the decision in *Taimur Ali Shah* v. *Shah Muhammad* (2) decided with reference to precisely similar provision in the Land Revenue Act. That suit followed an earlier Single Judge's decision in *Banwari Lal* v. *Gopi* (3) which was a case under s. 199 of the Tenancy Act. As, however, the suggestion has been made that special period provided by s. 199 is prescribed only for the purposes of suit in the Revenue Court and could not affect either the period of limitation provided by the Limitation Act or the jurisdiction of the Civil Court to entertain the suit if brought at any time, it is perhaps desirable to examine the principles on which the decision rests.

Section 167 of the Tenancy Act reserves certain classes of suits and applications expressly for the decision of the Revenue Courts. It not only provides that Revenue Courts alone shall decide them but it goes further and excludes the Civil Court from taking cognizance of "any dispute or matter in respect of which any such suit or application might be brought or made." Among the matters reserved for the Revenue Court is the ejectment of a tenant. In fact it may be said generally that a dispute as to whether the relationship of landlord and tenant exists between the parties is one within the exclusive jurisdiction of the Revenue Court. On the other hand questions of proprietary right are in general reserved for the Civil Court. But the same question may be in one aspect in dispute as to the existence of tenancy and in another a dispute as to proprietary right. That situation arises whenever, as here, a defendant alleged to be the tenant of the plaintiff pleads that he is not a tenant but a proprietor or mortgagee of the land. In such a situation there was always a danger of conflicting decrees being passed. In the ejectment suit the Revenue Court might hold that *B* was the tenant of *A* and eject him. The Civil Court might hold that *B* was the proprietor of the land and *A* a trespasser. To prevent this conflict of jurisdiction the scheme of s. 199 was devised. The Revenue Court before which the question of title was raised was given the option of deciding the question itself or of referring it to the Civil Court. If it adopts the former course it becomes a Civil Court for the time being and its decision will be *res judicata* for any civil suit. If it adopts the second course it must direct the suit to be instituted within a limited time, namely, three months, and if the suit is not instituted within that time, must decide the question of title against the defendant. This decision will also be a final decision between the parties.

If a party who has been ordered to file a suit within three months is to be at liberty to ignore the restriction and file his suit after three months but before the decision of the Revenue Court, the whole policy of the law will be defeated. The Revenue Court *must* decide against him under the imperative provision of s. 199. The Civil Court might conceivably decide in his favour. Such a decision would let in the very mischief which it is the whole object of the law to prevent—contrary decisions by independent Tribunals each acting

(1) 21 Ind. Cas. 654; 35 A. 541; 11 A. L. J. 746.
(2) 57 Ind. Cas; 346; 41 A 211; 17 A. L. J. 83; 2 U. P. L. R. (A) 326.
(3) 4 A. L. 713; A. W N. (1907) 282; 30 A. 44.

strictly within its jurisdiction. Section 10 of the C. P. C. will not apply because the Revenue Court, though its decision may indirectly produce the same result, could not have granted the relief asked for in the Civil Court.

The decisions of the Court below is wrong in principle as well as contrary to authority and must be set aside.

Sulaiman, J.—I agree in the order proposed. In my opinion cases arising under the Land Revenue Act are not directly in point though they may be referred to by way of analogy. Under s. 233 (*k*) of the Land Revenue Act the jurisdiction of a Civil Court is barred in respect of all cases affecting partition or union of *mahals* suits relating to such matters are, therefore, ordinarily outside the jurisdiction of a Civil Court. It is only when a reference is made by a Revenue Court under s. 111 of the Land Revenue Act to the Civil Court that the Civil Court assumes jurisdiction. It is obvious, therefore, that unless a proper reference under s. 111 is in existence the Civil Court would have no jurisdiction to entertain the suit at all. That is why I would distinguish cases like *Taimur Ali Shah* v. *Shah Muhammad* (2), *Shah Muhammad* v. *Kadir Bux* (4) and *Randhir Singh* v. *Bhagwan Das* (1) and cases referred to therein.

In the present case we have to consider the effect of the provisions of the Agra Tenancy Act. If the Revenue Court had actually decided the question of the relationship of landlord and tenant and had held that the defendant in the Revenue Court was a tenant, that would have been a finding by a Revenue Court competent to decide that question, and the provisions of s. 167 as well as s. 199 of the Tenancy Act would be applicable, and that finding would be final. This in effect has been held in several cases and I may only refer to the cases of *Chiranj Lal* v. *Kehri Singh* (5), *Baljit* v. *Mahipat* (6), *Kishore Singh* v. *Bahadur Singh* (7) and *Mollo* v. *Ram Lal* (8).

In the present case, however, the Revenue Court has not yet finally decided that matter. I have no hesitation in saying that the Civil Court should not try this question, and the only difficulty that I have felt is in trying to state the ground on which this view should be based. The difficulty in my mind arises because of the imperfection in the language used in the Tenancy Act. If we examine s. 167 carefully it would appear that all suits and applications of the nature specified in the Fourth Schedule are exclusively triable by Revenue Courts, and no Court other than a Revenue Court is entitled to take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. I think this must mean 'in respect of which any such suit or application might be brought or made in the Revenue Court by the plaintiff to the civil suit.' It would be impossible to throw out the plaintiff's suit on the ground that the defendant, if he so chooses, can raise the same dispute in a Revenue Court. Now the present plaintiff could not possibly have filed any suit or application in the Revenue Court in which he could have asked the Court to try a dispute between him and the opposite party. So the only Court to which he himself could go was the Civil Court. Suppose, for instance, that no suit in the Revenue Court had been brought by the defendant at all and the present suit was the first suit instituted, can it be said for a moment that s. 167 would be a bar to such a claim? Obviously it would not have been because the present plaintiff could not have asked for a declaration of his proprietary title in any form whatsoever in the Revenue Court. If that is so, then there would be some difficulty in holding that although s. 167 would not have been applicable if no suit in the Revenue Court had been pending, it has somehow or other become applicable because such a suit has been instituted. The language of s. 167 cannot bear this construction. On the other hand it is possible to lose sight of the fact that although the present plaintiff could not himself have sued in the Revenue Court, there is a suit pending in that Court which is exclusively triable by it and in which the same dispute arises.

I would, therefore, not base my decision on the provisions of s. 167 alone, but base it on the ground that I have a discretion to refuse to grant the declaration asked for when the question in dispute raised in this case is already pending before a Revenue Court which is competent to try it and is raised in a suit which is exclusively triable by that Court, though raised at the instance

(4) 25 Ind. Cas. 188; 12 A. L. J. 989.
(5) 6 Ind. Cas. 891; 33 A 1; 7 A. L. J. 810.
(6) 49 Ind. Cas. 118; 41 A. 203; 17 A. L. J. 60.
(7) 48 Ind. Cas. 470; 41 A. 97; 16 A. L. J. 933.
(8) 58 Ind. Cas. 772; 43 A. 191; 18 A. L. J. 1030.

of the defendant to the civil suit. The Revenue Court is empowered to decide it, and if it decides it, its decision will have the force of a Civil Court decree, and, subject to appeals, will be final. It is obviously undesirable that two Courts, even if they have concurrent jurisdiction to try the same point, should try it simultaneously. Although it is not possible to bring this case within the provisions of s. 10 of the C. P. C., as the Revenue Court is not competent to grant the relief asked for in the civil suit, nevertheless the principle underlying that section may be of wider application.

Under s. 199, sub-cl. (2) if the defendant in the revenue suit has not complied with the order and has not instituted a civil suit within the three months allowed it will be the duty of the Revenue Court to decide the point against him. In fact the inevitable result of the failure to file the suit in time will be a decision against the person claiming the proprietary right. If this is to be so, what is the use of the Civil Court going on with the dispute as to such right? We are entitled to assume that the Revenue Court would decide the point against the present plaintiff and it will, therefore, be altogether futile to allow the Civil Court to go into that question with the possibility of arriving at a contrary conclusion. The provisions of s. 199 are obviously intended to avoid such a conflict of jurisdiction and the Revenue Court alone must proceed with the case. The declaration, even if granted by the Civil Court, will be useless and may altogether be ignored by the Revenue Court.

The only case which I notice is similar to the present one in the case of *Banwari Lal* v. *Gopi* (3), where too a suit instituted in the Civil Court more than three months after the time allowed by the Revenue Court, was held to be not maintainable. The learned Judge who decided that case, however, based his decision on the ground that the ordinary period of limitation for a civil suit was suspended in view of the provisions of s. 99 of the Tenancy Act. He, in effect, held that Art. 120 of the Limitation Act was overridden by s. 199 of the Tenancy Act and the period of limitation was shortened. Although I agree with the view that the Civil Court should not grant the declaration, I find it impossible to base my decision on the ground that the suit was barred by time owing to the period of limitation being shortened. As I have already said I simply, in my discretion, refuse to grant the declaration asked for.

By the Court.—The appeal is accordingly allowed and the order of the lower Appellate Court set aside and the decree of Court of first instance restored with costs in all Courts.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 178 OF 1922.

February 25, 1925.

Present:—Mr. Justice Adami and Mr. Justice Dass.

PARTAB MAHTON AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat WAZIRUNNISA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 52, 158, 188—Suit for assessment of fair and equitable rent in respect of lands not forming part of original holding, nature of—Suit by co-sharer landlords, maintainability of—Assessment, applicability of, to rent in respect of past years.

Sections 52 and 188 of the Bengal Tenancy Act are applicable where the plaintiff contends that there has been an addition to the original holding. To a suit for the assessment of rent in respect of lands which did not form part of the original holdings these sections have no application. [p. 691, cols. 1 & 2.]

The right to sue for assessment of fair and equitable rent is a right given by the general law. Section 52 of the Bengal Tenancy Act applies only to cases where the area of a tenure or holding has increased while s. 158 (*i*) (*d*) of the Act refers to a determination of the existing rent. Where assessment is applied for in respect of lands forming separate holdings under separate agreements in respect of which there is no existing rent, neither of these sections is applicable. [p. 692, col. 1.]

Under the general law a suit by a co-sharer landlord for an assessment of the rent of a tenant's holding is not maintainable where the other co-sharers have not been made parties to the suit either as plaintiffs or as defendants. As in a partition suit, so in a suit for assessment all the interested persons must be made parties to the suit. [*ibid.*]

A suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been paid by the tenant and where the landlord claims arrears of rent in respect of past years for which rent has already accrued due, a suit for determination of fair and equitable rent does not lie. The assessment made in a suit for the determination of fair and equitable rent can only have reference to future years. [p. 692, col. 2.]

Appeal from a decision of the Subordinate Judge, Second Court, Patna, dated the 21st December 1921, modifying that

of the Munsif, Third Court, Patna, dated the 29th March 1921.

Messrs. *K. P. Jayaswal* and *B. C. Sinha*, for the Appellants.

Messrs. *Khurshaid Husnain* and *Hasan Jan*, for the Respondents.

JUDGMENT.

Adami, J.—The plaintiffs, respondents in this second appeal, have a 7 annas odd share in the two villages of Nathupur and Kazi Chak Sher Muhammad. Though the two villages have separate *tauzi* numbers and separate *sadar jama*, the co-sharer landlords have treated the lands of the two villages as of one village and kept joint collection papers for both villages. The predecessor-in-interest of the plaintiffs had 7 *bighas* 6 *kathas khudkast* land in the villages and in 1886 she purchased 37 *bighas* 5 *kathas* in execution of her decree for arrears of rent against Net Lal Mahto, Partap Mahto and Sarju Mahto, who had held that area as their *raiyati kasht* land. The 37 *bighas* 5 *kathas* thus become her *kudkasht* land which, with the 7 *bighas* 6 *kathas* she had held before, now amounted to 44 *bighas* 11 *kathas*. In 1889 she gave 9 *bighas* 6 *kathas* of this *khudkasht* land to Nasiruddin, one of the co-sharer landlords. According to the plaint these *khudkasht* lands were settled with tenants on *bhaoli* terms, the tenants paying to each co sharer his share, and in addition to this making a payment of one rupee per *bigha* to the plaintiffs' ancestor out of the tenants profit. In 1892 the *bhaoli* rents were commuted to *nakdi* but the payment of rupee one per *bigha* out of profits was continued.

Sometime before 1896 the plaintiff No. 1 came into possession of a 4 annas 9 *dam* odd share in the two villages and plaintiff No. 2 came into possession of a 2 annas 12 *dam* share, so that together they hold a 7 annas odd share. In 1896 plaintiff No. 1 let out her share, including *khudkasht* lands, in *ijara* to *Musammat* Bechan Kuer, and did not get direct possession again until 1916. In 1897 plaintiff No. 2 gave his share, including *khudkasht* lands in *ijara* to Jhari Lal, and he was still in possession as *ijaradar* when, in 1903, a fresh settlement of *khudkasht* lands was made. Under the terms of this fresh settlement the tenants were to pay to each of the co-sharer landlords his proportionate share of the annual rental *khudkasht* lands at the rate of Rs. 5-13 per *bigha*, and were to pay, in addition, to the plaintiffs one maund of polished rice per *bigha* out of their profits.

It was the plaintiffs' case that the father of defendant No. 1 and the defendants Nos. 2 and 3 cultivated 10 *bighas* 19 *kathas* in the two villages as their *raiyati kasht* land at a rent of Rs. 5-13 per *bigha*, the total rent amounting to Rs. 63-10-7, and that they had executed two *kabuliyats* in respect of this *raiyati* holding, one in 1894 and another in 1898, the latter enhancing the rent payable under the former. The plaintiffs alleged that in the settlement of *khudkasht* lands made in 1903, the father of defendant No. 1 obtained settlement of 17 *bighas* 5 *kathas* out of the 35 *bighas* 5 *kathas* left after the gift of 9 *bighas* 6 *kathas* to Nasiruddin, at the rate of Rs. 5-13 per *bigha*, together with one maund of polished rice per *bigha* to be paid to the plaintiffs. At the same time Nasiruddin settled 5 *bighas* 4 *kathas* out of the 9 *bighas* 6 *kathas* given to him with the father of defendant No. 1 at the same rate of rent and the same terms as to delivery of one maund of polished rice per *bigha*. The 17 *bighas* 5 *kathas* were contiguous to the holding of 10 *bighas* 19 *kathas*.

In 1903 the father of defendant No. 1 took a *thica* of the share of another co-sharer landlord. *Musammat* Halimunnissa, in the name of his grandson for a term of 7 years.

In 1908 the survey and settlement operations started in the villages, and *khewat* and *khatian* were prepared for each of them separately. It is alleged by the plaintiffs that in the course of the settlement operations, defendant No. 1 and his nephews, defendants Nos. 2 and 3, took advantage of the fact that they held a *thica* of *Musammat* Halimunnissa's share, and managed to get the 17 *bighas* 5 *kathas* of *khudkasht*, settled with them by the plaintiffs, as well as the 5 *bighas* 4 *kathas*, settled with them by Nasiruddin, amalgamated with 10 *bighas* 19 *kathas* which they did hold as *raiyati kasht* under the *habuliyats*, the whole 33 *bighas* 8 *khatas* being described in the Record of Rights as the *kaimi raiyati kasht* of the defendants, at a rental for the whole of Rs. 63-10-7 which was really the rental payable for the 10 *bighas* 19 *kathas* alone. In the Record of Rights 12·97 acres were recorded against *khata* No. 113 of Nathupur with an

annual *jama* of Rs. 63-10-7, and 7·57 acres were recorded against *khata* No. 121 of Kazi Chak Sher Muhammad with a remark that the *jama* was included in that of *khata* No. 113 of Nathupur. The plaintiffs alleged that, in order to keep them in ignorance and to prevent them taking any steps to get the record corrected within the time allowed, the defendants continued to pay rent for the 10 *bighas* and separate rent for the 22 *bighas* of *khudkasht* land till 1914, and then from 1915 ceased to pay rent either for the *kasht* land or for the *khudkasht*.

The plaintiffs in the plaint state that they do not ask for a declaration of their *khudkasht* right or of the want of title in the defendants; nor do they seek to recover possession of the *khudkasht* lands; but they do claim that the defendants are not entitled to hold the 22 *bighas* 9 *kathas* of the lands settled with them as *khudkasht* without payment of rent, and that the plaintiffs are entitled to get their proportionate share of rent for the 22 *bighas* 9 *kathas* at the rate of Rs. 5-13 alleged by them to have been agreed on at the time of settlement, and also to get one maund of polished rice per *bigha* from the tenants' profit.

Thus the claim in the suit from which this appeal arises is for the plaintiffs' proportionate share of the rents for 1323 *F. S.* to 1327 *F. S.* of the 10 *bighas* 19 *kathas* at the rate mentioned in the *kabuliyat* of 1898 and also of the 22 *bighas* 9 *kathas* at the rate which they allege was agreed on at the time the settlement of *khudkasht* lands was made. In case the Court is not satisfied as to their allegation of the rate fixed at the time of the settlement of these 22 *bighas* 9 *kathas*, the plaintiffs ask the Court to settle a fair and equitable rent for those lands and to give them a decree for the arrear rent of those lands at the rate so settled. A claim is made for the value of polished rice at the rate of one maund per *bigha* for the years in suit.

None of the other co sharers were made parties to the suit either as plaintiffs or defendants; the plaintiffs allege that those co-sharers refused to join them or take any action.

The defendants resisted the suit on the ground that, being instituted more than six years after the final publication of the Record of Rights, it was barred by limitation, and that it was not maintainable since all the co sharer landlords had not joined in the suit. They denied that the lands were *khudkasht*, or that they were settled with the father of defendant No. 1 on the terms and rates alleged by the plaintiffs. They denied also the right of the plaintiffs to claim the value of any polished rice, as such payment would amount to an *abwab*. They controverted the story put forward by the plaintiffs and claimed that all the lands were their ancestral *kasht* lands and the rental for all was Rs. 63.

The Munsif found that the *kabuliyats* of 1894 and 1898 were genuine and executed by the father of defendant No. 1, that, though undue influence was apparent as to some of the terms of the *kabuliyats*, none was used so far as the agreement to pay Rs. 63-9-7 for the 10 *bighas* 19 *kathas* was concerned and that *jama* was paid up to the survey. He was satisfied that the remaining 22 *bighas* 9 *kathas* were *khudkasht* as alleged by the plaintiffs, and not ancestral *raiyati* lands of the defendants, and that these *khudkasht* lands were settled with defendant No. 1's father in 1903. He decided, however, that the plaintiffs had knowledge of the survey proceedings, and as the suit was instituted more than six years from the date of the publication of the Record of Rights, the suit was time barred so far as the claim to the additional rent was concerned. As to the alternative prayer of the plaintiffs for a settlement of fair and suitable rates for the *khudkasht* lands, the learned Munsif held that the plaintiffs not being sole landlords, and the other co-sharers not having joined, the claim for assessment and for additional rent was barred by the provisions of s. 188 of the Bengal Tenancy Act. As a result of his findings the learned Munsif granted the plaintiffs a money decree for Rs. 113 only as representing their share for the years 1323 to 1326 *F. S.* of the rent recorded in the Record of Rights as being payable for all the land in suit. He disallowed the claim for the value of polished rice, this payment in kind being an addition to the rent and contrary to the provisions of the Bengal Tenancy Act.

On appeal the learned Subordinate Judge has held that the finding of the Munsif to the effect that Rs. 63 is the *jama* for the 10 *bighas* and not for the entire lands is conclusive because the defendants did not file a cross appeal. It is obvious that

the Subordinate Judge has expressed the position wrongly; the defendants had proved successful on the main question in the suit, namely, whether, they were liable to pay more than the rent recorded in the Record of Rights for the lands in suit; there was no occasion for them to appeal. The whole case was before the Subordinate Judge on appeal, and what he apparently meant to say was that the finding of the Munsif on this question was not contested before him.

The Subordinate Judge overruled the Munsif on the question of limitation, holding that the suit was within time being a suit for assessment of fair and equitable rent, and having been instituted within 12 years from the date of the publication of the Record of Rights when the plaintiffs' rights to additional rent was challenged.

With regard to the finding of the Trial Court that the suit for assessment was barred by the provisions of s. 188 of the Bengal Tenancy Act, the learned Subordinate Judge relied on the case of *Dhananjoy Manjhi* v. *Upendranath Deb* (1) and held that s. 188 of the Bengal Tenancy Act had no application, the bringing of a suit for the assessment of rent not being an act which a landlord is authorized or required to do by the provisions of the Bengal Tenancy Act. He found, therefore, that the suit was maintainable at the instance of the two co-sharers landlords without joining the rest as parties.

The learned Subordinate Judge proceeded to assess the rent for the 22 *bighas* odd at the rate of Rs. 5-13 a *bigha*, and held that the defendants, having been in occupation of the lands, were in justice and equity bound to pay rent for the past years in suit, and the settlement with them having been proved, on assessment, the rate of rent claimed by the plaintiffs, having been found to be the right rate, the plaintiffs were entitled to a decree for the past years at that rate. He rejected the claim of one maund of polished rice per *bigha*, in that this did not form part of the rent. As a result he decreed the appeal except as to this claim for the value of polished rice.

I have stated the facts of the case in some detail because it will be necessary to distinguish them from the facts of the various cases relied on by the parties.

(1) 46 Ind. Cas. 428; 22 C. W. N. 685.

Two points are taken by the learned Counsel for the appellants; the first is that the plaintiffs' suit cannot succeed in the absence of the other co-sharers, and s. 188 of the Bengal Tenancy Act is relied on, the second point is that the suit being a suit for assessment of rent no decree could be granted for arrears of past years at the rate newly assessed by the Court. The finding of the lower Appellate Court with regard to limitation has not been assailed in this Court and the suit has been treated as a suit for assessment of a fair and equitable rent of lands for which the Record of Rights omitted to mention a rent. It is to be noticed that the learned Subordinate Judge first assessed a rent and then proceeded to treat the suit as an ordinary suit for arrears of rent because the rate of rent assessed by him coincided with the rate claimed in one of the alternative prayers of the plaint. It is clear that there was a necessity to assess the rent as prayed for in the other alternative prayer, for the plaintiffs had no document or other reliable evidence to show what rate of rent was agreed upon at the time of the settlement of the *khudkast* lands with the defendants.

With regard to the first point taken by the appellants, namely, the maintainability of a suit for assessment by a co-sharer landlord, in the case of *Darik Dhakai* v. *Aswini Kumar Nag* (2) a co-sharer landlord brought a suit for arrears of rent and also for additional rent on the basis of a *kabuliyat* in which there was an agreement to pay additional rent for additional area. On measurement of the holding it was found that there was an addition of 10 *bighas*. The other co-sharers were made parties defendants. It was held that the suit was a suit under s. 52 to which s. 188 applied, and that the agreement to pay additional rent in the *kabuliyat* did not take it out of that section. That case is to be distinguished from the present one. Here we have no agreement as to additional lands and it is not a case of lands being found on measurement to be in excess of the area stated in the *kabuliyat*. We have here a prayer of assessment of the rent of lands settled under a separate agreement and not forming part of the area settled by the *kabuliyats* of 1894 and 1898. In

(2) 20 Ind. Cas. 659; 18 C. W. N. 942.

Gopal Chunder Das v. *Umesh Narain Chowdhury* (3) the proprietors of an 8-annas share claimed from a tenant rent for excess area under s. 52 and for enhanced rent under s. 30 and made the other co-sharers parties defendant. It was found that the land in excess was held as part of the original holding. This was clearly a case coming under ss. 52 and 30 of the Tenancy Act and there can be no question that the provisions of s. 188 apply to a suit under either of those sections. In the present case, as I have said before, assessment of rent is asked for with regard to lands not found to be part of the original holding.

Mr. Jayaswal relied on the decision of their Lordships of the Privy Council in *Jatindra Nath Chowdhri* v. *Prasanna Kumar Banerji* (4) but that was a case of enhancement of rent and is not relevent, for there is no question of enhancement before us. Their Lordships ruled that in cases to which s. 188 applies it is not sufficient to make the other co-sharers landlords parties defendant they must join as plaintiffs to make the suit maintainable.

On the other hand in the case of *Khondakar Abdul Hamid* v. *Mohini Kant Saha Chaudhuri* (5) the defendants, tenants of the original holding under the plaintiffs and their co-sharers, took possession of certain lands by gradual encroachment. The plaintiffs brought a suit for recovery of their share of the encroached lands or in the alternative for assessment of rent and made their co-sharers parties. It was held that the defendants must be treated as tenants of those lands apart from their tenancy in respect of the holding, and that those lands formed a new holding and the rent assessed upon it would be a new rent in respect of the new holding, and that a suit for the assessment of rent is not an act that is authorized by s. 188 of the Bengal Tenancy Act and s. 52 does not apply. In the present case the co-sharer plaintiffs are asking for an assessment of the rent of the 22 *bighas* claimed to be *khudkasht* and not for an assessment of the rent of the 10 *bighas*. If they had claimed rent, not merely of the additional 22 *bighas* in possession of the defendants over and above the 10 *bighas* but in respect of the entire quantity of land in possession of the defendants including the 10 *bighas*, according to the decision in this last case I have mentioned, ss. 52 and 188 would have applied. That is to say, ss. 52 and 188 will apply where the plaintiffs contend that there has been an addition to the original holding. That is not the contention in the present case.

In *Gobind Chandra Pal* v. *Hamidullah Bhuian* (6) the defendant executed a *kabuliyat* in favour of one of the co-sharer landlords with respect to a quantity of land proportionate to that co-sharer's share in the entire holding. The co-sharer landlord sued the defendant for rent of land in excess of the area for which rent had been previously paid. The other co-sharer was not made a party. In the *kabuliyat* the defendant had agreed to pay additional rent for lands found on measurement to be in excess. Prinsep, J., held that as the plaintiff did not sue under the general right, declared by s. 52 to be with a landlord to assess rent on excess lands but on the *kabuliyat* under which the right to assess such rent on the specific share was accepted by the defendant, s. 188 did not apply. The Court was not called on to consider what was the rent payable on the entire holding. The facts in that case are distinguishable from those in the present case inasmuch as we find from the plaint in this case that the agreement at the settlement of the *khudkasht* lands was that the defendants should pay to each of the co-sharer landlords his proportionate share of the rent, paying in addition the one maund of polished rice to the plaintiffs, who in making the settlement seem to have acted agents of all the co-sharers.

The learned Subordinate Judge relied on the case of *Dhananjoy Majhi* v. *Upendra Nath Deb* (1) and that case had also been cited by the respondents. There the tenants' lands had been recorded in the Record of Rights as liable to be assessed with rent. A co-sharer landlord brought a suit to have the rent assessed, and made his other co-sharers defendants. The defendants contended that the land was held rent free. It was urged that under s. 188 the suit was not maintainable. Richardson, J., after referring to the cases of *Khondakar Abdul Hamid* v. *Mohini Kant*

(3) 17 C. 695; 8 Ind. Dec. (N. S.) 1004.
(4) 8 Ind. Cas 842; 15 C. W. N. 74; 9 M. L. T. 1; 13. C. L. J. 51; 8 A. L. J. 1; 13 Bom. L. R. 1; 21 M. L. J. 92; 38 C. 270; (1911) 2 M. W. N. 149; 38 I. A. 1 (P. C.)
(5) 4 C. W. N. 508.
(6) 7 C. W. N. 670.

Saha Chaudhuri (5), *Barhamdat Missir* v. *Krishna Sahay* (7), *Assanullah Bahadur* v. *Mohini Mohan Das* (8) and *Harihar Pande* v. *Karamat Hossein* (9) held that the right to claim assessment is consistent with and arises out of the genral law and land revenue system of the country, and that the right to sue for assessment is not limited by the provisions of s. 188.

There cannot be any doubt that the right to sue for assessment is a right given by the general law and that s. 188 will not apply in a case like the present one. It cannot be held that the assessment was made under s. 52 or under s. 158 (*i*) (*d*) of the Bengal Tenancy Act, the former section applies, as shown by the decisions I have cited, to cases where the area of a tenure or holding has increased, here rent is claimed for lands as forming separate holdings under separate agreements; the clause of the latter section refers only to a determination of the existing rent, and in the present case there was no existing rent, so the Court was asked to fix one.

The question next arises, whether under the general law a suit by a co-sharer landlord for an assesment of the rent of a tenant's holding is maintainable where the other co-sharers have not been made parties either as plaintiffs or defendants. It is to be noticed that in the various cases noted above except in the case of *Gobind Chandra Pal* v. *Hamidulla Bhuian* (6) the other co-sharers were made parties defendants to the suit for assessment; in the present case the plaintiffs have not made their co-sharers parties to the suit at all and the plaint tells us that the co-sharers refused to take any action; they are apparently satisfied with the rent now paid to them in accordance with the Record of Rights. Two of the co-sharers come forward and ask for an assessment of the rent of the 22 *bighas* and for their proportionate share; the othor co-sharers are vitally interested. It may be that it was unnecessary to join the other co-sharers as plaintiffs as s. 188 does not apply, but surely they should have been made parties defendants, so that the assessment when made might bind all equally. As pointed out by the learned Munsif, great hardship will be caused to the tenants defendants if each of the other co-sharer landlords is left free to bring a separate suit for assesment; not only may there ensue a multiplicity of suits, but also the tenant, if different assessments are made in the separate suits, will be uncertain as to what is really the assessed rental. No really effective decree can be made in the absence of the interested co-sharers and there can be no finality as to what is really the fair and equitable rent. As in a partition suit so in a suit for assessment all the interested presons should be made parties.

I am of opinion that as the other co-sharers were not joined as parties in the suit, the suit, so far as it sought for assessment of the lands belonging to the co-sharers jointly, is not maintainable.

With regard to the second point taken in the appeal, namely, that the plaintiff was not entitled to claim rent in arrears at the rate to be assessed as fair and equitable in the suit, as pointed out by my learned brother, Das, J., in *Gobind Lal Sijuar* v. *Ramsaran Lal* (10) a suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been paid by the tenant, and when a landlord claims fair rent in respect of past years for which rent has already accrued due, a suit for determination of fair and equitable rent does not lie. No doubt it has been held [*Jagannath Manjhi* v. *Jumman Ali Putwari* (11)] that in cases under s. 52 of the Bengal Tenancy Act arrears of rent can be claimed for the additional area, but in those cases the rent of the holding is known and proportionate addition is made for the excess area. In suits for assessment of a fair and equitable rent it is understood that rent has not been settled or paid hitherto and the Court is asked to determine the rent to be paid in future. The learned Subordinate Judge states—"The appellants did allege that the lands were settled with them (the present appellants) at the rate of Rs. 5-13 per *bighas*. This contention has been found to be true and correct". As a matter of fact there has been no such finding. The Munsif in fact found that the 22 *bighas* were settled without any *jama*. The Subordinate Judge made an assessment of what a fair and equitable rent would be and

(7) 20 Ind. Cas. 910; 18 C. W. N. 466.
(8) 26 C. 739; 13 Ind. Dec. (N. S.) 1072.
(9) 4 Ind. Cas. 175; 9 C. L. J. 493.
(10) 68 Ind. Cas. 433; 2 P. L. T. 642.
(11) 29 C. 247.

found that a rate of Rs. 5-13 per *bigha*, the amount claimed by the co-sharer landlord was fair and equitable. There is no finding that the tenants ever paid rent for the 22 *bighas*, and there is no real finding that at the time of settlement a rate of Rs. 5-13 a *bigha* was agreed upon. Under the circumstances it may be taken that it is not found that up to the date of suit any rent had been settled for the 22 *bighas*, or paid, and, therefore, the assessment now made can only have reference to future years.

The suit for assessment of rent having been found not to be maintainable the appeal must succeed, and the decree of the lower Appellate Court must be modified to this extent, that the plaintiffs will be declared entitled to a money-decree for the sum of Rs. 113 only, in respect of the rent of the lands in suit for the years 1323 to 1326 *F. S.* The appellants will get their costs throughout.

The cross-appeal against the decision of both the lower Courts that the alleged stipulation for payment by the tenant of one maund of polished rice per *bigha* would amount to an illegal imposition under the provisions of s. 74 of the Bengal Tenancy Act, must fail. It is clear from the findings of the Courts that this payment would be an addition to the actual rent and would not form an integral part of the same. The cross-appeal is dismissed with costs.

Das, J.—I agree.

Z. K. *Cross-appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 166 OF 1924.

April 4, 1925.

Present:—Mr Findlay, Officiating J. C.

NIZAMUDDIN AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

JUMMA AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 65, 151, O. XXI, rr. 89, 90, 91—Contract Act (IX of 1872), s. 86—Specific Relief Act (I of 1877), s. 13, ill. (a)*—Auction sale—Property, burnt down after sale but before confirmation—Sale, whether can be confirmed—Auction-purchaser, rights of—Inherent powers of Court, when can be invoked.*

An auction sale is valid until it is set aside and in the absence of any circumstance vitiating it at its inception, the Executing Court has no right to refuse to confirm the sale apart from the contingencies contemplated in rr. 89, 90 and 91 of O. XXI of the C. P. C., even if by accident or by act of God the property has since the date of the sale been destroyed by fire. [p. 695, col. 2.]

An Executing Court has inherent power to refuse to confirm an auction-sale if it is shown that it was misled by mis-statement or non-disclosure of relevant facts or the like. [*ibid.*]

Raghavachariar v. *Murugesa Mudali*, 72 Ind Cas. 545; 46 M. 583. (1923) M. W. N. 323; 32 M. L. T. 285; 44 M. L. J. 680; 17 L. W. 750; (1923) A. I. R. (M.) 635, followed.

But it has no such power when there are no equities justifying a refusal to confirm the sale. The mere fact that by an accident or by an act of God the property sold has been destroyed after the date of the sale, does not empower the Court to refuse to confirm the sale. [p. 695, col. 2; p. 696, col. 1.]

Under s. 65 of the C. P. C., where immoveable property is sold in execution of a decree it is deemed to have vested in the purchaser from the date of the sale. [p. 694, col. 1.]

Under s. 86 of the Contract Act, the buyer has to bear any loss arising from the destruction or injury of the property after the contract of sale has been completed. [p. 694, col. 2.]

Where the judgment-debtor has a saleable interest, however small, in the property sold the purchaser buys at his own risk, and there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief, if the property does not correspond to the said description, and in the absence of fraud the auction-purchaser has no remedy unless the judgment-debtor has no saleable interest at all in the property. [p. 695, col. 1.]

An auction-purchaser is entitled to claim profits and accretions from the date of the sale of the property sold to him and he is responsible for the deterioration or loss which the property suffers during the interval between the date of sale and that fixed for confirmation thereof. [p. 695, cols. 1 & 2.]

When certain questions have been removed from the jurisdiction of the Court, they cannot be brought within its jurisdiction on the ground that the Court has inherent power to do what justice requires for the parties before it. [p. 696, col. 1.]

Appeal against a decree of the District Judge, Nagpur, dated the 23rd January 1924, in Civil Appeal No. 171 of 1923.

Mr. *M. R. Bobde*, for the Appellants.

Messrs. *J. C. Ghosh* and *N. G. Sarkar*, R. B., for the Respondents.

JUDGMENT.—A somewhat interesting point of law arises in this case. The appellants, decree-holders, in execution of their money-decree against the first respondent Jumma, attached his house in *Mouza* Dhapewada (Nagrur). The 17th of April 1923 was fixed by the First Court for sale of the property, and it was duly sold for Rs. 500 of which amount the second respondents Suleman, the auction-purchaser, deposited Rs. 125 forthwith; the balance of the purchase-money was paid on the 31st of April 1923. Meanwhile, the 23rd of June 1923 had been fixed for confirmation of sale, but on the 17th of May 1923 the house had been accidentally burnt down. On the 30th of June the auction-purchaser filed an application for refund of the pur-

chase-money on the ground that the property having been burnt down before the confirmation of sale he was entitled to obtain the said refund. The First Court, by its order dated the 24th of September 1923, granted this application, and an appeal to the District Judge, Nagpur, by the present appellants was dismissed. The Munsif took the view that in the peculiar circumstances of the case he was bound to exercise the inherent power of the Court under s. 151 of the C. P. C. in favour of the auction-purchaser. The learned District Judge, in his appellate judgment, took a similar view and pointed out that rr. 89-91 of O. XXI, C. P. C., are not necessarily exhaustive and do not affect the inherent power of the Court to act according to justice, equity and good conscience. Under those circumstances the District Judge was of opinion that it would be highly unjust and inequitable to confirm the sale of the house and he accordingly dismissed the appeal of the decree-holders.

The facts in this case are not in dispute. The only real question is as to the law applicable in the exceptional set of circumstances which have arisen. The correctness of the principle underlying the decision in *Raghava Chariar* v. *Murugesa Mudali* (1) cannot be questioned. But it is pertinent in this connection to point out that in the said case the inherent powers of the Court to refuse to confirm the auction-sale held under its order were only invoked when it was shown that the Court had been misled by a mis-statement or non-disclosure of relevent facts. The case was one where it was necessary to make an appeal to the principles of equity and it was on equitable considerations that the said decision was arrived at. Here, it seems to me extremely doubtful whether there is room for recourse to the principles of equity. Section 65 of the C. P. C. lays down that when a sale has been confirmed, the immoveable property sold shall be deemed to have vested in the purchaser from the date of the sale and not from the date the sale becomes absolute. Under the old C. P. C. the position was precisely the reverse: *Cf. Shiam Lal* v. *Nathe Lal* (2).

The question which, therefore, arises in this connection is whether or not the First Court was right in refusing to confirm the sale even although the house had been destroyed by fire more than a month after the sale had taken place. The ordinary circumstances, under which an Executing Court can refuse to confirm a sale, are specified in rr. 89—91 of O. XXI, C. P. C. for such an application a limitation of 30 days is laid down in Art. 166 of the First Schedule to the Limitation Act. Admittedly, therefore, there was no time to make any such application in the present case, if it can be assumed that such an application might lie under r. 91 quoted above.

For my own part, however, it seems to me that the rule in question could not possibly have been invoked in the present case. On the date of the sale the property was in full existence and the position that the judgment-debtor had no saleable interest therein, could not possibly be predicated, because a month later the house happended to be destroyed by fire.

Now, what was sold at the auction-sale on the 17th of April 1923? Very clearly the right, title and interest of the judgment-debtor as they then existed. When the Executing Court had to consider, therefore, in deciding whether or not to confirm the sale under r. 92, O. XXI, C. P. C., was whether there was any reason with reference to rr. 89—91 for refusing to do so. If there were not, in the absence of exceptional circumstances, such as arose in *Raghava Chariar* v. *Murugesa Mudali* (1) quoted above, the Court was bound to confirm the sale. That by an accident or by an act of God the house had been destroyed in the meantime, was not, in my opinion, a circumstance which entitled the Executing Court to have recourse to its inherent powers and to the application of a general equitable ruling. As a matter of fact, even if one had recourse to equity, it is difficult to see why the decree-holders should be made to bear the loss rather than the judgment-debtor or the autction-purchaser.

It is true that there is the widest possible different between voluntary sales and sales held by the Court in execution of a decree. But at the same time it is of interest to observe that in s. 86 of the Contract Act the buyer has to bear any loss arising from the destruction or injury of the property after the contract of sale has been completed. In execution-sales

(1) 72 Ind. Cas. 545; 46 M. 583; (1923) M. W. N. 323; 32 M. L. T. 285; 44 M. L. J. 630; 17 L. W. 750; (1923) A. I. R. (M.) 635.

(2) 7 Ind. Cas. 65; 33 A. 63.

it is accepted law that when the judgment-debtor has a saleable interest, however, small, the purchaser buys at his own risk, and there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief, if it does not correspond to the said description: *Cf Sundara Gopalan* v. *Venkatavarada Ayyangar* (3) and *Sonaram Dass* v. *Mohiram Dass* (4). Here, there was no question of fraud and in those circumstances it seems to me difficult to avoid the conclusion that the Munsif was bound under r. 92 to have confirmed the sale.

Let us suppose in the present instance that the house had been actually burnt down, in whole or in part, at the moment the auction was taking place, though the auction-purchaser and the other parties were unaware of the fact of the fire at the moment. The site of the house was also sold and from this point of view it cannot be said that the consideration wholly failed. In *Shanto Chandar Mukerji* v. *Nain Sukh* (5) and in *Muhammad Rahmat-Ullah* v. *Bachcho*, (6) it was held that an auction-purchaser has in the absence of fraud no remedy unless the judgment-debtor has no saleable interest at all in the property sold. Thus, even if the fire had occurred on the 17th of April, the date of the auction-sale, it would be absolutely impossible to affirm that there was nothing left to be sold.

Looking at the position from another point of view, the auction-purchaser is obviously entitled to claim profits from the date of the sale to him. Similarly in *Bhawani Kumar* v. *Mathura Prasad Singh* (7). Lord Shaw remarked as follows:—

"It was maintained in argument for the mortgagee that the true meaning of this was that the sale to him did not become a legal fact until the 23rd April. In their Lordships' opinion, this is an under-statement and a mis-statement of the mortgagee's rights. It is true that upon that date the sale was confirmed, but what was, as the certificate bears, confirmed, was a sale 'by public-auction on the 19th March 1900'. There seems little reason to doubt that upon the 19th March all the lands sold had been transferred to the mortgagee, and that if there had been any accretions to the property between that date and the date of the confirmation, those accretions would have become the property of the purchaser."

If accretions to the mortgaged property became the property of the auction-purchaser, the converse also holds true and he must be held responsible for any deterioration or loss which the property suffers in the meantime. The present case, therefore, was, in my opinion, one in which the sale should have been confirmed.

Illustration (*a*) to s. 13 of the Specific Relief Act is of interest in this connection. It is, no doubt, true that the last quoted Act was passed before the Transfer of Property Act was enacted, but, as I have already pointed out, the difference between the voluntary sales and Court sales is very marked, and it seems to me that in the circumstances of the present case it may be improper to draw any analogy from the case of voluntary sales. The Judge of the lower Appellate Court seems to have regarded the case from a wrong point of view. He apparently considered that the Court-sale was invalid until it was confirmed. It may be that the sale was inchoate until it was confirmed, but the more proper way of regarding the matter was to regard the sale as valid until it was set aside. Apart from fraud or misrepresentation and the like circumstances, which do not arise in the present case, there was no ground for refusing to confirm the sale except with reference to the action taken under rr. 89-91 and, as I have already shown, there was no possibility of any of these three rules being applied in the circumstances of the present case.

The decision in *Raghava Chariar* v. *Murugesa Mudali* (1) seems to me to have misled the Judges of both the Courts below. The decision was, in my opinion, incorrectly applied by them to the facts of the present case. If there were circumstances, which vitiated the sale at its inception, then the Executing Court would have been in a position to refuse to confirm the sale, even apart from the contingencies contemplated in rr. 89-91. Here, the sale of the 17th of April 1923 was a legal and valid sale and the fact that by accident or by act of God the property has since, with the exception of the site,

(3) 17 M. 228; 3 M. L. J. 293; 6 Ind. Dec. (N. S.) 158.
(4) 28 C. 235.
(5) 23 A. 355; A. W. N. (1901) 101.
(6) 27 A. 537; A. W. N. (1905) 99; 2 A. L. J. 244.
(7) 16 Ind. Cas. 210; 40 C. 89 at pp. 101, 102; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

been destroyed by fire, was not, in my opinion, a sufficient ground for having recourse to the principles of equity, when there was a definite and specific rule of law applicable. It has again and again been pointed out as regards the scope of s. 151, C. P. C., *e. g.*, in *Gopal Dinkar* v. *Ganesh Narayan* (8) and in *Jethabai Nursey* v. *Chapsey Cooverji* (9) that where according to well established principles, certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction on the ground that the Court has inherent power to do what justice requires for the parties before it.

I, therefore, hold in the present case that the Executing Court was bound, in the circumstances of the case, to confirm the sale. The lower Court's order and that of the Munsif are set aside and the sale will be confirmed as from the 24th of September 1923. The respondents will bear the appellants'costs in this Court and will also get their costs incurred in the lower Appellate Court from the same respondents. I do not think it necessary to interfere with ths order as regards the costs passed by the Executing Court.

Z. K. *Order accordingly.*

(8) 59 Ind. Cas. 785; 45 B. 512 at p. 518; 22 Bom. L. R. 1416.

(9) 4 Ind. Cas. 108; 34 B. 467 at p. 483; 11 Bom. L. R. 1014.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1534 OF 1922.
April 3, 1925.

Present:—Mr. Justice Pearson and Mr. Justice Chakravarti.

ABDUL MAJID AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srimati KULSAM BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contribution, suit for—Co-tenants—Set-off, equitable, whether can be allowed.

Where a co-tenant who has paid off a rent-decree in order to save the joint holding from sale in execution of the decree brings a suit for contribution against his co-tenants, the latter are entitled to put forward a claim by way of set-off in respect of payments of rent made by them on behalf of the plaintiff, and the set-off cannot be rejected merely on the ground that if the defendant brought a suit to recover the amount of the set-off it would be barred by time. [p. 697, col. 1.]

Gajadhar Mahto v. *Raghubar Gope*, 12 C. W. N. 60 and *Ramdhari Singh* v. *Parmanund Singh*, 21 Ind. Cas. 716; 19 C. W. N. 1183, referred to.

Appeal against a decree of the Subordinate Judge, Third Court, Tipperah, dated the 15th March 1922, modifying that of the Munsif, Second Court, Nabinagar, dated the 2nd September 1921.

Babu *Upendra Kumar Roy*, for the Appellants.

Moulvi *Nurul Haq*, for the Respondents.

JUDGMENT.

Pearson, J.—This is an appeal from a decision of the Subordinate Judge of Tipperah, varying a judgment and decree of the Second Munsif of Nabinagar, dated the 2nd September, 1921. It appears that the plaintiffs and the defendant were co-tenants of a holding. Rent having fallen into arrears the landlord brought a suit against them for rent for part of the year 1322 and for the years 1323 and 1324 and obtained a decree. The plaintiffs made the necessary payment to save the holding from being brought to sale, and in this suit they claimed against the defendant for contribution in respect of the amount so paid.

Before us it is not contended that the defendant is not liable to this contribution but it is argued that for certain other payments made by the defendant to the landlord in respect of the rent for the previous years the defendant is entitled to get credit by way of set-off in this suit of the amout which he would have been entitled to claim from the plaintiffs by way of contribution in respect of these payments made to the landlord by the defendant himself.

Upon this point both the Courts below have found against the defendant and that is the sole point which is now argued before us in this second appeal.

It has been argued on the part of the plaintiffs that no credit of this kind can be given to the defendant in this suit because admittedly the defendant's claim for contribution in regard to these payments would now be barred if he brought a suit in the capacity of a plaintiff. It seems to me that both upon principle and authority this position is one which can not be maintained.

The plaintiffs in this suit come into Court seeking contribution from the defendant, that is to say, they are seeking to enforce against the defendant an equitable right which they have. That being so it is open to the Court sitting as a Court of Equity to give effect to the equitable claim which the defendant in turn may be able

to show that he has still subsisting against the plaintiffs in this suit. The defendant has shown a subsisting right as against the plaintiffs and as in this suit the plaintiffs seek to enforce an equitable right the defendant is also entitled to enforce his equitable claim by way of set-off in this suit.

The learned Judges of the lower Appellate Court and also of the Court of first instance do not appear to have been referred to any authority upon this particular matter. Apart from the principle to which I have referred there are certain cases which have been laid before us which serve as illustrations of that principle. These are the cases of *Gajadhar Mahto* v. *Raghubar Gope* (1) and *Ramdhari Singh* v. *Permanund Singh* (2)

For these reasons I think the judgment of the lower Appellate Court was wrong and that the defendant must be allowed to have credit in this suit for such sums as he may be able to show he would be entitled to claim from the plaintiffs by way of contribution in respect of payment made by him on account of rents of the previous years although any suit for contribution upon that footing might now be barred by limitation. The case must be sent back to the lower Appellate Court for disposal after ascertaining what the actual amount is to which the defendant is entitled to credit upon the footing above mentioned.

The appellant is entitled to the costs of this appeal. No order as to costs of the lower Courts.

Chakravarti, J.—I agree.

Z. K. *Appeal allowed.*

(1) 12 C. W. N. 60.
(2) 21 Ind. Cas. 716; 12 C. W. N. 1183.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 619 of 1922.

April 28, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

Mahanth RAM CHARAN DAS—DEFENDANT—APPELLANT

versus

Gossain RAMLAKHAN DAS—PLAINTIFF—RESPONDENT.

Construction of document—Agreement settling dispute—Promises, mutual—Party guilty of breach, whether can enforce agreement.

Plaintiff and defendant were both *chelas* of the *mahant* of a *muth*. On the death of the *mahant* an agreement was executed between them by which it was provided that the defendant should be declared to be the *mahant* and the plaintiff, the *adhikari* of the said *muth*, and it was declared that the parties should to the end of their lives be bound to act according to the terms set forth in the agreement. It was provided that in the event of difference between the parties the plaintiff would be entitled to a certain sum for maintenance out of the income of the properties of the *muth* and that this sum would be a charge on the properties. Notwithstanding the terms of the agreement plaintiff brought a suit against the defendant claiming the *mahantship* but the suit was dismissed He next brought a suit to recover maintenance at the rates specified in the agreement and to have it declared that the amount was a charge on the *muth* properties:

Held, that by bringing a suit claiming the *mahantship* as against the defendant the plaintiff had broken his promise to be bound by the terms of the agreement and had defeated the whole intention of the agreement and that he was not, therefore, entitled to hold the defendant to his part of the contract. [p. 698, col. 2.]

Appeal from a decision of the Subordinate Judge, First Court, Chapra, dated the 1st May 1922, modifying that of the Munsif, Siwan, dated the 6th April 1921.

Messrs. *C. C. Das* and *Hassan Jan*, for the Appellant.

Messrs. *P. Dayal* and *Hareshwar Prasad*, for the Respondent.

JUDGMENT.

Ross, J.—The question in this appeal is whether in the circumstances of the case the learned Subordinate Judge was wrong in reversing the decision of the Munsif and in giving the plaintiff-respondent a decree for maintenance at the rate of Rs. 40 a year and charging the same upon the properties of a certain *muth* on the basis of an *ekrarnama* executed on the 23rd of April 1905.

The appellant and the respondent were both *chelas* of the late *mahant* of the *muth*. The *ekrarnama* recites that according to the custom and practice of the *muth* there is one *mahant* only and two *chelas* cannot become *mahants* at the same time. After the death of the late *mahant*, both the *chelas* had become *mahants* with the result that disputes had arisen between them. They, therefore, agreed that the appellant should be declared to be the *mahant* and the respondent *adhikari* of the said *muth*, and they declared that they should to the end of their lives be bound to act according to the terms set forth in the *ekrarnama*. The material terms were set forth in the *ekrarnama*. The material terms were that the appellant should remain *mahant* and *malik* of all the properties of the *muth* during his life-time, and the respondent *adhikari* during his life-time, and that in the event of difference between the parties the appellant would give to the respondent Rs. 40 a year for

maintenance out of the income of the properties of the *muth* and this should remain a charge on the *muth* properties. Notwithstanding the terms of this agreement the respondent, on the 27th of April 1909, brought a suit against the appellant in the Court of the District Judge claiming the *mahantship*. That suit was dismissed both by the Trial Court and on appeal by the High Court.

On these facts the learned Counsel for the appellant contends that the respondent has been guilty of acts tending to the subversion of the relationship created by the *ekrarnama*, and, consequently cannot claim any relief under it, and that the consideration for the *ekrarnama* has failed by reason of the conduct of the respondent. In support of his argument he referred to the judgment of Lord Cranworth in *Blackett* v. *Bates* (1) and to the decision of the Privy Council in *Srish Chandra Roy* v. *Banomali Roy* (2). The learned Vakil for the respondent contended that these decisions have no application to the present case, because they were decisions in suits for specific performance, whereas the present is a case of an executed agreement. It is true that in considering the present claim which is a claim for money, the Court will not be influenced by the equitable considerations which arise in a suit for specific performance, but the decision of the Judicial Committee is not without effect in the present case. That was a suit for specific performance of an agreement for a lease which was part of a general agreement entered into by the predecessors of the parties to the suit in settlement of a suit then pending between them. One of the documents constituting the settlement was an *ekrar* by which the defendant in that suit agreed to acknowledge the validity of the adoption of the then plaintiff. Notwithstanding that *ekrar* he susequently contested the adoption in various litigations. The decision proceeded on the grounds that there had been a failure of consideration for the agreement and also that the conduct of the plaintiff's predecessor was at variance with and amounted to a subversion of the relation intended to be established by the compromise. Specific performance of the agreement was, therefore, refused. The observations of their Lordships on the nature of the compromise are relevant to the present question. In the course of his judgment Lord Davey said: "The second and principal point of the appellants was characterized by more boldness than plausibility. It was that Banwari Lal (that is the original plaintiff) had received the full benefit of the compromise by being armed with the *ekrar* as a shield against the attacks of Krishna, (that is, the original defendant) and, therefore, the agreement in suit was for an executed consideration. .....The security of his title to the *zemindari* was of immeasurably greater importance to Banwari Lal than the mere question of the *patni*. And their Lordships have already expressed their opinion that the principal consideration to Banwari Lal for the agreement was to obtain such security and immunity from future attacks. In short they do not give the *ekrar* the restricted effect suggested by the learned Counsel, but they think that its language necessarily imports an agreement by Krishna to abstain from questioning the validity of the adoption for the future. Their Lordships are of opinion that there has been a failure of the consideration for the agreement in suit." Now this language applies with even greater force to the present *ekrarnama*, because there is an express stipulation that the appellant should remain *mahant* during his lifetime and that the parties to the end of their lives would be bound to act according to the terms of the *ekrarnama*. The *ekrarnama* consists of mutual promises each of which is the consideration for the other. The respondent promised to recognize the appellant as *mahant* throughout their lives and the appellant promised to recognize the respondent as *adhikari* throughout their lives. The object of the *ekrarnama* was expressed to save the property of the *muth* from the ruin and loss likely to arise from the dispute between the two parties who had both been installed as *mahants*. By his action in bringing a suit for the *mahantship* the respondent broke his promise and defeated the whole intention of the agreement, and he can, therefore, no longer hold the appellant to his part of the contract.

The learned Vakil for the respondent contended that the clause about maintenance was an isolated agreement for compensation to the respondent in the event of his losing the post of *adhikari*. In my opinion, it is

(1) (1866) 1 Ch. 117; 35 L. J. Ch. 324; 12 Jur. (N. S.) 151; 13 L. T. 656.

(2) 31 C. 584; 8 C. W. N. 594; 6 Bom. L. R. 501; 14 M. L. J. 185; 2 A. L. J. 31; 31 I. A. 103; 8 Sar. P. C. J. 677 (P. C.).

impossible to construe the document in this way. The recognition of the respondent as *adhikari* was subject to this that in the event of differences arising between the parties which should involve his ceasing to be *adhikari*, he would be entitled to maintenance. This is not an independent agreement, but an integral part of the whole agreement, and the terms of the agreement as a whole having been broken by the respondent he is not entitled to any benefit under this subsidiary clause.

I, therefore, hold that the respondent is not entitled to the benefit of this agreement and that his claim for maintenance must fail. The result is that the appeal is decreed with costs and the suit is dismissed with costs throughout.

Mullick, J.—I agree. I only wish to add that the defendant is not estopped from denying that the *ekrarnama* is enforceable against him. It is true that in the former suit he raised an issue as to the validity and genuineness of the *ekrarnama*. The plaintiff denied execution, but the Court found that he had executed the document and that he had therein admitted the title of the defendant. Whether the document was enforceable against the defendant was neither litigated nor decided and, therefore, no question of *res judicata* or estoppel against the defendant arises.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 29-B OF 1919.

April 7, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

RAMDHAN—PLAINTIFF—APPELLANT

versus

PURUSHOTTAM—DEFENDANT—RESPONDENT.

Benami *transaction—Burden of proof—Evidence Act (I of 1872), s. 13—Judgment not* inter partes, *admissibility of—Sale of immoveable property—Contract of indemnity—Decree against promisee, whether binding on promisor—Suit to recover purchase-money—Costs, whether can be recovered—Interest* pendente lite, *whether can be allowed—Discretion of Court—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 62, 116—Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for possession—Subsequent suit to recover purchase-money, whether barred.*

When a conveyance has been executed and duly registered it requires strong and clear evidence to justify a Court in holding that the person in whose favour the conveyance was executed was a mere *benamidar* for some third person. [p. 701, col. 1.]

In cases of alleged *benami* transactions the determination of the question as to who is the true-owner of the property must depend not merely on direct oral evidence but also upon circumstances such as the source of the purchase-money, the possession of the property, the custody of the title deed, the adequacy of the consideration and the like [*ibid.*]

Abdul Latif v. *Abdul Huq*, 81 Ind. Cas. 667, 28 C. W. N. 62; (1924) A. I. R. (C.) 523, followed.

A judgment not *inter partes* pronounced by a Court of competent jurisdiction in a suit in which the right in dispute has been asserted and either recognised or denied is admissible in evidence under s. 13 of the Evidence Act. [p. 701, col. 2.]

Where there is a contract to indemnify, a decree passed against the promisee cannot be impeached by the promisor. [p. 703, col. 1.]

Nallappa Reddi v. *Vridhachala Reddi*, 25 Ind. Cas. 888; 37 M. 270, and *Parker* v. *Lewis*, (1873) 8 Ch. App. Cas. 1035 at p. 1059; 29 L. T. 199; 21 W. R. 928; 43 L. J. Ch. 281, approved.

In the cases of contracts of indemnity the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity but is the very moving cause of that contract, and in such cases costs reasonably incurred by the promisee in resisting or reducing or ascertaining the claim may be recovered. [p. 703, col 2.]

Under O. II, r. 2, C. P. C., while it is necessary that every suit must include the whole of the claim arising from one and the same cause of action, it is not necessary that every suit should include every claim or every cause of action which the plaintiff may have against the defendant. The subsequent suit is not barred if the cause of action for it is different from the one in the previous suit, even though it was permissible to the plaintiff to join them in the previous suit. [p. 704, col. 1.]

Kulada Prasad Chatterjee v. *Khudiram Misra*, 70 Ind. Cas. 187; 27 C. W. N. 673; (1923) A. I. R. (C.) 371; 37 C. L. J. 545 and *Sonba* v. *Babya*, 78 Ind. Cas 376; 20 N. L. R. 28; (1924) A. I. R. (N.) 89, followed.

A suit for refund of purchase-money from a vendor on the ground that he had no title to the property conveyed is not barred by a previous suit against him for possession of the property conveyed. [*ibid.*]

Hanuman Kamut v. *Hanuman Mandur*, 15 C. 51; 7 Ind. Dec. (N. S.) 620 and *Lukhan Chandra Mondal* v. *Takim Dhali*, 80 Ind. Cas. 357; 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558, followed.

An action for damages for breach of a covenant for title contained in a registered-deed is governed by Art. 116 of Sch. I to the Limitation Act. [p. 704, col. 2.]

Pirbhu v. *Wazirbi*, 31 Ind. Cas. 877; 11 N. L. R. 186, followed.

Although the award of interest pending suit is discretionary with the Court, it should not ordinarily be refused in the absence of proper reasons. [p. 704, col. 2.]

Sarajubala Debi Chowdhurani v. *Saradanath Bhattacharjee*, 50 Ind. Cas. 862: 23 C. W. N. 336, followed.

Appeal against a decree of the Additional Subordinate Judge, Akola, dated the 22nd April 1919, in Civil Suit No. 90 of 1917.

Mr. *A. V. Khare*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—One Khatau owned certain immoveable property in the Akola District. Shortly after his death his widow

Nainbai sold that property for a consideration of Rs. 6,000 to defendant Purshottam Deoji under duly registered sale-deed dated 19th August 1911 (Ex. D-2). The latter in his turn sold it to the plaintiff for Rs. 5,000 and executed in his favour on 23rd January 1913 a sale-deed which was duly registered (Ex. P-7) and placed him in possession of the property comprised therein. Sometime after this, Manmal Aidan attached this property in execution of his decree against Khatau. Plaintiff objected to the attachment on the ground that he had purchased the property, but his objection was disallowed. He, therefore, brought a regular suit against Manmal (Suit No. 68 of 1913) for a declaration that he was the owner of the said property and that it was not liable for attachment and sale in execution of Manmal's decree against Khatau. In that suit it was held that plaintiff's vendor Purshottam Deoji had no title to the said property, that the sale-deed executed by Khatau's widow in favour of defendant Purshottam Deoji was a fraudulent and bogus sale-deed executed with the object of defeating Khatau's creditors and that plaintiff had acquired no title to the property as he had purchased it from a person, who had himself no title to it. Plaintiff's claim was accordingly dismissed on 31st January 1916. Thereupon he brought the present suit against the defendant for refund of the purchase-money, namely, Rs. 5,500 and also for recovery of costs incurred by him in Suit No. 68 referred to above plus interest thereon. He claimed in all Rs. 6,250 from the defendant.

Defendant pleaded that although the sale-deed dated 23rd January 1913 executed by him purported to be in plaintiff's favour, plaintiff was merely a *benamidar* for one Gajadhar to whom the property had really been sold, and that plaintiff had consequently no right to maintain the suit. He also pleaded that out of Rs. 5,500 which formed the consideration of the sale he had received Rs 3,000 only, and that he was in no case liable to refund more than Rs. 3,000 to the plaintiff. He denied that he had no title to the property conveyed by him to the plaintiff and urged that he was not bound by the decision given in Suit No. 68 of 1913 to which he was no party. He alleged that plaintiff had not properly conducted Suit No. 68, that if he had taken his help in prosecuting that suit he would have succeeded in establishing his right to the property which was the subject of dispute in that case, and that he was, therefore, not liable for the expenses which plaintiff had to incur in that suit He thus denied his liability for the plaintiff's claim.

The Court below held that the sale-deed which the defendant had obtained from Khatau's widow was without consideration and was a fraudulent and collusive deed executed with the object of defeating Khatau's creditors, that defendant had acquired no title to the property conveyed by the said sale-deed and that he could pass no title in favour of the plaintiff. It further held that the defendant had received the full consideration of the sale-deed dated 23rd January 1913 from the plaintiff, and that as the plaintiff had lost possession of the property by virtue of the decision in Suit No. 68 of 1913 he was entitled to a refund of purchase-money and to the cost incurred by him in prosecuting that suit. Accordingly it decreed plaintiff's claim for Rs. 6,250 against the defendant. But as it omitted to award him interest on the decretal amount from the date of suit until realization plaintiff has preferred this appeal and defendant has filed a cross-objection.

I shall first of all deal with the cross-objection filed by the defendant as it goes to the very root of the case and challenges the correctness of all the findings arrived at by the Court below.

It is urged in the first place that the lower Court ought to have held that the plaintiff was a mere *benamidar* for Gajadhar, and that he had no right to maintain the present suit. There is no substance in this contention. It was for the defendant to prove that Gajadhar was the real vendee and that plaintiff was a mere *benamidar* for him. He has adduced no evidence in proof of this fact The only evidence which he has adduced on this point is his own evidence, which is absolutely worthless and unreliable. Plaintiff had filed a suit against him in the Court of the Senior Subordinate Judge, Akola (Suit No. 69 of 1913), for recovery of damages on the ground that he had failed to deliver possession of certain items of property comprised in the sale-deed dated 23rd January 1913. If plaintiff was really a *benamidar* for Gajadhar, defendant would never have failed to raise this plea in that suit and to urge that plaintiff had no right to maintain that suit. But he raised no such plea

although he says in his deposition as D. W. No. 3 that he knew from the very beginning that plaintiff was a mere *benamidar* for Gajadhar. This itself goes to show that his present plea is a mere after thought invented with the object of defeating plaintiff's claim. Moreover he has assigned no reason as to why Gajadhar did not take the sale-deed in his own name if he intended to purchase the property for himself. It is not his case that Gajadhar was heavily indebted, and that consequently he obtained the sale-deed in plaintiff's name in order to defeat the claims of his creditors. *Benami* transactions are not entered into for mere fun. When a conveyance has been executed and duly registered in favour of a certain person, it requires strong and clear evidence to justify a Court in holding that the person in whose favour the conveyance was executed was a mere *benamidar* for some third person. The burden of proving that a certain conveyance standing in the name of one person is *benami* for another lies on the person who raises the plea of *benami*. The familiar test to apply to find out whether the ostensible purchaser is also the real purchaser is to find out the source of the purchase-money. In *Abdul Latif* v. *Abdul Huq* (1) it has been held that in cases of alleged *benami* transactions, the determination of the question must depend not merely on direct oral evidence but also upon circumstances, such as, the source of the purchase-money, the possession of the property, the custody of title deeds, the adequacy of the consideration and the like. In the present case, defendant has adduced no evidence to prove that Gajadhar, the alleged real owner, was ever in possession of the property covered by the sale-deed dated 23rd January 1913 nor has he furnished independent and reliable proof to show that the purchase-money came from Gajadhar. He has also given no evidence to show as to what must have been the motive of Gajadhar in not taking the sale-deed in his own name. The sale-deed has admittedly come from plaintiff's possession and it is nobody's case that the consideration of the sale was inadequate. In short the surrounding circumstances and the position of the parties do not support the plea of *benami* set up by the defendant. Under these circumstances, the Court below was perfectly justified in overruling the contention of the defendant and holding that plaintiff was the real purchaser.

It is next urged that the plaintiff has adduced no evidence in this case to prove that the defendant had no title to the property conveyed by him to the plaintiff under the sale-deed dated 23rd January 1913 and that consequently the Court below ought to have dismissed plaintiff's suit. There is no substance in this contention as well. Plaintiff has filed copies of the judgment and decree in Suit No. 68 of 1913 decided by the Senior Subordinate Judge, Akola, on 31st January 1916 (Ex. P-4). In that suit it was held that the sale-deed executed by Nainbai Khatau in favour of the defendant was without consideration and was a bogus and fraudulent sale-deed executed with the object of defeating Khatau's creditors, and that defendant had acquired no title to the property under that sale-deed. It is no doubt true that the defendant was no party to that suit, but the judgment given in that suit though not conclusive is clearly admissible under s. 13 of the Evidence Act, and is a very good and cogent piece of evidence in proof of the fact that the defendant had no right to the property sold by him to the plaintiff. Under that section, judgments not *inter partes* pronounced by a Court of competent jurisdiction in a suit in which the right in dispute had been asserted and either recognised or denied, are clearly admissible. Defendant should, therefore, have adduced satisfactory evidence to prove that in spite of the judgment delivered in Suit No 68 of 1913 by the Senior Subordinate Judge, Akola, he had a valid title to the property comprised in the sale-deed dated 23rd January 1913. He has adduced no such evidence; on the contrary whatever little evidence he has adduced in the case goes to prove that he had really no title to the property. The sale-deed which he had obtained from Nainbai Khatau (Ex. D-2) was not for a cash consideration. The consideration of that deed is said to be the debt due on a mortgage alleged to have been executed by Nainbai's husband in favour of the defendant. The mortgage deed which is dated 20th July 1909 has been filed in this case *vide* Ex. D-1. It purports to have been executed by Khatau in favour of the firm of Maoji Govindji of Bombay. Defendant says that he was one of the proprietors of

(1) 81 Ind. Cas. 667; 28 C. W. N. 62; (1924) A. I. R. (C.) 523.

that firm, but the evidence of his own witness Jetha Virji D. W. No. 4 clearly proves the falsity of his case. From the evidence JethaVirji it is perfectly clear that he (Jetha) along with three others, namely, Jivandas, Govindji and Maoji were proprietors of the Firm of Maoji Govindji, and that defendant had absolutely no concern with the said firm. He deposes that he had advanced money to Khatau and that Khatau had executed the mortgage-deed dated 20th July 1909 in favour of his firm. The account books which he produced in the Court below fully bear out his assertion. One of the attesting witnesses to that mortgage-deed, namely Balu (P. W. No. 3) has been examined in this case and he also proves that the said mortgage-deed was executed in favour of the Firm of Maoji Govindji of which Jetha Virji and others were proprietors, and that the defendant had absolutely no concern with the said mortgage-deed. It is also in evidence that the defendant maintains account books. This fact has been admitted by him and he has also admitted that there is absolutely nothing in his account books to show that he had advanced any money to Khatau, or that Khatau had executed a mortgage-deed in his favour in satisfaction of the debt due to him. He has further admitted that the Firm of Maoji Govindji of which he was a partner had no concern with the money which he had advanced to Khatau and for the satisfaction of which he had taken the mortgage-deed in question from Khatau. If so, it is absurd to believe that he could have obtained the mortgage-deed in the name of Maoji Govindji, who had nothing to do with the debt covered by the mortgage, instead of in his own name. All these facts taken together leave no room for doubt that the defendant had no concern with the mortgage dated 20th July 1909 (Ex. D-1). It is no doubt true that the defendant has filed the original mortgage-deed, but I have no doubt that he collusively obtained it from *Musammat* Nainbai and filed it in Court in order to lend a colour of reality to his title to the property in dispute. The evidence of Jetha Virji (D. W. No. 4) and Balu (P. W. No. 3) shows how the defendant came into possession of the aforesaid mortgage-deed. Considerable portion of the debt due on that deed had been paid by Khatau during his lifetime to Jetha Virji. Only Rs. 2,100 remained to be paid and as Khatau was anxious to take back the deed with a view to dispose of the property covered by it as unencumbered, he pledged certain ornaments with Jetha Virji to secure the balance of Rs. 2,100 and took back the mortgage-deed from him. This deed came into the possession of Nainbai after his death and was handed over by her to the defendant.

In short the consideration of the sale-deed executed by Nainbai in favour of the defendant on 23rd January 1913 (Ex. P-7) is simply illusory. There was no consideration for the same and Nainbai, who as proved by the evidence of Balu, began to live with the defendant on her husband's death executed the sale-deed dated 19th August 1911 (Ex. D-2) in defendant's favour within a few days after the death of her husband, who had died heavily indebted, in order to defeat the claims of her husband's creditors. The sale-deed covered the entire property left by Nainbai's husband. Defendant has admitted this fact and has further admitted that he purchased the property comprised in the sale-deed without caring even to see it. All these facts taken together lead to the irresistible conclusion that the defendant had obtained the sale-deed dated 19th August 1911 from Nainbai by colluding with her in order to defraud her husband's creditors, It was a sham deed not meant to be acted upon and the defendant did not acquire any title to the property conveyed by it. I accordingly hold that the defendant had no title to the property which he conveyed to the plaintiff.

I am further of opinion that although the defendant was not a party to Suit No. 68 of 1913 decided by the Senior Subordinate Judge, Akola, on 31st January 1916, he cannot question the decree passed in that suit. That suit was instituted by the plaintiff after giving notice to the defendant and thus affording him an opportunity of helping him (plaintiff) in the prosecution of that suit. Defendant was examined as a witness in that case by the plaintiff to prove his title to the property, but he was disbelieved and as the evidence adduced in that case was overwhelming in proof of the fact that the defendant had no title to the property, the Court had to dismiss plaintiff's suit. The allegation of the defendant, that that suit was conducted carelessly by the plaintiff, has not been proved at all. On the other hand

plaintiff has satisfactorily proved that he had conducted that suit with due diligence. Under these circumstances it is not open to the defendant to question the decree passed in that suit although he was not a party to that suit. The reason is that the sale-deed executed by him in plaintiff's favour contains an express contract of indemnity. The clause runs thus "Now you may enjoy the said property for generations as owner. I shall be responsible if anybody will set up claims thereto. I or my heirs and successors will be liable to pay the costs which would be incurred by you therefor and to make good the entire amount of loss on account of the purchase in case the said purchase made by you is in any way affected." (*Vide* Ex. P-7). It has been held in *Nallappa Reddi* v. *Vridhachala Reddi* (2), that where there is a contract to idemnify, a decree passed against a promisee cannot be impeached by the promisor. Similarly in *Parkar* v. *Lews* (3) Mellish, L. J., has observed. "It is obvious that when a person has entered into a bond, or bought land or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified and a verdict of a Jury obtained against him, it would be very hard indeed, if, when he came to claim the idemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second Jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity the judgment is conclusive." I accordingly hold that the defendant is bound by the judgment passed in Suit No. 68 of 1913. It was open to him after a decree was passed in that suit to pay off Manmal Aidan's claim and protect the title of the plaintiff. This too he did not do although he had full notice of the result of that suit. He is, therefore, clearly bound to indemnify the plaintiff and refund the purchase money and pay the costs which the plaintiff had to incur in Suit No. 68 of 1913.

Defendant says that he received Rs. 3,000 only towards the consideration of the sale but the endorsement on the back of the sale-deed by the Registering Officer clearly shows that the entire consideration of Rs. 5,500 was paid to him in cash at the time of registration. He has adduced no evidence to prove that he paid back Rs. 2,500 out of the consideration so received to the plaintiff. In fact that is not his case. He says he was paid Rs. 3,000 only but the endorsement of the Registering Officer gives a complete lie to his case. Plaintiff has satisfactorily proved that he paid Rs. 5,500 to the defendant as the consideration of the sale. I see no reason to disbelieve his evidence and hold that the defendant received the full consideration of the sale.

In *Bepin* v. *Chunder Seekur Mookerjee* (4) it has been held that in the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity but is the very moving cause of that contract and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered. This principle is also embodied in s. 125 of the Contract Act. The costs which the plaintiff claims are costs which were taxed in Suit No. 68 of 1913 as having been incurred by him and costs which he had to pay to Manmal Aidan. I hold that he is entitled to recover these costs by way of damages from the defendant.

The next question is whether the decision passed in Suit No. 69 of 1913 bars the present suit. I am clearly of opinion that it does not. It was a suit to recover damages brought by the plaintiff against the defendant on the allegation that the defendant had failed to deliver to him some of the items of property comprised in the sale-deed dated 23th January 1913 (page 7). It was not taken his case that defendant had no title to the property conveyed under the aforesaid-sale deed. In fact that could not be his case for he all along alleged that the defendant had title to the property conveyed by him and it was on the strength of this allegation that he instituted Suit No. 69 of 1913 against Manmal Aidan for a declaration that he was the owner of the property in dispute and that Manmal Aidan had no right to attach and sell it in execution of his decree against Khatau. When it was decided

(2) 25 Ind. Cas. 888; 37 M. 270.

(3) (1873) 8 Ch. App. Cas. 1035 at p. 1059; 29 L. T. 199; 21 W. R. 928; 43 L. J. Ch. 261.

(4) 5 C. 811; 6 C. L. R, 467; 2 Ind. Dec. (N. S.) 1124.

in that suit that defendant had no title to the property in dispute and that plaintiff had acquired no title to the said property by obtaining a sale-deed in respect of it from the defendant that plaintiff's cause of action for the present suit arose. In other words, the cause of action which gave rise to Suit No 58 of 1913 was wholly distinct from the cause of action which gave rise to the present suit. Failure on the part of the defendant to deliver possession of some of the items of property conveyed by the sale-deed dated 23rd January 1913 was the cause of action for the former suit while the cause of action for the present suit is the decision of the Civil Court in Suit No. 69 of 1913, that defendant had no title to the property conveyed by him to the plaintiff under the aforesaid deed and plaintiff's eviction from the said property by auction-purchasers who purchased that property in execution of Manmal Aidan's decree against Khatau. Besides the cause of action for the present suit had not arisen when Suit No. 68 of 1913 was instituted by the plaintiff against the defendant. The law is clear that under O. II, r. 2, C. P C., while it is necessary that every suit must include the whole of the claim arising from one and the same cause of action, it is not necessary that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant. The test is whether the cause of action in the subsequent suit is different from the cause of action in the previous suit. If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to write his cause of action in the prior suit; *Kulada Prasad Chatterjee* v. *Khudi Ram Misra* (5); *Sonba* v. *Babya* (6). It has accordingly been held that a suit for refund of purchase-money from the vendor on the ground that he has no title to the property conveyed is not barred by a previous suit against him for possession of the property conveyed; *Hanuman Kamut* v. *Hanuman Mandur* (7), *Lakhan Chandra Mondel* v. *Takim Dhali* (8). I accordingly hold that the present suit is not barred under O. II, r. 2, C. P. C. I further hold that it is not barred because plaintiff's cause of action for the same had not arisen when the previous suit (No. 68 of 1913) was instituted; *Kesheo Rao* v. *Suklya Mali* (9).

The only other question which remains to be considered is the question of limitation. It is urged on behalf of the defendant that the suit is barred under Art. 62 of the Limitation Act. I am not prepared to agree with this contention. This is an action for damages for breach of a covenant for title and as the covenant is contained in a registered instrument the suit is clearly governed by Art. 116 of the Limitation Act and is within time. It has been held in this Court that where the vendor has no title to convey, the Article applicable to a suit for refund of purchase-money is Art. 116 and that time in such a case begins to run from the date of execution of the conveyance if there is no question of fraud; *Pirbhu* v. *Wazirbi* (10). Following this decision, I hold that the present suit is not barred by time as it was instituted within six years from the date of the sale-deed executed by the defendant in plaintiff's favour. Plaintiff's claim was rightly decreed against the defendant and I dismiss defendant's cross-objection with costs.

I shall now deal with the appeal filed by the plaintiff. He contends that the lower Court should have allowed him future interest on the amount decreed from the date of suit until realization. His contention is perfectly sound and must prevail. Although the award of interest pending suit is discretionary with the Court it should not ordinarily be refused in the absence of proper reasons; *Sarajubala Debi Chowdhurani* v. *Sarada Nath Bhattacharjee* (11). The present suit remained pending for a considerable period and there appears no just reason why the plaintiff should be deprived of interest on the money due to and withheld from him. I accordingly direct that the sum of Rs. 6,250 decreed by the Court below will carry interest at Re 8 per cent. per mensem from the date of suit until realization. The decree will be modified accordingly. Defendant will bear costs of this appeal. Costs in the Court below will be paid as ordered by that Court.

G. R. D. *Decree modified.*

(5) 70 Ind. Cas. 187; 27 C. W. N. 673; (1923) A. I. R. (C.) 371; 37 C. L. J. 545.
(6) 78 Ind. Cas. 376; 20 N. L. R. 28; (1924) A. I. R. (N.) 89.
(7) 15 C. 51; 7 Ind. Dec. (N. S.) 620.
(8) 80 Ind. Cas. 357; 39 C. L. J. 90; 28 C. W. N. 1033; (1924) A. I. R. (C.) 558.
(9) 76 Ind. Cas. 122; 19 N. L. R. 170; (1924) A. I. R. (N.) 61.
(10) 31 Ind. Cas. 877; 11 N. L. R. 186.
(11) 50 Ind. Cas. 862; 23 C. W. N. 336.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 23 OF 1923.

February 21, 1923.

Present:—Mr. Justice Zafar Ali.

NATHA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 376—Rape—Penetration, partial—Offence.

Under s. 376 of the Penal Code vulval penetration only is sufficient to constitute rape.

Reg. v. *Lines*, (1844) 1 Kar. & K. 393, relied on.

Criminal appeal from an order of the First Class Magistrate, Jhelum, dated the 17th November 1922.

Mr. *Amar Nath Chona*, for the Appellant.

Mr. *Jai Lal*, for the Respondent.

JUDGMENT.—The appellant has been found guilty of rape on a female child of six or seven years of age and sentenced under s. 376, Indian Penal Code, to rigorous imprisonment for seven years. He is a Hindu *Jhiwar* youth of about 20 years of age and was employed as a cook in the Police Hospital at Jhelum. The father of the girl named Karam Chand holds the post of a compounder in that very hospital and lives with his family in the quarters close to the hospital. The girl was one day playing in a verandah of the hospital building when the accused took her into a room and had sexual intercourse with her. Soon after the occurrence Karam Ilahi, Police Constable, orderly at the hospital, found her crying in the verandah and asked her, why she was doing so, but she went on crying and said nothing. He carried her to her mother; the father was not at home, she told her mother what had befallen her. This took place at about 3 P. M. and the father came home at evening. The child's story was repeated to him by the mother. He with Karam Ilahi orderly made a search for the accused but could not find him anywhere. The next morning the matter was brought to the notice of the Sub-Assistant Surgeon in charge of the hospital, and he reported it to the Civil Surgeon. The latter forwarded the report to the Police for enquiry. The result was that the appellant was chalaned by the Police. The medical evidence was that the hymen of the child was not ruptured but that a partial penetration had taken place as indicated by stains of blood on both the legs from the vagina down to the ankles, and congestion of the orifice of the vagina. The girl's trousers and the accused's lion cloth were sent to the Chemical Examiner who detected semen on both. The accused was declared by the Civil Surgeon to be potent. The girl knew him and identified him and stated how he had had sexual intercourse with her. The appellant pleaded not guilty but tendered no evidence. His plea that the case had been got up against him is on the face of it preposterous, and is not pressed by the learned Counsel who has argued the appeal in this Court but he contends that the case falls under s. 354, Indian Penal Code, because the hymen was not ruptured. This contention is on the face of it untenable. "To constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little, *Reg.* v. *Lines* (1)." In the case *Reg.* v. *Ferrol* (2) Bombay High Court, cited by Lyon in his Medical Jurisprudence for India, Grean, J., directed the Jury that "vulval penetration only was sufficient, under the law of India, to constitute rape...The prisoner was charged with rape on a child six years old. The child had not complained and admitted on cross-examination that she had not been hurt. The medical evidence proved there was no injury to the parts. The child was found to be suffering from gonorrhœa, so was the prisoner. It was clear that the penetration (if any) had been only vulval. Green, J., directed the Jury that this was sufficient to constitute rape, and the prisoner was convicted of rape." In the present case there can be no doubt that the appellant effected vulval penetration and caused hurt. I am, therefore, of opinion that he was rightly convicted of rape, but having regard to the youth of the accused and the fact that the penetration was only partial, the sentence appears to be excessive and I accept the appeal so far as to reduce it to rigorous imprisonment for four years only.

Sentence reduced.

Z. K.

(1) (1844) 1 Kar. & K. 393.

(2) Bombay High Court Sessions February, 1879.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 194 B OF 1925.

March 30, 1925.

Present:—Mr. Justice Brown.

MAUNG OH KYAN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 141, 143—Meeting of association—Members compelled to take oath by violence—Unlawful assembly—Members not taking part in violence, whether guilty.

The actions of a few members of an assembly which has gathered together for a perfectly lawful purpose cannot, by themselves, make the whole assembly an unlawful assembly. The circumstances must be such as at least to justify the presumption that the other persons present associated themselves with the offending members. The mere fact that they are with the offending members at the time does not make them members of the unlawful assembly formed by those members, they must be shown to have joined or continued in that portion of the assembly which has become an unlawful assembly. [p. 707, col. 1.]

Accused was the Secretary of a Wanthanu Society. He convened a meeting of the society the object of which was to discuss whether certain resolutions should be adopted. It was proposed at the meeting that the members present should take a certain oath. Some of the members objected to the form of the oath, whereupon certain other members who were more than five in number, got up in an angry and threatening manner and in consequence of their attitude the objecting members took the oath. There was no evidence that the accused in any way associated himself with the show of violence or that he made any speech after violence had been used:

Held, (1) that the action of those members who used violence fell within the fifth clause of s. 141 of the Penal Code and that they, therefore, constituted an unlawful assembly; [p. 706, col. 2.]

(2) that there was nothing, however, to show that the accused had become or had continued to be a member of that unlawful assembly and that consequently the accused could not be convicted under s. 143 of the Penal Code. [p. 707, col. 1.]

Criminal revision against an order of the Head-Quarters Magistrate, Thayetmyo, in Cr. Reg. No. 205 of 1924.

Mr. *Kyaw Myint*, for the Petitioner.

JUDGMENT.—The petitioner is or was Secretary of the local Wunthanu Society at Talekpingaing. He convened a meeting for the 6th October last, the main object of the meeting being apparently to discuss whether certain resolutions passed at Okpo and Pakkokku should be adopted by those present. The petitioner has been found guilty under the provisions of s. 143 of the Indian Penal Code, on the ground that the meeting became an unlawful assembly after it had begun, and the petitioner remained a member of it after it became unlawful. The Sessions Judge upheld the conviction on appeal. The learned Sessions Judge held that there was no evidence that the common object of the meeting was unlawful at the start. It appears that it was proposed at the meeting that the members present should take a certain oath. They were to swear to agree to certain resolutions passed at Pakkokku, and, in addition to swear not to co-operate with the Government. Some of the members present at the meeting agreed generally to take the oath, but wished to make a reservation as to co-operation with Government with regard to certain serious crimes. After they had raised this objection to taking the oath as proposed, certain other members of the meeting got up in angry and threatening manner, and in consequence of their attitude the objecting members took the oath against their better judgment. It has been held by the lower Courts, and may be accepted now as a fact, that the persons who wished to coerce the other members by show of force consisted of five or more men. Their action would probably fall within the fifth clause of s. 141 of the Indian Penal Code, and if so, the learned Sessions Judge has rightly held that they did constitute an unlawful assembly. It is, however, contended, and it seems to me with considerable force, that the learned Sessions Judge was not justified in his further deduction that the petitioner was a member of this unlawful assembly. The total number of persons present at the meeting appears to have been about forty or fifty. Some of the prosecution witnesses put the numbers of those who threatened the use of force as twenty or twenty-five. They are somewhat vague, however, on the point, and the probability is that they have exaggerated the numbers. More than five persons can fairly be held to have been included, but the exact number it is impossible to estimate. The petitioner convened the assembly, and took part in its deliberations. It is further in evidence that he speaks in favour of the taking of the oath unmodified. But I can find no evidence that he actually presided over the meeting, and there is no evidence whatever that he in any way associated himself with the show of violence, or indeed that he made any speeches after violence had been used. It is impossible, therefore, to hold that he had an object in common with the others to overawe anybody. Nor do I understand the Sessions Judge to hold

this to be the case. The learned Sessions Judge's view was that by remaining in the meeting he became a member of the unlawful assembly formed by those members who did use force. This appears to me to be an unjustifiable extension of the meaning of ss. 141 and 142 of the Indian Penal Code. The five or more persons who used violence may have formed an unlawful assembly. But I see no ground for holding that all the persons assembled at the meeting were also members of this unlawful assembly. If this view of the law be correct then at any public meeting however peaceful its objects, the whole meeting at once becomes an unlawful assembly directly five or more persons present at the meeting act with a common object of using criminal force. The actions of a few members of an assembly which is gathered together for a perfectly lawful purpose, cannot, by themselves, make the whole assembly an unlawful assembly. The circumstances must be such as at least to justify the presumption that the other persons present associated themselves with the offending members. The mere fact that they are with the offending members at the time does not make them members of the unlawful assembly formed by those members. They must be shown to have joined or continued in that smaller assembly. It is not shown in the present case that the majority of the original members of the meeting approved of the tactics of violence or in any way associated themselves with those tactics. If the petitioner be held to have been a member of an unlawful assembly in these circumstances then the prosecution witnesses who were the victims of the violence would also have to be held to be members. There is nothing to show that these witnesses could not have left the meeting if they had wished to do so, and all that has been found against the petitioner is that he did not leave the meeting.

In my opinion the facts held to be established did not justify the finding that the petitioner was ever a member of the unlawful assembly formed by those persons present at the meeting who employed violence.

It does not appear to have been suggested that the whole meeting constituted an unlawful, assembly for any other person. I am unable, therefore, to uphold the conviction.

I set aside the conviction of the petitioner and direct that he be acquitted and released so far as this case is concerned.

Z. K. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 160 OF 1925.

May 25, 1925.

Present:—Mr. Justice Macpherson.

BASUDEO SINGH—ACCUSED—PETITIONER

versus

MAHADEO LAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute as to right to collect definite share of rents—Proceedings under section, validity of.

Proceedings under s. 145 of the Cr. P. C. are not warranted by sub-s. (2) of the section in respect of disputed crops or other produce of land or of disputed *bhaoli* rents or profits of such property when these have been severed and removed from the land. The definition of "land" however, as extended by sub-s. (2) of the section includes the rents of the land and where there is a dispute between rival claimants as to exclusive possession of a certain share of the rents, the section is not inapplicable and proceedings may properly be instituted under the section. [p. 708, cols. 1 & 2.]

Application against an order of the District Magistrate, Gaya.

Messrs. *Fazle Ali* and *S. K. Mitra*, for the Petitioner.

Mr. *Shiveshwar Dayal*, for the Opposite Party.

JUDGMENT.—In this application in revision the petitioner impugns the order of the District Magistrate drawing up proceedings under s. 145 of the Cr. P. C. on the ground that the order is without jurisdiction because that provision is not applicable to the circumstances. The Sub-Divisional Magistrate of Nawadah passed an order under s. 144 of the Code against the petitioners and the opposite party restraining them from removing any of the crops which had been paid as *bhaoli* rent by the tenants and which were deposited in the *khalihan*, and upon an application to him under sub-s. (4) the District Magistrate set aside the order as unwarranted by law, but in view of the definition of "land" in cl. (2) of s. 145 as including "the rent or profits of any such property" and as "the Police report shows that a breach of the peace was imminent and clearly as long as the dispute regarding the extent of the share is not decided, there will continue to be an apprehension of a breach of the peace" directed that proceedings under

s. 145 should be drawn up in his Court in respect of the six annas share in dispute and be transferred to the Court of the Sub-Divisional Magistrate of Nawadah for disposal.

In the formal proceeding drawn up under s. 145 the parties were directed to lodge "Written statements as to their actual possession of the right of collection of the six annas share of the produce rents which is in dispute" and a six annas share of the produce rent deposited in the *khalihan* was attached pending disposal of the case.

The following facts are admitted: Basdeo Singh and Mahadeo Lal are joint *thikadars* for seven years of Majhla *mahal* but the lease does not specify what is the share of each. For about four years the same *gomasta* Dilwar Khan, who had also worked for their lessor, represented both in the village but Mahadeo Lal being dissatisfied with him re-placed him, so far as his interest was concerned, by Behari Singh. The dispute between the parties is whether the share of Mahadeo Lal is two annas or eight annas and the collection is no longer joint. When the report of the Police which led to the order under s. 144 was made, the *thikadars'* share of the produce rent of the village was gathered in the *khalihan* and was awaiting distribution. After the attachment in the s. 145 proceedings, the Sub Divisional Magistrate directed the Agricultural Inspector to sell the attached produce rent (six annas of the whole) and the sale-proceeds have been placed in deposit.

Now it is not in controversy that proceedings under s. 145 are not warranted by sub-s. (2) in respect of disputed crops or other produce of land, or of disputed *bhaoli* rents or profits of such property when these have been severed and removed from the land. In the present instance the dispute between co-*thikadars* as to the extent of share in the distribution of the *bhaoli* rent collected in the *khalihan* could not be decided under s. 145. The pending proceeding, however, apart from the order of attachment which is not here assailed, does not relate to the six annas of the *bhaoli* rent deposited in the *khalihan*. The subject of dispute is the right to collect the six annas share of the rent of *mahal* Majhla.

The petitioner claims that s. 145 is not applicable to the circumstances as the parties are in joint possession of the village. Mr. Fazle Ali on their behalf relies upon the rulings in *Beni Narain* v. *Achraj Nath* (1) approved in *Surb Narain Singh* v. *Birj Mohan Thakur* (2), *Nritia Gopal Singh* v. *Chandi Charan Singh* (3) and also *Akaloo Chandra Das* v. *Mohesh Lal* (4) as showing that a dispute as to the right to realise rent of an undivided share of land is not a dispute falling within s. 145. In reply Mr. Shiveshwar Dayal relies on *Sri Mohan Thakur* v. *Narsingh Mohan Thakur* (5) referred to with approval by Spencer, J., in *Bulkis Bivi* v. *Nagoor Kanni Kowther* (6) and to two cases of this Court, *Sham Lal Mahton* v. *Ragendra Lal* (7) and *Ramjharia* v. *Piar Koeri* (8).

The first two cases cited by Mr. Fazle Ali were decided prior to the amendment of the Cr. P. C. in 1898 in which the terms of s. 145 were greatly altered and in particular by the extension of the defintion of "land" made by sub-s. (2) so as to include *inter alia* the rents of land. No doubt the principle has been approved in *Nirtta Gopal Singh* v. *Chandi Charan Singh* (3) but that case related to impartible property in which the possession of *co-shebaits* was necessarily joint. It was also there admitted that the facts in *Sri Mohan Thakur* v. *Narsing Mohan Thakur* (5) were distinguishable. In *Akaloo Chandra Das* v. *Mohesh Lal* (4) which relates to tolls of *hat*, the decision was that there is no jurisdiction under s. 145 to determine the method by which the possession of the parties is to be exercised or the agency whereby the party in possession is to collect the rents. These rulings and others relating to management of property to which the parties are jointly entitled are distinguishable and do not afford assistance in the present circumstances.

Here the two partners in the lease are admittedly in separate possession of their shares; there is no dispute that the parties hold actual separate possession of the right of collection in respect of eight annas and two annas respectively of the rent of the village. It is not a case in which one party claims joint possession and another contests the

(1) 5 A. 607; A. W. N. (1883) 163; 3 Ind. Dec. (N. S.) 544.
(2) 23 C. 80; 12 Ind. Dec. (N. S.) 54.
(3) 10 C. W. N. 1088; 4 Cr. L. J. 215.
(4) 4 Ind. Cas 696; 36 C. 986; 11 Cr. L. J. 28[illegible].
(5) 27 C. 259; 4 C. W. N. 420; 14 Ind. Dec. (N. S.) 171.
(6) 28 Ind. Cas. 332; 17 M. L. T. 225; (1915) M. W. N. 267; 16 Cr. L. J. 284.
(7) 58 Ind. Cas. 518; 1 P. L. T. 594; 21 Cr. L. J. 790.
(8) 73 Ind. Cas. 173; 4 P. L. T 308; (1923) A. I. R. (Pat.) 369; 24 Cr. L. J. 757; 2 Pat. L. R. 6 Cr.

claim. There is no dispute as to management. It is a pure case of rival claims to exclusive possession of six annas of "land" as defined in sub- s. 2. It does not appear that the authority of *Sri Mohan Thakur* v. *Narsing Mohan Thakur* (5) decided soon after the Code of 1898 came into operation has been seriously impaired and it goes much further than is necessary for the purpose of the present case. It was there held that there is no want of jurisdiction under s. 145 when the dispute is regarding the right to the collection of rent between joint owners of the land under Mitakshara Law. The two rulings of this Court which have been cited show that the criterion is whether the parties claim exclusive possession; if they do, s. 145 is not inapplicable. In the present case each party claims separate possesion of the "land" in dispute.

Accordingly on the facts as represented, the proceeding under s. 142 drawn up by the District Magistrate is not without jurisdiction. As to the order of attachment and the subsequent sale of six-sixteenths of the crop of the past year deposited by the tenants in the *khalihan* nothing has been said in this Court, the parties apparently realising that that order, whether made with jurisdiction or not, was in the circumstances the most beneficial order for all concerned which could have been made.

The Rule is accordingly discharged. An endeavour should be made to dispose of the case under s. 145 with all reasonable expedition.

Z. K. *Rule discharged.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 4310 OF 1923.

March 5, 1925.

Present:—Mr. Justice Crump.

BAI KASTURBAI—PLAINTIFF

versus

VANMALIDAS LAKMIDAS—DEFENDANT.

Criminal Procedure Code (Act V of 1898), s. 476—"Court," meaning of—Suit heard by one Judge of High Court—Complaint, whether can be made by another Judge.

Where a suit is tried by a Judge of the High Court the word "Court" in s. 476 of the Cr. P. C. in respect of proceedings arising out of such suit must be taken to mean the High Court. Any Judge of the High Court can, therefore, dispose of an application under s. 476 of the Code, whether the matter out of which the application arose was heard by him or some other Judge of the Court. [p. 710, col. 2.]

Emperor v. *Molla Fuzla Karim*, 33 C. 193; 3 Cr. L. J. 365, *Sheikh Bahadur* v. *Sheikh Eradatullah Mallick*, 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407, and *Begu Singh* v. *Emperor*, 34 C. 551; 5 C. L. J 508; 11 C. W. N. 568; 5 Cr. L. J. 398; 2 M. L. T. 298, relied on.

Mr. *R. D. N. Wadia*, (with him Mr. *Kanga*, Advocate-General), for the Plaintiff.

Mr. *Lalji* for Sir *Thomas Strangman*, for the Defendant.

JUDGMENT.—This matter arises out of a suit No. 4310 of 1923, which was heard by Mulla, J., and disposed of by him on July 3, 1924. The suit was one by the plaintiff Kasturbai for a dissolution of partnership and for partnership accounts. Among the other defences pleaded by the defendant, he said that there was no partnership between himself and Kasturbai, and that a certain agreement evidencing the partnership had not been acted upon. The learned judge who heard the suit came to a conclusion adverse to the defendant upon that issue, and, in the course of doing so, he expressed himself very strongly as to the conduct of the defendant in the suit. The following passage from his judgment shows his opinion upon this matter:—

"As regards the defendant I have no hesitation in saying that it is rarely that one comes across a witness of his type, who is not ashamed in telling a series of lies barefacedly in this Court. The story about his brother being the owner I hold is a false invention."

The suit ended in a decree in favour of the plaintiff. The plaintiff moved for a Rule to the defendant to show cause why sanction for his criminal prosecution should not be given and why he should not be prosecuted criminally for having made on oath statements which were false and which he knew or believed to be false and for having given intentionally false evidence on oath in the proceedings in the said suit. The Rule was issued in these terms, and has now come before me for hearing and disposal. It is unfortunate that the day on which this Rule was issued was the last day Mulla, J., held office as a Judge of this Court.

Before coming to the merits of this matter I must notice two preliminary points that have been urged by Mr. Lalji on behalf of the defendant. In the first place it is urged that the Rule is not in the correct form. It is no doubt true that the pro-

cedure by way of sanction for prosecution is no longer in force since the amendment of the Cr. P. C. in 1922; but this is a matter of form and not of substance and as a matter of strict law no notice would be necessary to the defendant before taking proceedings against him under the law which now exists. It is not thus open to him to complain of the formal defect of this Rule, and even if he is strictly entitled to notice, before the Court takes action against him—and no doubt it is right that he should have notice—still this Rule fully informs him as to the nature of the proceedings sought to be taken against him. Therefore, there is no substance in this point.

The second point raised is that this Court has no jurisdiction to dispose of a Rule granted by Mulla, J. Several decisions have been cited upon that question, but the effect of them is very materially affected by the amendment of the Cr. P. C. since the date when the decisions were pronounced. As the law now stands there is no question of giving sanction to any private person to prosecute and old s. 195 has now been repealed and s. 195 now enacts that no Court shall take cognizance of certain offences without a complaint in writing of the Court in or in relation to which the offence was committed or some other Court to which such Court is subordinate. But before proceeding to the cases it is necessary to turn to s. 476 of the Cr. P. C. That section has made a very considerable change not merely as regards sweeping away the procedure as to applying for sanction but also with regard to those cases where the Court could take summary action under s. 476 as it formerly stood. Sec-476, cl. (1), with which I am here concerned, runs as follows:—

"When any Civil, Revenue or Criminal Court is whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in s. 195, sub-s. (1), cl. (*b*) or cl. (*c*), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court."

The question, therefore, which arises is the meaning of the word "Court" as used by the Legislature in this connection. In my opinion, "Court" for the purposes of this application must be taken to mean "High Court" and if that is so—as any Judge of the High Court has power to exercise the powers of the High Court—it would follow that any Judge could dispose of an application under s. 476 whether the matter out of which the action arose was heard by him or some other Judge of the Court. No doubt as a matter of convenience that would seldom be done, but where, as in the present case, the Judge has ceased to hold office, I see nothing in the language of the section to preclude any Judge from disposing of such a matter as is now before me. As I have stated the result of the amendment of the Cr. P. C. robs decisions upon the terms of the former Code of much of their significance, still there are three decisions which may be cited as bearing out the view which I have expressed.

The first of these is *Emperor* v. *Molla Fuzla Karim* (1) in which it was held, that where a Judge of the Small Causes Court had heard the suit and had ceased to hold office, it was open to another Judge of the same Court to deal with the grant of sanction for prosecution arising out of the suit. This is really analogous to the present case, for procedure under s. 476 as it now stands is very close to the old procedure under s. 195 for the grant of sanction. Again in *Sheikh Bahadur* v. *Sheikh Eradatullah Mallick* (2) it was held that in s. 476 as it stood before the amendment there was nothing to warrant their Lordships from witholding from the word "Court" its natural meaning with the sense of continuity thus implied, notwithstanding any change of officers. The learned Counsel for the defendant relied upon the Full Bench ruling in *Begu Singh* v. *Emperor* (3) but this is overruled by the case last cited, and it is also obvious from a reference to the section itself as it stood and it now stands that the main grounds on which the decision rests are no longer in force. The learned Judges relied on the words "committed before it or brought under its notice in the course of a judicial proceeding" which

(1) 33 C. 193; 3 Cr. L. J. 365.

(2) 6 Ind Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407.

(3) 34 C. 551; 5 C. L. J. 508; 11 C. W. N. 568; 5 Cr. L. J. 398; 2 M. L. T. 298.

are no longer to be found in the section. and, secondly, they thought that the case was one which it was proper to have recourse to the alternative procedure under s. 195, which is no longer open, and further they appear to have laid stress on the fact that under s. 476 there was no appeal from the action of the Court, but an appeal is provided now by s. 476 (*b*) of the amended Cr. P. C. In my opinion, therefore, there is no want of jurisdiction and I am glad to come to that conclusion, for any other conclusion, in my opinion, would lead to inconvenient results.

Passing now to the merits of the case, I would observe at the outset that what I have to do here is to consider after such preliminary enquiries as appear necessary, whether it is expedient in the interests of justice that an enquiry should be made into any offence referred to in s. 195, sub-s. (1), cl. (*b*) or cl. (*c*). If I come to that conclusion that it is expedient, then a finding to that effect must be recorded and upon such finding a complaint in writing must be made to the Magistrate.

I am not here to decide whether or not the defendant is guilty of the offence of giving false evidence, but I have to consider whether in the interests of justice there is a *prima facie* case, which ought to be enquired into.

Now I have heard the evidence upon the merits and I do not consider that it is my function to state at any considerable length the reasons which actuated me in the conclusions to which I have come. I do not think that it is desirable in any case to do so. For what we are considering here is merely a step *in limine*. In the first instance I naturally attach very great weight to the expressed opinion of the learned Judge who heard the suit, which I have set out above, which shows that he obviously considerd the case as a proper one in which a rule should issue. I also find it is extremely difficult to reconcile the defendant's interpretation of Ex. A, the document of partnership with the contents of Ex. F, another document which he also admits. This latter document was given pursuant—so it is expressed—to the writing made between Bai Kasturbai, the plaintiff in the suit, and the defendant, Venmalidas Lakhmidas, and if that is so it is difficult to understand how there can be no partnership. In addition to that there is positive evidence given by Bai Kasturbai, her husband, and one Chandulal that the partnership was in fact acted upon, and that evidence was believed by the learned Judge who heard the suit. It has also been made to appear to me that the defendant's brother Dharsey, who according to his story was the sole owner of the partnership business, was in fact nothing of the kind, but at most a paid servant of the firm. There are also affidavits, no doubt subsequent in date to the decision of the suit, in which the defendant has himself stated that he and Kasturbai were partners. Had he confined himself to stating that the High Court had decided that point of partnership against him, little importance could be attached to these affidavits, but he goes further than that and deliberately says that he and Kasturbai were partners.

Having regard to all these matters it appears to me that this is a case in which in the interests of justice it is expedient that an enquiry should be made into offence under s. 193 of the Indian Penal Code or such other sections as may be applicable committed in the course of the suit in question, and I, therefore, record a finding to that effect. The action to be taken upon this finding is of course to be taken by the Court itself, and a complaint will be drafted and sent to the Magistrate for disposal.

I direct that the words "why sanction for the criminal prosecution of the said defendant Vanmalidas Lakmidas should not be given" should be deleted from the Rule.

In other respects Rule made absolute with costs.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL APPLICATION No. 1271 OF 1923.
March 8, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

KUNDAN SINGH *alias* KUNDU AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 162—Penal Code (Act XLV of 1860), s. 302—First Information Report, omission in, whether can be supplied by reference to Police diaries—Death caused by gunshot—Accident or design, determination of—Benefit of doubt.

It was contended on behalf of the defence in a criminal trial that the name of one of the accused was not mentioned in the First Information Report and that a certain material witness had not been produced by the prosecution. In dealing with these contentions the Sessions Judge stated in his judgment that the omission to mention the name of one of the accused in the First Information Report had been set right in the first *zimni* report written up by the Sub-Inspector who proceeded at once to the spot and that the *zimnis* showed that an attempt had been made to secure the attendance of the witness but that he could not be found at his residence:

Held, (1) that if the prosecution desired to explain away the omission of the name of one of the accused from the First Information Report questions should have been put to the Sub-Inspector as to when the name of the accused was first mentioned and that the omission could not be made up by a reference to the *zimnis*; [p. 714, col. 1.]

(2) that similarly with regard to the omission to produce a particular witness the Sessions Judge was not entitled to discover the explanation from the *zimnis* and that such use of the *zimnis* was improper. [*ibid*]

During the course of a fight between the party of the accused and the party of the complainants a member of the latter party was killed by a shot from a gun but the Court was unable to determine definitely whether the shot had been fired by one of the accused or was the result of the gun going off of itself during the struggle for its possession:

Held, that the accused must be given the benefit of the doubt and that a conviction was not justified. [p. 714, col. 2.]

Criminal appeal against an order of the Additional Sessions Judge, Amritsar, dated the 29th October 1923.

Mr. *Ram Chand Manchanda*, for the Appellants.

The Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Sessions Judge, Amritsar, convicting the appellants of the murder of Jetha Singh by shooting him with a gun on the 20th of April 1923. Sadhu Singh and Samand Singh have been sentenced to death and Kundan Singh, Lal Singh and Nandu to transportation for life. They have filed a joint appeal to this Court through Lala Ram Chand Manchanda and the cases of Sadhu Singh and Samand Singh are also before us for confirmation of the sentences of death under s. 374, Cr. P. C.

One Pala Singh was also tried but was acquitted. Four other persons are said to have taken part in the assault on Jetha Singh and others and to be absconding. These are Harnam Singh, Gangu, Chandu and Gandu. Gandu, Kundan Singh, Sadhu Singh and Samand Singh are the sons of Lal Singh. Pala Singh who was acquitted is the brother of Lal Singh and Nandu is a sweeper of village Usman, to which all the appellants belong. Jetha Singh deceased and Bahadur Singh, Hazara Singh and Tara Singh and Sohan Singh P. Ws. belong to the neighbouring village of Dhotian. There was a charge under s. 420, Indian Penal Code, against Kundan in connection with taking away of Hazara Singh's mare from Amritsar at the time of the *Basakhi* fair shortly before the occurrence. Early in the morning of the 20th April Thakur Singh Head Constable (P. W. No. 10), Hakim Ali and Gulab Singh Constables (P. Ws. Nos. 8 and 9) together with a large body of villagers from Dhotian some 50 in number went to Usman village to search for the missing mare in the house of Kundan Singh. The search was without result. After it was over the majority of the Dhotian villagers left to return to their own village, whilst the Policemen who belonged to Amritsar set out for Tarn Taran with Tara Singh, Jetha Singh, Hazara Singh, Sohan Singh and Bahadur Singh. Whilst the party were on the way to the main road to Tarn Taran they are said to have been set upon by the appellants and the absconding accused and to have been beaten. Tara Singh was at the time armed with a gun and Kundan Singh, Sadhu Singh, Samand Singh and Nandu are said to have wrested it from him at the instigation of Lal Singh. Samand Singh is said to have fired two shots at Jetha Singh and his companions which hit no one. Sadhu Singh is then said to have taken the gun from him and to have fired at Jetha Singh killing him on the spot. Sadhu Singh fired a second shot at Jetha Singh's companions as they were running away. The learned Sessions Judge has accepted the evidence for the prosecution and has convicted the appellants.

Tara Singh's gun was a double barrelled breech loading hammerless one. We sent for it and inspected it. It has a safety catch and after the gun has been fired and re-loaded it cannot be fired again until the safety catch has been pushed up. According to Tara Singh the gun was unloaded and the cartridges which were in his pocket were taken out by some of the appellants who loaded the gun and fired it four times. The evidence of Mr. Lobb (P. W. No 23) is to the effect that he examined the gun before appearing as a winess in the Committing Magistrate's Court and found that there was no trace of gun powder in the left barrel. In his opinion the right barrel only had been used. We may, there-

fore, take it that any shots that were fired from the gun at the time of the assault were fired from the right barrel. Now it appears to us in the first place to be improbable that the appellants would have had time to load the gun and fire it four times in the way stated by the prosecution witnesses before the members of the other party had scattered. It is also probable seeing that there were three Police Constables amongst the party, that they would not have been allowed to fire so many times. The evidence for the prosecution shows that one empty cartridge case Ex. P. 3 which had contained A A shot was found near the body of the deceased after the occurrence. Mohammad Sharif, Sub-Inspector (P. W. No. 20) says that one Kesar Singh handed him another empty cartridge case but Kesar Singh was not produced as a witness and there is no evidence to show where this cartridge case was found. There is, therefore, evidence as to one empty cartridge case only having been found at or near the spot of occurrence. This points at once to exaggeration in the story of the prosecution. Moreover in the First Information Report which was made by Bahadur Singh P. W. No 11 it was stated that only two shots were fired one by Samand Singh and one by Sadhu Singh.

The evidence of Lieutenant-Colonel Keates, Civil Surgeon, who conducted the *post mortem* examination on the body of Jetha Singh shows that death was due to a gun-shot wound in the front of the chest on the level of the second rib and only two inches from the middle of the chest. The wound was $\frac{1}{6}$th of an inch wide and went inwards and backwards and passed through the right lung and the membrane round the heart and the main artery just above the heart and then entered the back of the left lung in the lower part of which a large shot was found. Only one shot was found and the medical evidence shows that only one entered the body. From the fact that the wound was in the front of the chest and near the middle it is clear that the gun must have been fired at Jetha Singh from a considerable distance say 50 yards at least for otherwise the shot would not have scattered so much and other wounds would have been found in his body There is considerable discrepancy in the evidence as to the distance at which the shot was fired. According to Hakim Ali, P. W. No. 8, Jetha Singh was at a distance of 20 or 25 *karams* when Sadhu Singh fired at him. According to Thakar Singh, P. W. No. 10, the distance was only 14 or 15 yards. Bahadur Singh puts it at 15 or 20 yards and Hazara Singh at 10 or 12 yards whereas Gulab Singh, P. W. No. 9, says that Jetha Singh was only at a distance of two or three *karams* when Sadhu Singh fired at him. These discrepancies are, in our opinion, very important and throw a good deal of doubt upon the evidence for the prosecution.

In the First Information Report it was stated that Lal Singh shouted out to his sons "Snatch away the gun and kill them never mind if any one of us is hanged." Bahadur Singh in his evidence in Court has made a similar statement but Hazara Singh says that Kundan Singh and Lal Singh instigated the others. Tara Singh says that instigation was given by Lal Singh, Pala Singh and Kundan Singh whereas Sohan Singh says that nobody spoke at all before the attack and does not refer to any instigation of any sort. The Police Constables and the witnesses who belong to village Usman say nothing about any instigation. Under these circumstances we think it would be extremely unsafe to rely upon the evidence as to instigation to kill anybody.

According to the prosecution evidence when the Police Constables who were some distance behind the rest of the party saw the fight beginning they shouted out to Tara Singh to shoot with his gun. Upon this some of the members of the Police party grappled with Tara Singh to seize the gun. The learned Sessions Judge is of opinion that the primary object was to seize the gun so as to prevent Tara Singh using it against them and in our opinion there is no doubt that this was their object. The evidence is to the effect that out of the appellant's party Kundan Singh and Lal Singh were armed with *chhavis* but made no attempt to use them against Jetha Singh and his companions. It is argued from this that they had no intention to do any serious harm to the other side. It would have been perfectly easy for Kundan Singh and Lal Singh to attack Tara Singh with their *chhavis* and in this way there would have been no difficulty in getting the gun out of his hands. The fact that *chhavis* were not used is, in our opinion, a ground for holding that at first there was no intention to

kill or grievously injure any of the members of Jetha Singh's party. The statement of Kundan Singh at the trial was that Tara Singh aimed his gun at him and shot Jetha Singh who was behind him by mistake. Before us the argument is that the gun probably went off by accident when the parties were struggling for its possession. There can be no doubt that Jetha Singh was at a distance of not less than about 50 yards at the time that he was shot. This lends probability to the theory of an accident. In our opinion the story of the prosecution is an improbable one and the evidence in support of it is unsatisfactory. If the shooting of Jetha Singh was an accident it would be quite in accordance with probabilities that a false charge of murder should be brought against the members of the other party as it was necessary for the Police Constables and their companions to explain how Jetha Singh met his death.

We regret to find that the learned Sessions Judge has made use of the *zimnis* in an improper manner. Referring to the omission of Nandu's name from the First Information Report he states at page 38, line 10 of the judgment that this omission was set right in the first *zimni* report written up by the Sub Inspector who proceeded at once to the spot. If the prosecution desired to explain away the omission of Nandu's name from the First Information Report questions should have been put to the Sub-Inspector as to when Nandu's name was mentioned. The omission could not be made up by a reference to the *zimni*. Again regarding the omission to produce Wadhawa Singh as a prosecution witness the Court states that it finds from the Police *zimnis* that a futile attempt had been made to secure his presence but that he could not be found at his residence.

Some of the accused persons pleaded *alibis*. In regard to them the learned Sessions Judge at page 36, line 32 says: "Pala Singh is definitely telling a lie in saying that the fight did not take place in his presence and that no man had been killed before he left for Taran Taran." The Court then goes on to refer to some telegrams to the address of the Deputy Commissioner and the Superintendent of Police, Amritsar, which were handed in at Tarn Taran at 10-45 A. M. These telegraphic messages are to the following effect:—

"Dhotian residents attacking Usman furiously. One dead. Kindly help immediately. Serious case." The Court says that the mention of the death of one man could not have found place in the telegrams unless and until Pala Singh and Buta Singh who went to Tarn Taran to hand over these messages had known of it before leaving their village. These telegarams have not been proved and there is no evidence on the record to show that they were despatched by Buta Singh and Pala Singh and the learned Sessions Judge was in error in taking them into consideration without their being proved.

There can be no doubt that there was a fight between the appellants or some of them and the Dhotian witnesses on the morning of the 20th April and that in the course of that fight Jetha Singh met his death owing to a shot from Tara Singh's gun but whether the shot which killed him was fired by Sadhu Singh as P. Ws. depose or by Tara Singh, or whether it was the result of an accident, the gun going off of itself during the struggle for its possession we find it impossible to say but, in our opinion, the probability is that the gun went off during the struggle and a false charge of murder has been made up against the appellants The latter must be given the benefit of the doubt and we, therefore, accept the appeal and setting aside the convictions and sentences acquit the appellants.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.
FULL BENCH.

FULL BENCH REFERENCE No. 1 OF 1925

IN

CRIMINAL REFERENCE No. 7 OF 1925.

April 8, 1925.

Present:—Justice Sir Hugh Walmsley, KT., Justice Sir Ewart Greaves, KT., Mr. Justice Cuming, Mr. Justice Mukerji and Mr. Justice Chakravarti.

NARENDRA CHANDRA RUDRA PAL—1ST PARTY

versus

SABARALI BHUIYA—2ND PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 360—Proceedings under s. 145—Deposition of witnesses, whether must be read over.

Held, by the majority (*Cuming, J.* dissenting) that the provisions of s. 360 of the Cr. P. C. apply to proceedings under s. 145 of the Code, subject to the qualification that in proceedings under that section there is no accused whose presence at the reading of the evidence is necessary. [p. 716, col. 2.]

Per *Cuming, J.*—Section 360 of the Cr. P. C. has no application whatsoever to proceedings under Ch. XII of the Code in which s. 145 is to be found. If, however, the depositions of witnesses recorded in an enquiry under s. 141 have to be read over, the parties, not being accused persons, are not entitled to be present nor is their presence necessary when the evidence is read over. [p. 719, col. 1.]

Reference under s. 438, Cr. P. C.

ORDER OF REFERENCE.

Panton and Mukerjee, JJ.—This is a Reference made under s. 438, Cr. P. C., by the Second Additional Sessions Judge of Dacca, recommending that an order made under s. 145, cl. (4), Cr. P. C., in favour of the first party to proceedings under that section may be set aside on the ground that in recording the evidence of the witnesses who were examined in those proceedings the mandatory provisions of s. 360, Cr.P.C., were not observed by the Court holding the enquiry. The second party in their application for revision alleged in ground No. 3 thereof that the said provisions were not observed, and the learned Judge was satisfied on an examination of the record that the said ground appeared *prima facie* to be well-founded and he thereupon called for a report from the Deputy Magistrate who held the enquiry. The learned Deputy Magistrate then submitted a report in which he did not state that the provisions were complied with, but stated that the procedure in a case under s. 145, Cr. P. C., is that of a summons case and that the provisions of s. 360, Cr. P. C., are not applicable to such a case.

The question, therefore, which arises is whether the provisions of s. 360, Cr. P. C., are applicable to an enquiry held under s. 145, Cr. P. C.

There is a clear conflict of judicial opinion, so far as this question is concerned. A Division Bench of this Court in Criminal Revision Case No. 589 of 1924 [*Aswini Kumar* v. *Puti* (1)] decided on the 12th September 1924, that section 360, Cr. P. C., is applicable to proceedings under s. 145, Cr. P. C. This is the decision on the strength on which the learned Judge has made the Reference in the present case. Another Division Bench of this Court in Criminal Revision Case No. 960 of 1924, decided on the 26th November 1924, also held that the provisions do apply to these proceedings. One of us was a party to both these decisions. On the other hand, in Criminal Revision Case No. 906 of 1924 [*Ishan Chandra* v. *Hridoy Krishna* (2)] there was a difference of opinion on this question between two learned Judges one of whom was a party to the decision in *Aswini Kumar* v. *Puti* (1) mentioned above. This matter, on such difference of opinion, was referred to another learned Judge under the provisions of s. 429, Cr. P. C., who on the 11th February 1924 held that the provisions of s. 499, Cr. P. C., are not applicable to proceedings under s. 145, Cr. P. C. The learned Judge was of opinion that it was a point which should be laid before a Full Bench for decision, but felt that as he did not constitute a Division Bench he had no option but to decide the matter himself.

The question is of general importance and, in our opinion, calls for immediate decision.

We must necessarily differ from one or other of the views taken in the decisions we have mentioned. We accordingly refer the case to a Full Bench under r. 5 of Ch. VII of the High Court Rules, Appellate Side.

Mr. *L. P. E. Pugh* (with him Babu *Prafulla Chandra Chakravarti*), for the 1st Party.

Babu *Dwijendra Krishna Dutt*, for the 2nd Party.

JUDGMENT OF THE FULL BENCH.

Walmsley, J.—The question referred is whether the provisions of s. 360, Cr. P. C., are applicable to an enquiry under s. 145, Cr. P. C. The difficulty arises from the requirement that the deposition of each witness should be read over to him in the presence of the accused, if in attendance, or of his Pleader, if he appears by Pleader, and the question for our decision becomes nothing more than this, *viz.*, whether persons against whom proceedings under s. 145, Cr. P. C., have been initiated are accused within the meaning of s. 360, Cr. P. C.

The word "accused" is one of the words that have not been defined in any Statute. Our attention has been drawn to various decisions in which a definition has been attempted. For the purpose for which those decisions were given, they may be

(1) 86 Ind. Cas. 978; 29 C. W. N. 474; (1925) A. I. R. (C.) 437; 26 Cr. L. J. 914.

(2) 86 Ind. Cas. 979; 29 C. W. N. 475; 41 C. L. J. 357; 26 Cr. L. J. 915.

accepted as correct; but I do not think it necessary to consider whether the definition may be regarded as satisfactory for all purposes, for to my mind they have been rendered obsolete by the changes introduced in s. 340, Cr. P. C., by Act XVIII of 1923. That section, before the amendment, ran: "Every person accused before any Criminal Court may of right be defended by a Pleader." It now runs: "Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a Pleader." The second clause says that "Any person against whom proceedings are instituted in any such Court under s. 107, or under Ch. X, Ch. XI, Ch. XII or Ch. XXXVI, or under s. 552, may offer himself as a witness in such proceedings." The first clause recognises two classes of persons who may be before a Court, those who are accused of an offence, and those against whom proceedings under the Code are instituted, and the second clause emphasises the distinction by enacting that many of those of the second class may offer themselves as witnesses in such proceedings. In my judgment the effect of this amendment is to narrow the meaning of the word "accused" and to limit to those who are accused of an offence. With all deference to those who take a different view. I do not think that any of the alarming results which they picture will follow from attributing to the word "accused" the narrow meaning. As for the suggestion that the provisions of s. 360, Cr. P. C., will cease to apply to evidence given in proceedings under s. 145, Cr. P. C. I see no difficulty in reading the first clause of s. 360 as meaning that the evidence is to be read over to the witness in the presence of the accused if there is one, that is to say, in proceedings under s. 145, Cr. P. C., to each witness must be read over the deposition which he gives, but it will not be necessary that either the parties to the proceeding or their Pleaders should be present.

This view is, I think, in accordance with the provisions of the law, and it has in its favour that it avoids the immense practical difficulties that might result from the other view, and that it does not demand in summary proceedings as to possession a more elaborate procedure than is prescribed for the civil proceedings which will finally determine questions of title.

My answer to the Reference, therefore, is that the provisions of s. 360, Cr. P. C., do apply to proceedings under s. 145, Cr. P. C., subject to the qualification that in proceedings under that section there is no accused whose presence at the reading of the evidence is necessary.

Greaves, J.—I agree with the judgment just delivered by my learned brother Mr. Justice Walmsley and with the reasoning on which it is founded and I do not think it necessary to deliver a separate judgment.

Cuming, J.—The question that has been referred to the Full Bench is whether the provisions of s. 360, Cr. P. C. are applicable to an enquiry held under s. 145, Cr. P. C., or in other words, to proceedings under Ch. XII, Cr. P. C.

I would answer the question in the negative and hold that s. 360 has no application whatever to proceedings under Ch XII, the Chapter in which the s. 145 is found. Section 360 provides that (1) as the evidence of each witness taken under s. 356 or s. 357 is completed, it shall be read over to him in the presence of the accused or of his Pleader, if he appears by Pleader and shall, if necessary, be corrected.

This is the material portion of the section which we now have to consider. The argument which has been put forward to us is that the expression "accused" in the section includes the "parties" referred to in Ch. XII and that it is in their presence that the evidence must be read over to the witness and further that even if they cannot be considered as accused still so much of the section as relates to the reading over to the witness must be complied with.

In my opinion the expression "accused" in s. 360 cannot and does not include the parties referred to in Ch. XII, neither does the section contemplate that in cases coming under Ch. XII so much of the section must be complied with as relates to the reading over of the evidence to the witnesses.

I shall deal first with the contention that the expression "accused" in s. 360 includes the parties to a proceeding under Ch. XII. The learned Vakil has contended that an accused person is a person over whom the Magistrate or other Court

is exercising jurisdiction and in support of this argument he relies on the case of *Jhoja Singh* v. *Queen Empress* (3) which followed the case of *Queen-Empress* v. *Mona Puna* (4). These decisions undoubtedly support the learned Vakil's contention, but with great respect to the learned Judges to carry this definition to its logical conclusion would involve some startling results. For instance, the Court clearly exercises jurisdiction over a witness for it issues a summons on him and if he disobeys can issue a warrant and arrest him and punish him for disobeying the summons. This, I presume, is exercising jurisdiction over him. So a witness is an accused.

Section 342 (2) says an accused shall not render himself liable to punishment for refusing to answer such questions or giving false answers to them and further no oath shall be administered to an accused. Therefore, no oath can be administered to a witness and also being an accused he cannot be compelled to answer any question nor can he be prosecuted for giving false evidence. Yet s. 5 of the Indian Oaths Act (X of 1873) provides that oath shall be made by the following persons: all witnesses, that is to say, all persons who may lawfully be examined or given or be required to give evidence by or before any Court.

Further, a witness who refused to take an oath or answer any questions may be punished under s. 178 and s. 179, Indian Penal Code, and he may be punished under s. 193 for giving false evidence. To take yet another test, a Juror is clearly a person over whom the Court exercises jurisdiction. He attends in obedience to a summons, he can be punished for neglecting to attend. He is, therefore, according to the defintion, an accused person, so no oath my be administered to him.

Yet s. 281, Cr. P. C., provides that he shall be sworn under the Indian Oaths Act. It is not necessary to further labour these points. I need only say with great respect to the learned Judges that I am not prepared to accept a definition which fails on the simplest tests being applied to it. The Code itself has not defined the expression "accused" possibly because the meaning of the term is so well-known in its relation to ciriminal law that it requires no definition.

I would define an "accused" as a person charged with an infringement of the law for which he is liable if found guilty to be punished. Turning now to the Code itself, which perhaps is the safest guide, in Ch. XII we never find the expression "accused." The persons concerned are always referred to as parties and s. 145 (7) provides for the substitution of a party's legal representative on his death. I am not aware that the legal representative of a person accused of any of the offences known to the Penal Code can be substituted for him on his death.

In other parts of the Code, for instance, Chs. XVIII, XIX, XX, XXI, XXII, XXIII which deal with trials and enquiries preliminary to commitment the expression "accused" is always used to denote the person proceeded against.

Let us, however, for the sake of argument presume that the expression 'accused" in s. 360 includes the parties to a proceeding under s. 145 and see what remarkable results will follow.

Presumably all the parties would be accused and, therefore, the evidence would have to be read over in the presence of all of them. In many cases there are a very large number of parties. Still if they were present in the Court it might be possible.

But it must be remembered that the parties to a proceeding under s. 145 need not attend nor can they be compelled to attend nor if they choose to attend can they be compelled to remain. How would the evidence be read over in the presence of those who did not attend ?

Moreover, those who did attend could prevent the evidence of their opponents being read over in their presence by at once leaving the Court when it was attempted to read over the evidence in their presence. The result obviously would be that no proceedings under s. 145 could be carried out for each party could render them impossible. Section 145 (4) provides that the Magistrate shall receive all evidence as may be produced and take such further evidence as he thinks necessary but any party could, if s. 360 applies to the Ch. XII, render the taking of any evidence impossible. The Legislature clearly could not contemplate such an absurdity and for this reason deliberately omitted "parties" from s. 360. Attempts have been made

(3) 23 C. 493; 12 Ind. Dec. (N. S.) 328.
(4) 16 B. 661; 8 Ind. Dec. (N. S.) 919.

to argue that the Code makes a distinction between accused persons and that the expression "accused" may be divided into two branches, persons accused of an offence and any person against whom proceedings are instituted under s. 107 or Ch. X, Chs. XI, XII, XXXVI or s. 552 and reliance had been placed on s. 340 (1) and (2) where these two classes of persons are referred to. But this argument will not stand the simplest test. In s. 342 the expression used is "accused" which would presumably include both the branches, *viz.*, persons accused of an offence and parties to proceedings under s. 145. No oath shall be administered to an accused and, therefore, no oath can be administered to a party to a s. 145 proceedings. Yet s. 340 (2) provides that a party may offer himself as a witness.

Section 5 of the Indian Oaths Act provides that an oath shall be administered to witness. It is not necessary to elobarate this point further. A very little consideration will show at once the absurdities into which we are led if we accept the expression "accused" in s. 360 as including the parties to a proceeding under Ch. XII. I am, therefore, of opinion that the expression "accused" as used in s. 360 does not include the parties to a proceeding under Ch. XII.

It has also been argued that even if the expression "accused" as used in s. 360 does not include the parties to a proceeding under Ch. XII, still so much of the section must be observed in such proceedings as relates to the reading over to the witness. That is to say, the evidence must be read over to the witness. I do not agree with the contention for the simple reason that it does not appear to me that the section requires it.

The line of argument is that the Legislature enacted the section for the protection of the witness as well as of the accused and, secondly, that unless the evidence is read over the witness cannot be prosecuted for perjury. The two arguments it will be seen are mutually destructive, for obviously if a witness, if the evidence were not read over to him, could not be prosecuted for perjury he would be far better protected than if the evidence was read over to him so that if necessary he could be prosecuted. It is always dangerous to attempt to speculate as to what was or was not the intention of the Legislature in enacting any particular section of an Act. The Judge is liable to attribute to the Legislature what he himself thinks should have been their intention and so twist the section to fit in with his own views as to what he thinks it ought to mean. Probably the safer course is to hold that the Legislature intended exactly what it says. In the present s. 360 the Legistature provides that the evidence shall de read over in the presence of the accused. If it contemplated that if there was no accused it should still be read over to the witness it would have said so. We cannot presume that the Legislature is ignorant of the provisions of the Code that it is enacting or amending. The next argument is that unless the evidence is read over to the witness he cannot be prosecuted for perjury. I admit I cannot follow this argument. A prosecution for giving false evidence is based on the statement the person made in Court, This can be proved by many ways, *e. g.*, by oral evidence or the written record of what he said. Section 80, Evidence Act, would still apply to such a record even though it had not been read over to the witness if the law did not provide that it should be read over to him. There is no particular virtue to be attached to the process of reading over the evidence to the witness as any one who has had any practical experience of the operation realises. In the High Court Sessions trials the evidence is never read over and up to a short time ago the only record if it was the Judge's note. Yet I never heard it suggested that a witness who gave false evidence in the High Court Sessions could not be prosecuted. Neither is tho evidence read over to the witness in summons cases or in any case tried by a Presidency Magistrate.

A further argument has been put forward that s. 360 comes after s. 359 and s. 357. Section 356 deals with the manner of recording evidence in enquiries under Chs. XII and XVIII and also in trials before the Court of Sessions and Magistrates and it is argued that s. 360 refers to the evidence of each witness taken under s. 356 or s. 357 and as the evidence in proceedings under Ch. XII are taken under s. 356, therefore, s. 360 must apply to evidence taken in proceeding under Ch. XII. I do not think this is correct.

Section 356 is merely more general than s. 360. Section 360 refers to one branch of the

evidence taken under s. 356, *viz.*, in case where there is an accused person. The reason for the distinction is clear These proceedings under Ch. XII are *quasi*-civil proceedings to determine who shall be the plaintiff and who the defendant in the civil suit and to prevent breaches of the peace.

No title is decided and no one's life or liberty is in question. They were intended to be summary proceedings and not elaborate civil suits into which they are sometimes allowed to be converted.

I am, therefore, of opinion that s. 360, Cr. P. C., has no application to proceedings under Ch. XII, Cr. P. C. My learned brothers Walmsley and Greaves, JJ., are of opinion that there should be a partial compliance and the evidence should be read over to the witness. Although I am unable to agree, at the same time I do so far agree with them that if the deposition had to be read over the parties not being accused are not entitled to be present nor is their presence necessary when the evidence is read over.

Mukerji, J.—The question which arises upon the case referred to us under r. 5 of Ch. VII of the High Court Appellat Side Rules is whether the provisions of s. 360 of Cr. P. C. are applicable to an inquiry held under s. 145, Cr. P. C.

In my judgment in the case of *Hira Lal Ghose* v. *Emperor* (5) I have endeavoured to show that s. 360, Cr. P. C., is intended not only to protect the witness but also to safeguard the interest of the accused, and that the failure to observe its provisions may materially affect the witness and may also deprive the accused of a very valuable right which the law secures for him. The question which arises in this Reference is whether these salutary provisions were intended to apply to an inquiry held under s. 145, Cr. P. C.

The mode of recording evidence in an inquiry under s. 145, Cr. P. C. is perscribed in s. 356, Cr. P. C. That section expressly lays down that in inquiries under Ch. XII—and s. 145 is one of the sections in that Chapter—the evidence of each witness is to be taken down *in extenso* as contra-distinguished from merely making a substance the reof as prescribed in s. 355, Cr. P. C. Section 369, Cr. P. C., provides for the procedure to be followed in regard to the evidence recorded under s. 356 and makes no reservation or exception in respect of evidence recorded under the section in the case of inquiries under s 145, Cr. P. C., *Prima facie*, therefore, s. 360 would seem to apply to inquiries held under s. 145, Cr. P. C. It is said, however, that there is a difficulty in applying s. 360 to an enquiry under s. 145 by reason of the provision therein that the reading over of the deposition o the witness should be in the presence of tthe accused, if in attendance, or of his Pleader, if the accused appears by a Pleader. The objection in substance is that the term "accused" is not applicable to a party to a proceeding under s. 145, Cr. P. C. I propose to deal with the grounds upon which this objection is based: but before I do so, I should like to observe that even if it be assumed that the objection is well-founded. I can see no appreciable reason why so much of the section should not be held to be applicable as can possibly be applied, that is to say, why the evidence when completed should not be read over to the witness himself on the footing that there is no accused either in attendance or appearing by Pelader.

In several reported decisions to which our attention has been drawn a view has been expressed that in certain sections of the Cr. P. C the word "accused" has been used in its wider significance as meaning a person over whom a Criminal Court is exercising jurisdiction. This view is considered by some to be unsound as then the word "accused" would include a witness or a juror, because a Criminal Court exercises jurisdiction over witnesses and Jurors as well. According to them the word "accused" wherever it has been used in the Code, must be taken to mean a person charged with an infringement of the law for which, if convicted, he is liable to be punished. With all respect to those who are of this opinion, I do not think that this objection needs any serious consideration as it is quite clear that the learned Judges used the words "jurisdiction" in a sense wholly different from what has been understood by the critics. "Jurisdiction" of a Court may have to be considered with reference to various matters, and its meaning and import varies according to the matter with reference to which it is considered. For instance, in the case of a Criminal Court, it exercises jurisdiction over a particular local area in respect of certain offences, in cases of proceedings of a particular kind, as against

(5) 83 Ind. Cas. 905; 52 C. 159; 28 C. W. N. 968; (1924) A. I. R. (C.) 889; 26 Cr. L. J. 201; 41 C. L. J. 224.

persons parties thereto, as regards witnesses with regard to Jurors or Assessors or others who may have to assist in the administration of justice, or in relation to other matters. The conception of jurisdiction in each of these instances is fundamentally distinct from that in the other. The definition perhaps is not scientific but its meaning is quite clear. It means that the word is used in its wider sense as meaning not merely persons who are accused of having committed offences, and who are, therefore, accused persons in the narrower sense of the expression, but includes also persons against whom some accusation or allegation has been made or some information has been received, by reason of which the Criminal Court is called upon to take action. In its wider sense it would include not merely persons accused of offences before a Criminal Court but also persons against whom proceedings are instituted under the Cr. P. C. in any such Court.

It is said that this wider meaning cannot be attributed to the word "accused" for the following reasons: (*i*) the word "accused" does not find a place in Ch. XII; (*ii*) there is no machinery for enforcing the attendance of a person who is a party to a proceeding under s. 145, Cr. P. C., and so there may be cases in which he will neither attend nor appear by a Pleader, and a criminal trial or enquiry in which the "accused" is absent is an anomaly which cannot be permitted; and (*iii*) in a case under s. 145 the several parties will all be in the position of accused persons so that the proceeding will then be a proceeding with no complainant but only accused persons.

As regards (*i*), it would appear that the expression "accused person" does not find mention in Ch. VIII as well; and the logical effect of this process of reasoning will be to hold that persons who are dealt with under the preventive sections in that Chapter are also not accused persons. This is a view which was propounded by this Court in the almost solitary decision in the case of *Binode Behari Nath* v. *Emperor* (6), the authority of which sitting as a member of this Bench I am not prepared to accept as binding. That decision, in my opinion, does not lay down the law correctly. With all respect to the learned Judges who decided that case, I must say I do not agree with the reasons given by them and the decision is against a consensus of authority the weight of which is overwhelming. It certainly seems somewhat repugnant to one's conception of an accused person to think that a person who can be arrested, detained in custody, put on bail, restrained by imposition of an order for furnishing security and sent to prison in default thereof—a person whose liberty may be curtailed or taken away in this way—is not an accused person and, therefore, not eligible to such rights, privileges and protection as an accused person may have under the law. The absence of the word "accused" in Ch. XII, therefore, in my opinion, affords no criterion. As regards (*ii*), inquiries under the Cr. P. C. and trials held for offences under some special laws, in the absence of accused persons, are not unknown; they are criminal inquiries and trials all the same. If there is no attendance by the accused or appearance by Pleader on his behalf that part of s. 360 cannot possibly be observed, but that is all that it comes to. This is what happens when evidence is recorded under s. 512, Cr. P. C. This again is what happens when the trial or the inquiry is held in the absence of the accused, his attendance being dispensed with under s. 540 A, Cr. P. C., in a case in which he is represented by a Pleader; it should be remembered that in such a case the Pleader only represents him but he does not appear by the Pleader as he does under s. 205, Cr. P. C. As for (*iii*), I do not see why all the disputing parties should not be considered as belonging to the category of accused persons; and after all, it is not necessary in a criminal trial or inquiry that there should always be present in the proceedings a complainant or somebody who is in the position of a complainant; for what happens when a Magistrate takes cognizance of an offence of his own knowledge or suspicion under cl. (*c*) of s. 190, Cr. P. C? These objections, in my opinion, do not militate against the view that the parties under s. 145, Cr. P. C., may be regarded as accused persons.

Another objection which is said to be more serious is based upon the provisions of s. 340 as recently amended. It is said that a person against whom proceedings under Ch. XII are instituted may now offer

(6) 81 Ind. Cas. 909; 50 C. 985; (1924) A. I. R. (C.) 392; 25 Cr. L. J. 1085.

himself as a witness in such a proceeding and consequently that we shall be landed in this position that an accused person will be competent to be examined as a witness and yet no oath shall be administered to him under the law. In my opinion no difficulty need be felt on the ground that the accused person will have to be examined as a witness, for it is not a compulsory examination but such examination will be held only if the person himself offers to be examined as a witness. The Legislature simply removed in the case of some particular classes of accused persons a disability, which ordinarily attaches to accused persons, and they put it in that way in their statement of objects and reasons for the amendment. The accused was at one time not a competent or compellable witness under the English Common Law but the position has now greatly changed in consequence of a series of statutory provisions. The Indian Legislature is gradually making an advance in that direction. The further objection, namely, that in this view, such a person will be a competent witness, if he offers himself as one, and yet will not be able to be examined on oath, assumes that the word "accused" is used in the same sense in all parts of the Code and that it is used in the same sense in the Indian Oaths Act. For the latter assumption there is no foundation; and as regards the former I propose to examine whether it is correct to assume that the word is used in one and the same sense in all parts of the Cr. P. C.

In the Codes of 1861 and 1871, the word "accused" and the expressions "accused person," "person accused of an offence," "person charged with an offence" and "offender," were used without anything to indicate that any distinction was meant. The same was the state of things, though not quite so largely, in the Code of 1882. In the Code of 1898 a person against whom an order for maintenance was applied for was designated an accused person and it was provided that he might tender himself as a witness, and that in such a case he should be examined as such [s. 488, sub-ss. (7) and (9) of Act V of 1898]. Act V of 1898 was an Act to consolidate and amend the law relating to Criminal Procedure. The Acts of 1923 were merely amending Acts. The policy of the law has to be gathered from a study of the Act of 1898 with the aid of such light as may be afforded by the amendment subsequently made thereto. In the face of the provision contained in sub-ss. (7) and (9) of s. 488 of Act V of 1898 to which I have just referred it cannot possibly be contended that the Legislature used the expression "accused person" in all parts of the Code in the narrower sense of meaning a person accused of an offence. This conclusion is further supported by a consideration of the amendments introduced in 1923 in at least two places. In s. 340 the words in the Code of 1898 were "Every person accused before a Criminal Court." They have been substituted by the words "Every person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court." This to my mind clearly shows that an "accused person" is not identical with a "person accused of an offence;" and I can find no reason to hold that the word "accused," when it was used in the Code of 1898 and where it has retained its place after the amendment, may not include both the classes of persons mentioned above, unless there is something in the context repugnant to that meaning. The other instance is still more clear. In s. 436 of the Code of 1898, the words "any accused person who has been discharged" have been altered to "any person accused of an offence who has been discharged." This also in my judgment shows that where the word has not been altered it is capable of the wider meaning. Reference may also be made in this connection to s. 499 which applies not merely to persons accused of an offence but also to those dealt with by Ch. VIII of the Code, and the marginal note to that section runs as "Bond of accused and sureties." In the Chapter dealing with enquiries in trials relating to offences the word "accused" wherever it occurs necessarily means a person accused of an offence. In the case of general provisions relating to enquiries or trials, in such of them as relate to procedure applicable to all proceedings under the Code, the word "accused," in my opinion, is used in its wider significance unless the context suggests a narrower meaning. I can see nothing in s. 360 which suggests the narrower meaning and, in my opinion, it will not be right to restrict the meaning of the section in that way. The Code does not define the word and the Legislature does not say that it is

to be taken in the same sense wherever it has been used in the Code. The word has no well defined or recognised meaning in other systems of law, the word "defendant" being more often used instead of the word "accused." To build an argument on a supposed policy on the part of the Legislature when really there is none and to assume a uniformity and on such assumption to attempt to explain away diversity is, in my opinion, fallacious. With regard to other matters as well dealt with by the Code there is diversity and it is futile to attempt to evolve a consistent scheme. I have dealt with one such instance in the case of *Bahadur Molla* v. *Emperor* (7).

To put the narrower interpretation will lead us to absurdities and in a way revolutionise the system of Criminal Procedure. I give a few instances. A part of s. 344 will not apply with the result that it will be permissible to remand a person in custody against whom proceedings under the preventive sections have been taken for any length of time. Section 361 will not apply; the interpretation of the evidence given in a language which the person proceeded against does not understand will not be necessary, and the inquiry held in that manner will be opposed to all principles of criminal jurisprudence. Section 362, sub-s. (2-A) will not be applicable, and no memorandum of the statement of the person will have to be made though the case is an appealable one, and the Appellate Court will have to deal with the appeal not knowing what the appellant had stated in his examination. Section 364 will not apply and there will be no provision for recording the examination of such a person. A part of s. 435 will not apply, and if such person is in confinement, no order for his release could be made by the District Magistrate pending the examination of the record by him, as s. 498 does not apply to the District Magistrate. Section 439, sub-s. (2) will not apply and there will be no bar to the High Court setting aside an order of discharge without hearing the party in whose favour it has been made as under s. 440 he will not have a right to be heard. Section 526, sub-ss. (5), (6) and (8) will not apply, and it will not be possible to make an order for furnishing bond, nor will any notice be necessary, and no adjournment of the inquiry will be compulsory in spite of the notification of an intention to move the High Court for transfer. Section 367, sub-s. (6), provides that an order under s. 118 or s 123, sub-s. (3), shall be deemed a judgment; but s. 371 will not apply and the party dealt with by such an order will not be entitled to a copy of it. Section 383 will have no application, and there will be no provision for issuing a warrant for committing to jail a person who has failed to furnish the bond called for from him under the preventive sections.

I do not see any reason why the limited meaning should be attached to the word so as to give rise to inconsistencies and difficulties, some of which will have the effect of denying justice and others paralysing the administration of it.

I am clearly of opinion, that the word "accused" has not been used in the same sense in all parts of the Code. The Code deals with procedural law and a Court has always inherent power to shape and mould its procedure in such a way as may be necessary to meet the requirements of each particular case or class of cases. In my opinion the word "accused" has been used in s. 360, Cr. P. C., in its wider significancy and the provisions of the section are applicable to a proceeding held under s. 145, Cr. P. C., and the said provisions should, if practicable, be applied in their entirety to such proceedings. If, however, a party or the parties to the proceedings do not care to attend or appear by Pleader at the reading over of the deposition, there is no conceivable reason why so much of the provisions as it is possible to apply should not be complied with.

In the present case it is not disputed that the provisions of s. 360, Cr. P. C., were not complied with, and the said provisions being mandatory the trial must be held to have been vitiated. Accordingly, in my opinion, the order passed by the learned Magistrate should be set aside.

Chakravarti, J.—The question referred to the Full Bench for decision is stated in the Order of Reference in these words:—"Whether the provisions of s. 360, Cr. P. C. are applicable to an enquiry held under s. 145, Cr. P. C." At the very outset I must point out that the question before us is not what is the precise meaning of the word "accused" as used in s. 360, cl. (1) of Cr. P. C. This is necessary because it seems to me that any answer to the latter question may not furnish any definite answer to the question we are to decide although it is the

(7) 85 Ind. Cas. 135; 29 C. W. N. 151; 41 C. L. J. 45; (1925) A. I. R. (C.) 329; 26 Cr. L. J. 455.

use of this word in the section which has led to the divergence of views on this question.

Now the Chapter in which s. 360 finds its place is Ch. XXV which purports to lay down. "The mode of taking or recording Evidence in Inquiries and Trials" The sections which follow are, therefore, of general application but, an examination of these sections will make it clear that some of the provisions are of a limited application and that is owing to the use of the word " accused " which has not been defined in the Code.

I confess I do not see that the Legislature by the recent amedment of s. 340 of the Code have in any way made the position clearer.

The word "accused" used in s. 340 before amendment was interpreted by this High Court and other High Courts to have a wider significance than the word has in common parlance in which an accused person is understood to be a person accused of an offence punishable under the law. To make the provisions of s. 340 of the Code applicable to the proceedings under Chs. X, XI, XII, etc., the word "accused" was read in a wider sense. By the amendment the Legislature have adopted the view expressed by the High Courts, and with a view to make their meaning clear s. 340 was amended as follows :—

Section 340.—(1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court may of right be defended by a Pleader.

(2) Any person against whom proceedings are instituted in any such Court under s. 107, or under Ch. X, Ch. XI, Ch. XII or Ch. XXXVI or under s. 552 may offer himself as a witness in such proceedings.

Therefore " an accused " before amendment was understood to mean " any person accused of an offence " and also a person as party to a proceeding under Chs. X, XI, etc. The Legislature have used the word " accused " in a number of sections in Ch. XXV after the amendments but without the qualification by adding the words " of an offence." Can it not, therefore, be understood that the Legislature left the word to be interpreted according to the context so as to mean one or the other thing.

An examination of the sections of this Chapter shows that the word as used in some of the sections means " a person accused of an offence " and cannot mean anything else.

The word " accused " in s. 342, cl. (1), is undoubtedly used in its narrower sense. I may cite other section, namly, ss. 344, 347, 348, 353, etc, in which the same limited sense is intended. But there are sections in which the word is used as it appears to me, in its wider sense. Section 340, Cr. P. C., as amended, provides that parties to proceedings under the Code, other than those accused of an offence, may give evidence in their own behalf but not parties under proceedings held under s. 110 of the Cr. P. C. Section 342 (4), Cr. P. C. provides, as it did before amendment, that " no oath shall be administered to the accused." In my opinion if the word "accused" in this section is limited to a person accused of an offence, a party to a proceeding who has not the benefit of s. 340 (2) will also lose the protection of this section. This could hardly be intended. To take other examples s. 356, cl. (2) runs as follows :—

" When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall from part of the record."

There is no reason to hold why a party in a proceeding under Ch. XII shall be deprived of the benefit of the provision of this section.

Then s. 361 runs as follows :—

" (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

" (2) If he appears by Pleader and the evidence is given in a language other than the language of the Court, and not understood by the Pleader, it shall be interpreted to such Pleader in that language."

If the word " accused " is understood here in its limited sense than a person who is a party to a proceeding under s. 107 or 110, Cr. P. C. may be proceeded with without his understanding a word of the evidence. This could not have been intended when it is borne in mind that these are general provisions for recording evidence.

It appears to me, therefore, that there is no difficulty in reading the word "accused" in both its wider and narrower sense according to the context of the various sections in this Chapter.

Coming now to s. 360 I do not see any reason why it should not apply to proceedings under s 145 in so far as the mode of recording of the evidence goes. The evidence has to be read over as the section requires and I do not see what practicable difficulty can arise if the party, whether he is a person accused of an offence or not, takes part at the time of reading that evidence over to the witness. If such a party does not appear that can create no practical difficulty. If any party to a proceeding deliberately abstains from taking advantage of the safeguard provided by this section, he cannot be heard to say that the recording of the evidence was irregular, because it was not read over to the witness in the presence of the accused. On the other hand, the word "accused," if limited to a person accused of an offence, will preclude amongst others parties to proceedings under ss. 107 and 110 of the Cr P C from watching the reading over of the evidence in which they are as vitally interested as a person accused of an offence. I do not see any cogent reason why this section which provides "the mode of taking or recording" evidence should be limited only to cases in which the party is a person accused of an offence.

On the whole, therefore, my answer to the question put in the Reference is in the affirmative and I think the word "accused" in s. 360 is not used in a limited sense but is used in the wider sense of the word.

ORDER OF THE FULL BENCH.—The result of these judgments is that a majority of the Court is of the opinion that the provisions of s. 360, Cr. P. C., do apply to proceedings under s. 145, Cr. P. C., to this extent at least that as the evidence of each witness is completed it must be read over to him.

The majority of the Court is of opinion that the parties to the proceedings are not "accused," and that their attendance at the reading over is not necessary.

Regarding the particular case before us, our decision is that the Reference made by the learned Sessions Judge must be accepted and the order made by the Magistrate in favour of the first party set aside because the learned Magistrate does not pretend to have complied with the provisions of s. 360, Cr. P. C. even to the limited extent indicated.

Z. K. *Reference accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 294 OF 1925.

June 9, 1925.

Present:—Mr. Justice Banerji.

BRIJ BEHARI LAL—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 75, 511—Conviction for attempt to commit offence—Enhanced punishment, whether can be inflicted.

Under s. 75 of the Penal Code it is only when an accused person is convicted of an offence under Ch. XII or Ch. XVII of the Penal Code that he is liable to enhanced punishment. An accused person convicted of an attempt to commit an offence cannot be made liable to enhanced punishment under that section.

Criminal appeal from an order of the Additional Sessions Judge, Aligarh, dated the 21st March 1925.

Mr. *I. B. Banerji*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Brij Behari Lal has been convicted of an offence to commit theft, and has under s. 75 of the Indian Penal Code been sentenced to five years' rigorous imprisonment by the learned Sessions Judge of Aligarh. The main contention before me is that when an accused person is convicted of an attempt to commit an offence, he cannot be made liable to enhanced punishment under s. 75 of the Indian Penal Code. A reference to s. 75 clearly shows that only when an accused is convicted of an offence under Ch. XII or Ch. XVII of the Indian Penal Code, that he is liable under the circumstances set out in that section to enhanced punishment. Now as the accused has been convicted not under Ch. XVII but under Ch. XXIII, in which s. 511 is to be found, the accused cannot be punished for anything more than what the law provides for, namely, half of the maximum term provided by s. 379, and he is not liable to enhanced punishment under s. 75. I am, therefore, of opinion that the sentence passed on the appellant is illegal. He has been rightly convicted for an attempt to commit theft, and the maximum punishment that I can

give him under the section is 18 months' rigorous imprisonment. I, therefore, set aside the sentence of imprisonment passed by the learned Judge and I direct that the appellant Brij Behari Lal be sentenced to 18 months' rigorous imprisonment for an attempt to commit theft (ss. 379/511 of the Indian Penal Code).

Z. K. *Sentence altered.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 39 OF 1925.

March 31, 1925.

Present :—Mr. Daniels, J. C.

Syed ALI ABBAS *alias* BANNE SAHEB —COMPLAINANT—APPLICANT

versus

SUBBA SINGH AND ANOTHER—ACCUSED—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 448—U. P. Excise Act (IV of 1910), s. 53—Search carried out by Sub-Inspector without warrant—Reasons not recorded—Criminal trespass—Intention, proof of.

An offence under s. 448 of the Penal Code requires an intention either to commit an offence or to intimidate or annoy the person in possession.

The mere fact that an Excise Sub-Inspector omits to record his reasons as required by s. 53 of the U. P. Excise Act for not first obtaining a search warrant from a Magistrate, does not render him guilty of an offence under s. 448 of the Penal Code if he proceeds to carry out the search.

Application for revision of the order of the Sessions Judge, Lucknow, dated the 17th February 1925, confirming that of the City Magistrate, Lucknow, dated the 10th November 1924.

Mr. *H. C. Dutt*, for the Applicant.

ORDER.—The Sub-Inspector of Wazirgung who is the opposite party in this case searched the applicant's house for cocaine. It appears that he omitted to record his reasons as required by s. 53 of the Excise Act for not first obtaining a search warrant from a Magistrate. On this the applicant filed a complaint against him of various offences ranging from defamation to dacoity. That complaint was dismissed under s. 203, Cr. P. C., and as the Sessions Judge refused to make a reference to this Court the present application is filed in revision. The applicant's learned Counsel does not insist on most of the offences contained in the application but urges that the real offence is one of criminal trespass. Now admitting that it might be an act of trespass to enter the applicant's house without complying with all the formalities required by law a criminal charge under s. 448 requires something more. It requires an intention either to commit an offence or to intimidate, insult or annoy the person in possession. There is no indication in this case of any such intention and the complaint was, therefore, rightly dismissed. I reject the present application.

Z. K. *Application rejected.*

CALCUTTA HIGH COURT.

Re SUIT No. 1452 OF 1924.

May 22, 1925.

Present:—Mr. Justice C. C. Ghose.

A. H. SKONE AND ANOTHER—DEFENDANTS —APPLICANTS

versus

V. N. BASON—PLAINTIFF—OPPOSITE PARTY.

Contempt of Court—Jurisdiction of Court to punish for contempt—Ill-treatment of process-server, whether contempt.

The jurisdiction to punish for contempt of Court is inherent in the Calcutta High Court as a Court of Record. But the Court always exercises its power of punishing a contempt with great forbearance and acts with scrupulous care. It is ordinarily chary of punishing people for contempt and when the occasion arises it deals with such questions in the interest of the public, bearing in mind that the greater the power it possesses, the more caution it is necessary to use in exercising it. In other words, the Court does not interfere where the offence is of a slight or trifling nature and it only interferes where there is a real attempt to obstruct the course of justice. [p. 727, col. 2.]

It is contempt of Court to assault, ill-treat or threaten a process-server engaged in his duty. The object in punishing for contempt where a process-server in the execution of his duty has been abused and assaulted is not to vindicate the dignity of the Court but to prevent undue interference with the administration of justice. The law has armed the Court with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to witnesses, jurymen and process-servers are not allowed. The principle is that those who have duties to discharge pursuant to orders of Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of Justice and carry out their orders. [p. 727, col. 2; p. 728, col. 1.]

The Court does not and will not ordinarily take notice of mere rude behaviour on the part of the person against whom the allegation is made; the test is, did the person in question abuse or maltreat the serving clerk while he was engaged in the execution of his duty. [p. 728, col. 1.]

Mr. *S. K. Chakraburtty* (with him Mr. *A. N. Chaudhuri*), for the Defendant.

Mr. *W. W. K. Page*, for the Plaintiff.

JUDGMENT.—This is a Rule calling upon the plaintiff Vernon Milward Bason to show cause why he should not be committed to Jail or otherwise dealt with for contempt of Court for having insulted one Ashit Kumar Pal, a clerk in the service of Messrs. Orr, Dignam & Co., the Attorneys for the defendant Anne Helen Skone in manner stated in the latter's petition.

The facts, shortly stated are as follows :— The plaintiff Bason instituted this suit against the defendants A. H. Skone and another for damages for breach of a certain agreement. The suit was dismissed with costs on scale No. 2 on the 9th February 1925. The defendants' bill of costs was taxed and an allocatur was issued on the 2nd May 1925 for a sum of Rs. 5,827-4-0. It was served on Bason's Attorneys on the 5th May 1925. On the 9th May 1924 the defendant A. H. Skone took out a notice under O. XXI, r. 37 (1), C. P. C., signed by the Master of this Court requiring the plaintiff to appear in person before this Court on the 22nd May 1925 at 11 o'clock in the forenoon to show cause why he should not be committed to Jail in execution of the decree for costs passed against him on the 9th February 1925. Ashit Kumar Pal who as mentioned above is a clerk in the service of Messrs. Orr, Dignam & Co., was entrusted by the latter with the duty of effecting service of the said notice on Bason. Bason had been a client of Messrs. Orr, Dignam & Co., and was known to Ashit Kumar Pal. It appears that on the 9th May at about 2-30 P M. in the afternoon Ashit Kumar Pal called at premises No. 6-1, Moira Street where Bason resides, for the purpose of serving the said notice upon him. Bason occupies a flat on the first floor of the said premises. There were servants downstairs but they were not Bason's servants and Ashit Kumar Pal went up to the first floor. He says that when he got to the first floor he did not find the front door of the sitting room of the plaintiff to be closed, the door was open and a *purdah* was hanging at the entrance to the room. He found that Bason was sitting in a chair and reading a newspaper. Ashit asked him if he might enter and thereafter he entered the sitting room with Bason's permission. He informed Bason of the purpose for which he had called and made over to him both the original notice under O. XXI, r. 37 (1), C. P. C. and a copy. (It may be noted in passing that Ashit in his affidavit states that he made over the original notice only to Bason) Bason read the notice and flung the papers at the floor. Ashit thereupon picked the papers from the floor and showed to Bason the original notice bearig the seal of this Court and informed him that if he refused to accept service he would affix a copy on the outer-door. Bason thereupon became very angry and called Ashit Kumar Pal a "damned swine" and caught him by the throat and dragged him and pushed him towards the door so that he nearly fell down. Ashit states that thereafter he affixed a copy of the said notice on the front door of the room. He came back to the office of his employers and reported the matter to the Head Court Clerk of Messrs. Orr, Dignam & Co., Babu Kali Prosanno Chakrabarty. The latter hearing what had happened took Ashit Kumar Pal to Mr. D. C. Banerjee, a member of the firm of Messre. Orr, Dignam & Co., who was in charge of the case and reported the incident to him. Mr. Banerjee directed that Ashit should make an affidavit setting out what had happened. It was a Saturday and the affidavit was not made till the Monday following.

Bason denies the allegation made by Ashit Kumar Pal and his account of what happened on Saturday, the 9th May, is as follows : "That on Saturday, the 9th instant, while I was resting in my sitting room (which is on the first floor of the premises No. 6-1 Moira Street) I saw a person on the other side of the *purdah* at the entrance door of my half flat. Not having my glasses on, I could not distinguish the person and called out "Who are you and what do you want?" I then got up to go to the door but the man whom I had seen walked quickly into my room and informed me that he had a notice of the High Court to serve on me. I enquired of him if he was a Court Official. He replied that he was a clerk of Messrs. Orr, Dignam & Co., and that it was not necessary for a Court Official to serve me with

the said notice. I read the said notice, handed it back to the said clerk and told him that it was quite unnecessary to take out the said notice, as I had been all along willing to pay the taxed costs and that I was unable to understand why such a notice had been taken out. I requested the said clerk to take it to my Attorneys, Messrs. B. N. Basu & Co., who would accept service on my behalf and who were in communication with Messrs. Orr, Dignam & Co., then on the subject and had informed them that I would pay the taxed costs. I assured him that there would be no trouble about the payment of the costs. The clerk said "Yes sir, I will go to Messrs. B. N. Basu & Co., now." There the matter ended. Bason produced an affidavit in support of his version by his *khitmatgar* Shaik Korban. There are affidavits by Mr. Banerjee and Kali Prosanno Chakrabarty stating that Ashit Kumar Pal on his return from 6-1 Moira Street reported to them that he had been abused and assaulted by Bason when he went to serve the said notice.

There being on the affidavits a direct conflict of testimony, I directed that the deponents should be cross-examined before me and accordingly this was done and I have had an opportunity of seeing the deponents in the witness-box and of listening to their respective versions of what happened on the afternoon of the 9th May last. Mr. S. K. Chakraburtty, who appeared in support of the Rule, at first expressed his unwillingness to cross-examine Bason, as the latter was in the position of an accused; but Mr. Page, who appeared for Bason, waived all questions of privilege and thereupon Bason was cross-examined by Mr. Chakraburtty. Bason in his evidence stated that the conversation between him and the clerk, Ashit Kumar Pal, was in "very nice and amicable language throughout" and that the last conversation was on the landing outside the door and was quite friendly. Mr. Page has argued that having regard to the denial of Bason no order against him could or should be made, and, secondly, that, assuming for the sake of argument that the allegations made by Ashit Kumar Pal are true, Bason has not committed contempt of Court.

I desire to say at once that I accept unreservedly as true the evidence of Ashit Kumar Pal. He was in the witness box for some length of time and I am bound to say that he struck me as a witness of complete honesty and truth. A great deal of criticism has been levelled on slender and minute points in his evidence; but I have heard nothing to induce me to doubt the correctness of his evidence. It follows that I disbelieve the evidence of Bason and of his *khitmatgar* and I can conceive of no reason whatsoever why this inoffensive clerk, Ashit Kumar Pal, should have started a false case against Bason as is alleged by the latter's Counsel. It may be something difficult to choose between witnesses where there is oath against oath; but in my judgment having seen the witnesses in the box, it is not difficult to make out which side has told the truth. The question then arises whether what happened on the 9th May constitutes contempt of Court on the part of Bason.

The jurisdiction to punish for contempt of Court is inherent in this Court as a Court of Record and without it, its constitution as a Court of Record would be altogether useless. But the Court always exercises its power of punishing for contempt with great forbearance and acts with scrupulous care. It is ordinarily very chary in punishing people for contempt and when the occasion arises it deals with such questions in the interest of the public, bearing in mind that the greater the power it possesses, the more caution it is necessary to use in exercising it. In other words, the Court does not interfere where the offence is of a slight or trifling nature and it only interferes where there is a real attempt to obstruct the course of justice. Now from very early times, it has been held to be contempt of Court to assault, ill treat or threaten a process-server engaged in his duty. The cases on this point are numerous and they will be found collected in Vol. 16 of the English and Empire Digest, pp. 32, 33; Oswald on Contempt, Third Ed., p. 85, and Vol. VII, Halsbury's Laws of England, p. 288. The object in punishing for contempt where a process-server in the execution of his duty has been abused and assaulted is not to vindicate the dignity of the Court but to prevent undue interference with the administration of justice. As has been said the law has armed the Court with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to

witnesses, jurymen and process-servers are not allowed. The principle is that those who have duties to discharge pursuant to orders of Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of Justice and carry out their orders. Bearing the above in mind, I have no doubt in my mind that Bason had been guilty of contempt of Court.

With reference to Mr. Page's contention that inasmnch as the alleged circumstances of contempt have been positively denied by Bason, this Court could not or would not punish him for the contempt. In this connexion I desire to quote the words of Shadwell, V. C., in the case of *Emery* v, *Bowen* (1). He said: "I must observe that I do not admit that this is the doctrine of the Court and in *Peachey* v. *Peachey* (unreported), I thought it right to commit the party and there was an appeal from my order to the Lord Chancellor and he affirmed the order and, therefore, I think that notwithstanding the positive denial of the party, it is the duty of the Court to look into all the affidavits and see on which side the truth lies." I have, therefore, looked into the entire evidence and I have come to the conclusion indicated above. Mr. Page said if I believed the process-server then no one would be safe in Calcutta. This, if I may say so, is an argument of despair and I propose to take no notice of it except to remark that the statement of it carries its own appropriate answer. Mr. Page argued that Bason might have been guilty of cowardly and despicable conduct, but he certainly did not prevent the serving clerk from affixing a copy of the notice on the door of the sitting room and, therefore, he has not been guilty of contempt of Court. Each case must depend upon its own facts and while I agree that the Court does not and will not ordinarily take notice of mere rude behaviour on the part of the person against whom the allegation is made, the test is, did the person in question abuse or maltreat the serving clerk while he was engaged in the execution of his duty. In my opinion there can be one answer to this question on the facts of this case and that in the affirmative. It is intolerable that process-servers in the employ of Attorneys while engaged in the execution of their duties should be treated in the manner in which Ashit Kumar Pal was treated and in my opinion it would be an abdication of the functions of this Court to refuse to take notice of a case like the present one. Ordinarily in cases like this, an apology is tendered and the party found to be guilty of contempt is made to pay the costs. This was what happened in the case of *D' Cunha* v. *The Alliance Bank of Simla, Ltd.* (unreported), where a process-server named Bhusan Chandra Das in the employ of Mr. P. N. Sen, an Attorney of this Court, who had gone to serve a Rule on Messrs. Bird & Co. was abused by one Kenaram Laha, a cashier in the employ of Messrs. Bird & Co., at Chartered Bank Buildings in Calcutta. The matter attracted the notice of Mr. Justice D. Chatterjee, sitting as vacation Judge, and ultimately owing to the importance of the case, the then Chief Justice, Sir Lawrence Jenkins, formed a Special Bench consisting of himself, Mr. Justice Carnduff and Mr. Justice Chatterjee to hear the matter. The offending parties apologized and thereupon by their order, dated the 3rd November 1909, their Lordships held that it had been established that there had been contempt of Court and directed that the parties concerned should pay the costs. In this case, as far as, I can find, the attitude of Bason is one of insolent defiance and untruthfulness. In these circumstances I have very carefully considered what my judgment should be. I find as a fact on the entire evidence before me that Bason has been guilty of contempt of Court in having abused and assaulted Ashit Kumar Pal while he was engaged in the duty of serving the said notice and I direct him to pay a fine of Rs. 200 and to pay the costs of this application. In default of payment of fine, Bason will be committed to the custody of the Superintendent of the Presidency Jail for one week.

Z. K. *Order accordingly.*

(1) (1836) 5 L. J. Ch. 349.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 156 OF 1925.

April 16, 1925.

Present:—Mr. Justice Boys and Mr. Justice Banerji.

HASAN ALI AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 164—Confession, recording of—Recording Magistrate, position of—Questions, whether can be put—Record of questions—Duty of Magistrate.

A Magistrate recording a statement or a confession under s. 164 of the Cr. P. C. is not absolutely prohibited from putting any question to the deponent but his position when recording such statement or confession is merely that of a recording Magistrate, and he is in no sense enquiring into the case and in no sense an investigating officer. There is no justification for such a Magistrate to extract by questions put to the deponent facts which the deponent has not spoken to before such Magistrate, and facts of which the Magistrate himself would only be aware because he has been supplied with some copy of a statement which somebody else alleges the deponent has made and is willing to make again before the Magistrate, or unless he is prompted by somebody who is aware of such facts. Everything must, however, depend on the nature of the question and the object of it and the mere fact that an answer was elicited by a question does not make the proceeding improper or the statement inadmissible in evidence as a confession. [p. 731, col. 1.]

Under s. 164 of the Cr. P. C. a Magistrate recording a confession is bound to record every question that he puts to person making the confession. It is of great importance that this provision of the law should be obeyed otherwise it might be impossible to tell how far the deponent has deposed voluntarily to a matter and how far his statement was extracted from him by questioning in the nature of cross-examination. [p. 731, col. 2.]

Criminal appeal from an order of the Sessions Judge, Gorakhpur, dated the 14th February 1925.

Messrs. *Nehal Chand, J. M. Banerji* and *T. N. Chadha*, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This appeal concerns a dacoity said to have been committed, and which was undoubtedly committed at the house of Birj Raj Pandey in the village of Pipra Hamail in tha Gorakhpur District at some time in the middle of the night of the 27th-28th July 1924. The Police Station of Hata was five miles off and the first report was made at 10 A. M. on the 28th. One of the alleged dacoits Dukhi was captured on the spot, and on the 31st of July he was taken before a Magistrate and made a confession recorded under s. 164 of the Cr. P. C. and he has not retracted from that confession though he has filed an appeal from Jail. His uncle Nagri says that he Nagri gave himself up after having consulted the *karinda* of his *zemindar*. He suggests that he was alarmed when he found that one of the dacoits, his nephew Dukhi was missing, and apparently thought it advisable to consult the *karinda* as to the best way of saving his own skin. On the other hand a constable takes to himself the credit of having arrested Nagri because he noticed that he had injuries. It is not really material to determine which of these two versions is correct, for the real important question is whether we can believe in substance the confession of Nagri recorded under s. 164 on August the 1st. Two other of the appellants before us, Chilar and Palku, also made confessions on August 3rd and August 4th, which were recorded under s. 164 but which they have retracted. As a result of these confessions and of the subsequent investigation 19 men were sent up for trial, of whom the learned Sessions Judge has convicted 12 who are now the appellants before us. One very important question which arose for decision in the case was as to whether this was an ordinary dacoity in which the purpose of one and all of the dacoits was to loot, or whether it was an attack on the house of Birj Raj of which the motive was the personal animosity of a man called Nirhu, *Mukhia* of the village of Papra Hamail, and his supporters. Birj Raj alleges that such enmity existed and it is admitted on all sides. It was due to the rivalry between Nirhu and Birj Raj for the post of *Mukhia* when Mangal, the previous holder died. In this rivalry Nirhu had so far succeeded that he had been appointed. A number of witnesses, chiefly Birj Raj and those under his control in the sense of being members of his family or servants, named Nirhu and others of Nirhu's family. Of those all have been acquitted with the exception of Munshi, who was a cousin of Nirhu. The fact however, that Munshi has been convicted means that the question remains of some importance as regards his case as to whether this was an ordinary dacoity, or whether it was due to personal animosity, even though a number of those taking part in the attack may have had no motive of enmity themselves, and had merely joined for the sake of what they might be able to get out of it. One fact is clear that they got very little

out of it, if anything. No property of any sort or description has been recovered with the exception of a *hamel*, which was said to have been found in a *bagh* close by, and two or three articles said to have been taken off the person of Dukhi when he was captured on the spot. According to the prosecution evidence as appearing in the statement of the approver and the confessions of some of the accused, it would appear that the dacoits had very definite information that several *gharas* filled with rupees could be found buried under the cot of one of the women living in the house. No serious attempt appears to have been made to get at this money. The only evidence on the record pointing in this direction is that the Investigating Officer says that he found the ground at one place dug up in *Musammat* Gomti's room. No attempt was made at the trial to get anything further out of the Sub-Inspector or out of the approver as to why, if it was known that the money was in a particular spot and the object of the dacoity was only loot, some of the dacoits at least did not go straight for that spot and make a serious effort to get it. Another feature of this dacoity is that there were at least 28 men who are said to have taken part in it, while the only men sleeping in the house of whom we hear are Birj Raj complainant his younger brother Rajendra, and a man called Gudri who was sleeping with them. Three women, of one of whom we hear nothing further, were sleeping inside with two children. The story of the attack on the house really amounts to little more than the beating of Birj Raj and his brother Rajendra, and the snatching of some ornaments from the persons of two of the women. A number of slight injuries appear to have been inflicted some of them apparently with a pointed weapon alleged to be a spear, but there was nothing in the nature of really serious injuries. On the other hand some of the dacoits themselves received spear wounds also of a minor description, and apparently inflicted either with the spear that one of the party took with him and which was snatched from him, or with spears which the inmates of the house possessed. The whole occurrence described could not have taken really more than a minute or two before the dacoits fled upon the approach of the villagers. The whole incident to our minds indicates that it was rather in the nature of an attack on Birj Raj with a hope and expectation on the part of some of the assailants of getting some loot, rather than that of a determined dacoity for the purpose of loot and loot only. Further we find in the statements of the approver and of the confessing accused indications that the dacoits were not old hands at the game, and were rather to be described as bad characters of a petty sort, and lastly we find that there is not a single previous conviction against any one of them of any serious offence of violence such as would permit the use of s. 75 of the Indian Penal Code. The general conclusion from these facts and the general impression that we have formed from the evidence on the record is that it is more probable that the origin of the attack is to be found in personal enmity against Birj Raj and his household, rather than in the sole intention to loot. If we express ourselves in regard to this part of the case somewhat vaguely it is only because owing to the nature of the trial in the Sessions Court where no proper attention was directed to this point and where there are no reliable indications in the evidence on the record.

The next point upon which we will comment is the statement of Nagri recorded under s. 164. We find that the Magistrate in recording that statement at first approached it in a proper manner. He satisfied himself that the statement was of a voluntary nature, and then proceeded to take it. Nagri detailed his whole story. He had come to within the last few lines of his statement when for the first time he mentioned one of the present appellants before us, namely, Hasan Ali. He said: "In the morning I enquired from Bandhu, Jahangir, Hasan Ali, Sundar, Mundar and Muneshar, but they said that they had got nothing." This was his first and only mention of Hasan Ali. The Magistrate then put him the question "you have mentioned above the name of Hasan Ali; did he also take part in the dacoity?" And the answer was "Hasan Ali also took part in the dacoity," and the deponent went on to say further things about him. The Magistrate next asked: "what more do you want to state." In reply to this very proper question the narrative given by the witness continues for some time, but it very soon is apparent from the record of his statement, though question and answar are not recorded, that the Magistrate was beginning to ask him questions, and the further we go into the record of the statement, the more apparent

it is (questions and answers being sometimes recorded) that the remainder of his deposition was solely elicited by questions put to the deponent. The Magistrate himself in his evidence has stated to the Court: "all the questions put to Nagri are not recorded." It is manifest from the statement that that is so. Strong objection is taken by Mr. J. M. Banerji particularly on behalf of Hasan Ali to this procedure. We think his objeclion is entirely justified. It would be going much too far to say that a Magistrate recording a statement or a confession under s. 164 cannot and should not ask a single question of the deponent. But it is equally certain that his position when recording such statement or confesion is merely that of a Recording Magistrate, and that he is in no sense enquiring into the case, and that he is in no sense an Investigating Officer. The whole object of the section is very clear. Such statements and confessions made to a Police Officer are not regarded as being made in circumstances which justify a Court under ordinary circumstances in relying upon the record of them and they cannot be ordinarily put in evidence. But it is desirable that if a witness is really willing to make a statement, or a guilty person is really willing to make a cofession, that a record of that should be made in such circumstances as may make it reasonably safe to rely upon it. We think that the Magistrate would be justified in, and ought in the ordinary performance of his duties, to clear up any matter which is ambiguous on the face of the statement, but that he is wholly unjustified in extracting by questions from the deponent fact which the deponent has not spoken to in his Court and facts of which the Magistrate himself would only be aware because he has been supplied with some copy of a statement which somebody else alleges the deponent has made and is willing to make again before the Magistrate, or unless he is prompted by somebody who is aware of such facts. Everything must depend on the nature of the questioning and the object of it, and the mere fact that an answer was elicited by a question, does not make the proceedings improper, or the statement inadmissible as a confession. In the present case it is clear that the deponent had left the matter of Hasan Ali ambiguous. He had already mentioned five men as amongst those who had taken part in the dacoity. He then described himself as making an enquiry the next morning about their share of the loot from these five men, and adding a 6th man. The Magistrate was quite right to notice that the facts were left ambiguous as regards this 6th man, and he might very well have said to the deponent: "why did you ask Hasan Ali if he had received any of the loot." But the form of the question which he actually did put in a leading form "did he also take part in the dacoity" was open to exception. We have said enough to indicate the nature of the questioning which we think is permissible under s. 164, and it is unnecessary to pursue the record of this statement further, for it is obvious on the face of it that a very large number of the questions asked were not prompted by any wish to clear up an ambiguity, but were based on a knowledge of the statement which the deponent might be expected to make, obtained from some record given to the Magistrate or from information supplied to him orally. It is clear that the questions were questions which could not have been prompted by anything which the deponent had himself said before the Magistrate.

Another point on which the record of the statement is defective is that under s. 164 the Magistrate is bound to record every question that he asks. This he clearly did not do, and admits he did not do. It is of great importance that this provision of the law should be obeyed, otherwise it may be impossible to tell how far a witness voluntarily deposes to a matter, and how far it was extracted from him by questioning even in the nature of cross-examination.

In this case we do not think that the irregularities we have mentioned should lead us in any way to reject the confession, because the witness has given evidence on oath, and his confession is really only of importance as corroborating or contradicting that evidence given in Court. But the defects might very well under other circumstances have been of vital importance.

We turn now to a consideration of the case against each of the accused. As regards Hasan Ali the chief feature of the case is that he and his brother Bandhu are the only two Muhammadans who are said to have taken part in this dacoity. This is no doubt a striking feature. But we note first

of all that Hasan Ali and his brother, if he was in it, should not be regarded as being the only two Muhammadans of a party of 28, for it is not suggested that they had anything to do with any others than the five men who are said to have come from Dumri. Even so regarded it is still urged that they are not said to have been particularly brought by Nagri, who was no doubt the leader of the Dumri party. Both of these considerations deserve weight, but we do not find that they are of sufficient weight to override the direct evidence given by the witnesses who name Hasan Ali. We should note that Bandhu has been acquitted. He was the elder brother of Hasan Ali. He may be said to have been acquitted on two grounds, one that Nagri and he had fallen foul of each other sometime before the dacoity, and it would be quite conceivable that Bandhu's name had been put in by Nagri and by other at Nagri's instigation. It is argued that the mere enmity which would induce Nagri to name Bandhu, would induce him to put in the name of Hasan Ali. This is a fair argument, but we find that the name of Hasan Ali is not only mentioned by Nagri but the case of this man is distinguishable from that of Bandhu in that he is named in addition by Brij Raj, Gudri and Dwarka, while Bandhu was only named by Nagri and Qayamat. It is suggested that Brij Raj Gudri and Dwarka were naming Hasan Ali to please Nagri and that it was in the nature of a return for his attributing the dacoity to an organization carried out by Nirhu. In other words that Brij Raj said: "you name Nirhu to please me, and I will name Hasan Ali to please you.,, But we think that if there had been any force in this contention. Nagri would have asked Brij Raj to name not Hasan Ali but Bandhu, or at any rate Bandhu as well as Hasan Ali. But we find in fact that Brij Raj does not even suggest that Bandhu was in the dacoity. We find ourselves, therefore, unable to reject the evidence of Nagri as corroborated by Brij Raj, Gudri and Dwarka. With the question of sentence we will deal later.

Similarly in the case of Sunder we find it impossible to reject the evidence of Udit corroborating that of Nagri. We give no weight to the confessions of Palku and Chilar who did not identify Sundar in Jail, nor to the evidence of Jan, who evidently did not give the Judge the impression of being an honest witness. But we find nothing whatever to be said against the evidence of Udit. We have referred to the fact that Palku and Chilar, the two confessing accused, did not identify Sunder in Jail. The procedure was unusual. It would appear that the Police had on the 2nd of August an idea, hope or expectation, that Palku and Chilar would confess as they did in fact confess on August 3rd and 4th. They probably had further the idea that one or both of them might be made into approvers. They may have wished to put the other accused up to be identified by these two men with a view to get these identification proceedings carried out very early and thereby strengthen their value if the men subsequently were made approvers. On the other hand they may have desired to tie Palku and Chilar down very quickly after having brought some pressure to bear upon them. There is no sufficient evidence as the matter was not cross-examined upon to enable us to say whether this procedure was excusable or reprehansible. We are more concerned now with the actual facts, and while at first sight it would seem that the statements of Nagri and Udit must be received with great caution because Palku and Chilar both failed to identify Sunder in Jail, yet that consideration becomes of little moment when it is appreciated that Palku and Chilar not having yet confessed in Court and not having yet any offer made to them of a possible pardon, would naturally think it wise to be cautious and prudent not to identify at that stage any of the accused. The record of the identification proceedings suggests very strongly that this is what happened. We do not think, therefore, that the evidence of Nagri and Udit can be discounted by the fact that Palku and Chilar did not identify him in Jail.

The evidence against Mundar requires no detailed discussion. He was named by Nagri, Rajendra, Sharifa and Bundhu. Of these men Sharifa made three right identifications. His evidence was not accepted as sufficient against Muneshar, but the Judge evidently thought that possibly the witness was making an honest mistake and not deliberately naming anybody falsely.

The case of Sidhu is on a different footing to the other three. Corroboration of the approver is only to be found in the statement of Qayamat. The Judge has found

Qayamat's statement insufficient corroboration of the approver in the case of Bandhu, and he said that he would hesitate to act on the solitary identification by Qayamat. We do not see any material distinction between the case of Sidhu and the case of Bandhu in this respect. We, therefore, acquit Sidhu.

The case of Munshi has really been established by overwhelming evidence, and the only difficulty that we had in his case was to determine whether there was really nothing but an ordinary dacoity, or whether it was a dacoity instigated by personal enmity. With that question we have already dealt, and we have shown that the evidence in our opinion is in favour of the fact that the dacoity was organized owing to personal enmity. If this is so, there is nothing improbable in the presence of Munshi.

The case against Bhuindhar is supported by the approver and the confessions of Dukhi and Chilar. While we do not lose sight of the importance of remembering that all these three statements are in the nature of tainted testimony, we think that we can safely rely upon them at any rate in the case of this man.

With the case of the other six appellants we see no reason to deal in detail. Three of them, Palku, Chilar and Dukhi are men who have confessed and as regards the other three, we see no reason to differ from or to criticise the conclusions of the learned Sessions Judge.

The result is that we maintain the convictions of all the appellants except Sidhu, whose conviction we set aside and direct his release. In the view that we have taken of this dacoity, and in view of the injuries inflicted we think that the learned Sessions Judge has taken an unnecessarily severe view on the question of sentence We agree with him in thinking that Chilar, Palku, Nepal, Nubshi and Manohar are men whose conduct in the dacoity calls for a more severe sentence, but we think that under the circumstances of the case transportation for life is excessive. We, therefore, in the case of these five men reduce the sentence from transportation for life to one of five years' rigorous imprisonment, and we set aside the conviction of Munshi under s. 397 maintaining the conviction under s. 395 and reducing the sentence as we have stated. The sentence passed on Dukhi, Sunder, Mundar, Bhuindhar and Birbal we reduce from 10 years' rigorous imprisonment to three years' rigorous imprisonment. Of the remaining two, accused we have already acquitted. Sidhu, Hasan Ali is only 22 years of age and on that account has been given a smaller sentence but we think a sentence more severe than is called for. We accordingly reduce the sentence passed on him from five years to a sentence of 1½ years' rigorous imprisonment.

Z. K. *Sentenced reduced.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 309 OF 1924.

December 1, 1924.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice Mukerji.

DARGAHI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 360—Evidence Act (I of 1872), s. 33—Penal Code (Act XLV of 1860), s. 395—Reading over deposition to witness while another witness is being examined, legality of—Deposition of witness before Committing Magistrate, use of, at trial—Procedure—Dispute between two communities—Looting of shops—Separate offences.

To read over the deposition of a witness while another witness is being examined by the Court is not sufficient compliance with the terms of s. 360 of the Cr. P. C., since the intention of that section is that the evidence should be read in such a manner that the accused can hear what is being read and take objection to it. An accused person cannot be expected at one and the same time to listen to the evidence that is being read over and to the evidence of a fresh witness that is being recorded [p. 734, cols. 1 & 2.]

Under s. 360 of the Cr. P. C. the evidence of a witness must be read over before the examination of another witness is commenced. [p. 736, col. 2.]

Where the deposition of a witness made before a Committing Magistrate is sought to be used at the trial under the provisions of s. 33 of the Evidence Act, the Court must first be satisfied that it was recorded after due compliance with the provisions of s. 360 of the Cr. P. C. [p. 736, col. 1.]

In consequence of a dispute between the members of two communities, the members of one community raided and looted a large number of shops in the bazar belonging to the other community:

Held, that the looting of each shop was a separate offence and that in respect of each such offence the Court must come to a finding what the offence amounted to. [p. 735, col. 1.]

Criminal appeal against an order of the Officiating Sessions Judge, Hooghly, dated May 10, 1924.

Mr. *Camell* (with him Babu *Nanda Gopal Banerjee*), for the Appellants.

Mr. *Khundkar*, Deputy Legal Remembrancer and Babu *Heramba Chandra*, for the Crown.

JUDGMENT.—The eight appellants were tried before the Sessions Judge of Hooghly and a Jury on charges of rioting and dacoity. Five of them, appellants Nos. 1, 2, 5, 6 and 7, were convicted of rioting only, and sentenced each to one year's rigorous imprisonment. Two of them, appellants Nos. 3 and 8, were convicted of dacoity only, and sentenced each to three years' rigorous imprisonment. The appellant, No. 4, was convicted on both the charges, and was sentenced to three years' rigorous imprisonment for dacoity and one year's rigorous imprisonment for rioting, the sentences to run concurrently.

The first point taken in this appeal is that the trial is vitiated for failure of the Trying Court to comply with the provisions of s. 360 of the Cr. P. C. It is stated in the affidavit filed on behalf of the accused that the depositions were read over to the witnesses, and that, though this was done in the presence of the accused persons, it was done in such a manner that the accused persons could not hear the evidence read; and further that while the evidence of one witness was being read over to him, the evidence of another witness was being taken in the Court. To rebut this the prosecution have produced the statement made by the stenographer who read over the evidence to the witnesses. His account is that he read out the depositions of all the witnesses in the presence of all the accused persons, sitting at a place near middle of the dock in which the accused were standing, and he did so rather in a loud voice so as to reach the ears of all the accused, during tiffin hours, and when the examination of the witnesses was finished for the day. We do not attach much importance to the question whether the evidence was read sufficiently loud to be heard by all the accused. If any of the accused had any ground to object that they were unable to hear, they should have at once complained to the learned Sessions Judge, and this could have been remedied. No such complaint appears to have been made at the time, and we do not believe that the evidence was read in such a low voice that it could not be heard by the accused. But the other statement in the affidavit filed on behalf of the accused that the evidence was read over while the other witnesses were being examined is far more important. If this was done there was no compliance with the direction of s. 360 of the Cr. P. C., since in that section the intention is that the evidence should be read in such a manner that the accused can hear what is being read and take objection to it. Obviously they could not at one and the same time listen to the evidence that is being read over and the evidence of a fresh witness that is being recorded. The statement on behalf of the accused is a statement on oath. To rebut it there is nothing but the report of the stenographer which is not on oath. The learned Sessions Judge who held the trial has been transferred, and there is consequently no report from him as to what actually happened. Under these circumstances we must hold that the sworn statement has not been rebutted by the unsworn statement. Further, even if the stenographer's statement be accepted, the method in which the evidence was read over would not be in accordance with the first clause of s. 360 of the Cr. P. C. That clause provides that, as the evidence of each witness is completed, it shall be read over to him. That means that the evidence shall be read over before the examination of another witness is commenced. It is unnecessary to consider whether such a failure to comply strictly with the provisions of this section would necessitate a re-trial, since, as already stated, we do not accept the stenographer's statement in preference to that in the affidavit, and the affidavit, shows that there was no reading over "in the presence of the accused," as we interpret those words. We must, therefore, hold that the trial was vitiated and a re-trial must be ordered.

The learned Counsel, who appeared on behalf of the appellants, was prepared to argue 14 other points on behalf of his clients. We have not heard him on all these points. A large number of them may not arise when the case is re-heard, since they are based on the contention that there had been mis-direction in the charge to the Jury. At the fresh trial, if there is a fresh trial before a Jury, the charge will be based on the evidence given in that trial, and cannot be said that there is any probability that the mistakes, if any, in this connection would be repeated. But there were certain points of law which were urged which we have thought it necessary to consider in order that if there had

been any mistakes they may be rectified at the trial.

One of these points relates to the dacoity charge. This charge is in the following terms :—"that you, on or about the 3rd day of September 1922, at Telinipara, p. s. Bhadreswar, committed dacoity in the shops, stalls and houses of Hindus in and about the Victoria Mill Bazar, *e.g.*, shops of Padarat Sha and Sitaram and others, and thereby committed an offence punishable under s. 395, Indian Penal Code." According to the case for the prosecution, in consequence of a dispute between Muhammadans and Hindus, the appellants and others who are Muhammadans, raided and looted a large number of shops in the *bazar*. Evidence has been given of the looting of as many as 60 shops? The looting of each of these shops must be held to be a separate offence, and it is by no means certain that, even on the case for the prosecution, dacoity was committed every time a shop was looted. Though the number of rioters far exceeded five, it does not necessarily follow that there were as many as five persons looting each individual shop, nor does it necessarily follow that when each shop was looted there was force or violence used in every case which would make the offence the aggravated one of dacoity. However, as there must be a re-trial, it is not necessary to consider what was the effect of charging as a single dacoity what were in fact large number of separate offences. At the re-trial it will be open to the prosecution to have charges framed in respect of one or more individual dacoities which they are prepared to prove, and the trial can proceed on those charges. But we think that charges of dacoity should not be framed against those appellants who have been acquitted of dacoity at this trial. We further think it is a matter for consideration by the officers of the Crown whether it is desirable to frame charges of dacoity at all. The dacoities were not of the ordinary kind committed by a gang of professional thieves, but were aggravations, and no doubt serious aggravations of the riot. It is for the officers of the Crown to consider whether it would not be sufficient at the re-trial to proceed on charge of riot only.

We have been asked by the learned Counsel for the accused to make a special recommendation in the case of the 8th appellant, Abdul Gani Jamadar. We are informed that he has already been convicted both of rioting and of dacoity in connection with this occurrence ; for the former he has been sentenced to one year's, and for the latter to two years' rigorous imprisonment. In consequence of a previous conviction on the charge of a rioting the learned Sessions Judge directed the Jury that they should not convict him on the charge of rioting framed against him at this trial, and we hold that this was a proper direction. It seems to us worthy of consideration whether it is desirable that he should be again charged in respect of another dacoity arising out of the same occurrence.

Another point of law on which there is said to have been an error committed was in regard to the first information. It was urged that the First Information was not really the First Information as it was recorded by the Police Officer after he had been investigating the case for two hours or more. We hold that, having regard to the facts that have been placed before us, this information must be held to be an information which was recorded under s. 154. Though some enquiry was made before this information was recorded, it could not be an investigation under Ch. XIV of the Cr. C. P., since before there could be an investigation under that Chapter there must be an information given to an Officer in charge of a Police Station, and reduced to writing by him. No such information had been recorded until the statement Ex. 10 was taken in this case. Our attention has been drawn to several rulings on this point. It is unnecessary to discuss them in detail, but in some of them the facts will be found to differ on this point that the information had been recorded prior to the recorded statement which, it was held, could not be proved as the First Information. In others of the reported cases the real point of the ruling is not that the statement is inadmissible, but having regard to the late stage at which it was recorded it has lost a great deal of its evidentiary value. We hold there is no substance in this objection.

On the next point, as regards the erroneous admission of evidence, we hold that the learned Counsel for the defence made a sound contention. In the charge to the Jury the learned Sessions Judge has referred to the evidence of P. W. Nos. 77

and 100, Protap Singh and Sheo Lakhan Singh, about an incident which took place on the day after the occurrence. Their evidence is that there the appellant Basir wanted to convert Sheo Lakhan to Islamism and threatend to beat him if he did not agree. This incident on the day after the occurrence is totally irrelevant to either of the charges framed, and the evidence should not have been admitted.

The last point on which we have heard arguments relates to the depositions of 9 witnesses which were admitted in evidence at the Sessions Court on the ground that the witnesses were dead or could not be found. We express no opinion as to the sufficiency of the evidence which was adduced to render those depositions admissible under s. 33 of the Evidence Act. But we must point out that, if it is sought to use these depositions at the trial, the Court must first be satisfied that they were recorded after due compliance of the provisions of s. 360 of the Cr. P. C. since it is urged that they were not so recorded by the Magistrate.

For the above reasons we allow this appeal. We set aside the convictions of the appellants, and direct that they all, except Abdul Gani Jamadar, be re-tried on the charge of rioting. The appellants Ashgar Miya, Ramjan Sardar and Abdul Gani Jamadar may be re-tried on properly framed charges of having committed dacoity if the officers of the Crown think it necessary to do so. If no charges of dacoity are framed, the re-trial may take place before any First Class Magistrate to be selected by the District Magistrate.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 15 OF 1925.

April 7, 1925.

Present:—Mr. Dalal, J. C.

EMPEROR—APPLICANT

versus

PERU AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 337 (2-A)—Approver—Commitment to Sessions—Approver, whether must be committed along with accused.

The meaning of the provision contained in s. 337 (2-A) of the Cr. P. C. is that whenever an approver is examined the Magistrate has no jurisdiction to proceed with the trial but must commit the accused persons for trial to the Court of Session. It does not mean that the approver should be committed for trial along with the accused persons.

Reference made by the Sessions Judge, Gonda, with his Letter No. 277-XV, dated the 7th March 1925.

ORDER.—I made an attempt in my administrative capacity to explain s. 337 (2 A) to Magistrates but no attention is paid to my letter. That clause runs as follows :—

"In every case where a person has accepted a tender of pardon and has been examined under sub-s. (2) the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are no reasonable grounds for believing that the accused is guilty of an offence, commit *him* for trial to the Court of Session or High Court, as the case may be."

The word 'him' underlined *(italicised)* by me above does not refer to the person who has accepted a tender of pardon, but refers to the accused. What the provision of law means is that whenever an approver is examined the Magistrate has no jurisdiction to proceed with the trial, but must commit the accused persons on trial to the Court of Session. It does not mean that the approver should be committed for trial along with the accused persons. It is the common rule of interpretation that the pronoun refers to the person immediately preceding. Here the person immediately preceding is the accused and not the approver. The matter is further made clear by the provision of cl. (3) which directs the Courts what to do with the approver. The direction is that the approver unless he is already on bail shall be detained in custody until the termination of the trial. There would be no necessity for such a direction if the approver had to be committed to the Court of Session along with the accused persons.

It is obvious that Nur Muhammad approver has been committed to the Court of Session under a misapprehension. I quash his commitment and direct that he be detained in custody until the termination of the trial.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 212 OF 1923.
February 11, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Chakravarti.

SREE LAL CHAMARIA—PLAINTIFF—APPELLANT

versus

SIR HARIRAM GOENKA, KT., AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific performance—Damages for breach of contract—Readiness to perform contract—Repudiation of contract, effect of—Discretion of Court.

In order to claim specific performance of a contract or damages for its breach, the plaintiff must prove his readiness and willingness to perform his own part of the contract. [p. 738, col. 2.]

Readiness and willingness to perform a contract imply not only the disposition but the capacity to perform the contract. [*ibid.*]

When the defendant has repudiated the contract before the filing of the suit, the plaintiff is absolved from proving his readiness and willingness to perform the contract. [*ibid.*]

The claim for a decree for specific performance of a contract is not a matter of right. The Court has to consider the whole of the surrounding circumstances and the position of the parties, and then to consider whether it should grant specific performance or give damages in lieu thereof. [p. 740, col. 2.]

Appeal against a decree of the Subordinate Judge, First Court, Howrah, dated the 29th June 1923.

Messrs. *N. N. Sirkar*, *S. C. Bose* (with him Babus *Manmatha Nath Roy* and *Indu Prokash Chatterjee*), for the Appellant.

Dr. *S. C. Basak* (with him Babu *Paresh Chunder Mitter*), for the Respondents.

JUDGMENT.

Chakravarti, J.—The plaintiff appeals against a decree of the Subordinate Judge of Howrah dated the 29th June 1923 dismissing his suit for specific performance of a contract for sale of lands and in the alternative for damages, which was ultimately, in the circumstances which had happened, limited to a suit for damages only for breach of contract. The facts are these: The defendant by a contract dated the 27th March 1920 agreed to sell to the plaintiff 74 and odd *cottas* of lands in Howrah at the rate of Rs. 9,001 per *cotta*. It is admitted that there was a supplementary verbal contract when it was found that the mortgaged properties together with other properties had been advertised for sale in execution of a mortgage-decree dated November 13, 1917 obtained by the Maharajah of Darbhanga in the Original Side of this Court. By this latter contract the plaintiff undertook to pay off the entire mortgage-decree. This verbal contract was admitted by the plaintiff as will appear from what follows later on. The plaintiff brought this suit on the 8th May 1920. The properties were sold on July 14, 1920 and then the claim was limited to a prayer for damages only.

The defence was a prolix one. It denies the validity of the contract, although its execution was admitted. The Issues Nos. 3 4 and 5 embody the main points of controversy between the parties.

The learned Subordinate Judge found that the contract was vitiated by undue influence and that the plaintiff failed to perform his part of the contract and that the plaintiff was not in a position to raise sufficient money to carry out the term of the contract. He also found that the suit filed on the 8th May was premature. In the result the suit was dismissed with costs. Against this decree the present appeal has been filed.

Before I deal with the points which arise in this appeal I shall very briefly state the facts and circumstances which are admitted to have transpired between the date of the agreement, *i. e.*, 27th March 1920 and the date of the institution of this suit, *i. e.*, the 8th of May of the same year.

After the execution of the agreement, a further verbal arrangement, taking the version admitted by the plaintiff, took place to the effect that the plaintiff should pay off the mortgage-decree and until the sale of the Howrah properties, the title-deeds should be held by the plaintiff as security for the advance and after the sale of the Howrah properties, the title-deeds of the other properties should be held by the plaintiff by way of security for the amounts paid in excess of the sale price.

On the 27th the attorney for the defendant wrote to B. N. Bose & Co., the attorneys for the mortgagee to deliver the title-deeds to the plaintiff's attorney on his accountable receipt. After some correspondence the Receiver and the mortgagee's attorney declined to part with the title-deeds or to postpone the sale.

On the 8th April, 1920, Mr. P. N. Sen, the attorney for the plaintiff, wrote to Messrs. B. N. Bose & Co., a letter in which he enquired what the actual amount due to the Maharaja was and also stated that his client was prepared to pay the whole of the purchase-money in satisfaction of the entire amount due under the mortgage with interest and costs. In reply to this letter

Messrs. B. N. Bose & Co. wrote that the mortgagors had already had the account of the money due under the mortgage.

On the 26th of April, Mr. P. N. Sen wrote to the defendant a letter which stated that "In view of your present intention of getting out of the agreement, I have to give you notice that my client will take legal steps to enforce the agreement without any further reference unless you immediately declare that you have no intention to go back on the agreement and name your solicitor, etc.".

On the following day the plaintiff's attorneys wrote to the Receiver Mr. S. N. Bose informing him that his client was willing to pay the price agreed under the contract if the Receiver would agree to sell the Howrah preperty to the plaintiff and he also offered on behalf of his clients to pay off the entire sum due under the mortgage on condition that the Receiver should transfer the mortgage to the plaintiff. To this the reply was a curt refusal.

On the 29th April Mr. P. N. Sen wrote to the defendant in continuation of his letter of the 26th that the plaintiff had accepted the title of the defendant and promised to send a conveyance for execution by the defendant and asked the defendant "to arrange to have the property released from the mortgage."

On the 3rd of May the plaintiff filed petition before the High Court in the mortgage suit by the Maharajah. This petition has been quoted later on.

Then this suit was instituted on the 8th May. The defendant filed his affidavit in answer to the aforesaid petition on the 17th of May and eventually the plaintiff declined to deposit the decretal amount as directed by Mr. Justice Rankin by his order dated the 17th May 1920. The defendant filed his written statement on the 9th July 1920. The Howrah properties were sold on the 14th July 1920 in execution of the Maharajah's mortgage-decree for Rs. 8,61,000.

The decision of the case really depends upon the facts which appear from the documents filed in the case and the oral evidence has very little bearing on the matters.

Mr. Sircar who opened this appeal for the plaintiff put his case on this short and clear ground, namely, that the plaintiff was absolved from showing that he was ready and willing to perform his part of the contract, namely, the payment of the decree held by the Maharajah of Darbhanga, and thus to save the property from sale, because the defendant had repudiated the contract before the suit was brought. In support of this contention he relied upon the case of *British and Beningtons, Ltd.*, v. *N. W. Cochar Tea Co.* (1). The proposition of law as broadly stated is undisputable, but then the proposition which remains to be established is, "Was there such a repudiation in fact as would attract the operation of this rule." Before I discuss the matter any further, I shall quote here a few material extracts from the judgments of this case. At page 63, Lord Atkinson said as follows:—"Lord Abinger, in *Demedina* v. *Norman* (2), laid down that the words, 'readiness and willingness' used in such a connection imply not only the disposition but the capacity to perform the contract" then says that "repudiation is accepted and acted upon by the seller, as it evidently was in this case, the seller is relieved from the performance of all conditions precedent, including the condition of being ready and willing at the date of repudiation." At page 64 his Lordship goes on and says "In common sense the meaning of such an averment of readiness and willingness must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendant." At page 65 as Lords Mansfield says [*Jones* v. *Barkely* (3).] "The party must show he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther and do a nugatory act".

The passages which I have quoted are quite sufficient for the present enquiry. The plaintiff had not redeemed the mortgage which was a condition precedent to the sale and the plaintiff has not shown that he was stopped from doing so.

Mr. Sircar admitted, though not in clear terms, that his client had not performed his part of the verbal agreement, because there was clear repudiation by the defendant before the suit was brought. It is necessary, therefore, to examine the evidence to see whether this was established. Now

(1) (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265.

(2) (1842) 9 M. & W. 820 at p. 827; 2 Dowl. (N. S.) 239; 11 L. J. Ex. 320; 152 E. R. 347; 60 R. R. 912.

(3) (1781) 2 Doug. 684 at p. 694; 99 E. R. 434.

with a view to understand this part of the case, it would be very convenient to refer to the petition which was put in by the plaintiff on the 3rd of May 1920 only 5 days before the suit was instituted on the 8th of May 1920. In para. 6 at page 23, the subsequent verbal arrangement is set out. In para. 10, at page 27, the plaintiff treated the agreement for sale between himself and the defendant as subsisting and on that basis he asked for permission to pay off the mortgage-decree and there was no allegation in that petition against the defendant which could be construed as a repudiation of the contract by him. The statement in para. 12 is practically the same as is the 8th paragraph of the plaint which I shall deal with later on. Now it is clear from this petition that the plaintiff was bound to carry out the terms set out in para. 6 of this petition and this petition was obviously intended as a step in furtherance of that object, and this petition, as I have already stated, does not indicate that he, the plaintiff, was absolved from performing his part of the contract by any repudiation of it by the defendant and, therefore, he was not entitled to rely upon the rule of law quoted above.

Mr. Sircar very strongly relied upon the letter of the plaintiff's Attorney to the defendant, dated the 26th April, for establishing that the defendant had by omitting to reply to this letter, repudiated the contract and, therefore, after waiting for a reasonable time for a reply he was entitled to sue to enforce this contract without waiting for the result of this application, because the plaintiff was not bound to pay the mortgage-money due to the Maharajah. The learned Counsel further relied upon the affidavit which the defendant filed on the 17th May in reply to the plaintiff's petition mentioned above. The subsequent acts and conduct of the defendant may be useful in judging of the acts and conduct of the defendant before the suit was brought, but the repudiation by the defendant upon which the plaintiff relies must be established by the acts and conduct of the defendant before the suit was brought. I quoted the plaintiff's petition of the 3rd May only with a view to show that the contents of this petition clearly negative the case of such repudiation as will justify the plaintiff to plead that he was entitled to a convevance on the 8th of May when the suit was brought.

The plaint does not mention any plea of repudiation of the contract as justification for the non-performance of any terms of the oral agreement, which is not even mentioned in it. Then again the plaintiff states that he was always ready and willing to perform his part of the contract. No issue was raised on the question of repudiation of the contract although it is a material point in the case.

What then is the evidence of the repudiation of the contract by the defendant. His denial of the contract in his affidavit or in the written statement cannot furnish a cause of action arose on the 27th March the date of the contract. This has no meaning. The plaint except stating what is to be found in para. 12 of the petition quoted above gives no definite facts nor does it state any breach of the contract by the defendant. In para. 8 of the plaint the plaintiff states, "He (the defendant) is seeking to sell the said property at a higher price in breach of the said agreement and in derogation of the plaintiff's rights."

It seems to me that the plaintiff rushed to Court in a hurry and without any definite cause of action. The vague rumour that the defendant was trying to secure a higher price for the Howrah properties cannot constitute a repudiation of the contract for sale dated the 27th March. This conduct of the defendant may be explained on various hypothetical grounds. He might have been trying to find out other purchasers in case the bargain with the plaintiff failed, or it may be that the defendant if he got a better offer might expect to buy off the plaintiff. This conduct of the defendant cannot, therefore, be treated as a breach of the contract with the plaintiff.

Then what was the conduct of the plaintiff even though defendant gave no reply to the letter of the 26th April. Did the plaintiff treat that as a definite breach by the defendant? On the contrary on the 29th April the plaintiff conveyed his approval of the defendant's title to the property and according to the contract the time for completion of the contract after such approval was 30 days from the 29th April. In the petition to the High Court, the plaintiff gave no indication whatsoever as to the defendant having done anything which offered any obstacles in his way. It is quite clear from this petition that the plaintiff was trying to evade the terms of the verbal and subsequent

agreement set out in the 6th paragraph of the petition. His endeavour seems to have been directed to obtain a conveyance of the Howrah properties without redeeming the entire mortgage as he was bound to do before he could demand a conveyance from the defendant of the Howrah properties in terms of the contracts admitted by him. The prayer portion is significant. In his letter of the 26th April, upon which reliance was placed by his learned Counsel, the plaintiff intimated to the defendant that the conveyance which he was ready and willing to accept, would require the Receiver to join as a party. This certainly did not contemplate a previous redemption of the entire mortgage-decree of the Maharajah. Mr. Bose in his reply relied upon certain passages from the evidence to show that the plaintiff was informed by Junglu as to the defendants' attempt to procure purchasers at higher value. This only explains and supports para. 12 of the petition but really does not establish such a repudiation which "stopped" the plaintiff so as to make his further acts nugatory. In fact the plaintiff did not treat the defendants' conduct as a breach but on the contrary the plaintiff treated the contract as still an open one when he filed the petition of the 3rd May. On the evidence I have no doubt that both the parties were trying to take advantage over each other.

Dr. Bysak, who appeared for the respondents, supported the decree of the learned Judge although he very properly admitted that the judgment could not as a whole be supported. The finding of the learned Subordinate Judge that the contract was obtained by undue influence cannot be supported. There was no evidence of any undue influence or pressure upon the defendant who freely entered into the agreement for sale, though, it may be he did so with great reluctance. The learned Subordinate Judge was unnecessarily severe on the defendant on the ground that he acquired wealth in a short time.

We do not think, therefore, that the plaintiff has established any breach or repudiation of the contract by the defendant before the 8th of May and we also think that the plaintiff has failed to carry out the subsequent verbal agreement which was a condition precedent to the execution of the *kobala*. It appears that the plaintiff was unwilling to undertake the burden of discharging the entire sum due under the Maharajah's decree.

The claim for a decree for specific permance of contract is not a matter of right. The Court has to consider the whole of the surrounding circumstances and the position of the parties and then to consider whether in the exercise of its discretion, no doubt to be exercised on well-known principles, the Court should grant such relief or grant damages in lieu thereof. Here we are relieved from such consideration when we find that the plaintiff's claim fails on the grounds stated before.

The appeal fails and is dismissed with costs.

Walmsley, J.—I agree.

N. H. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 123 OF 1924.

March 5, 1925.

Present :—Mr. Justice Heald and Mr. Justice Chari.

MOOLJEE DHARSEE AND CO.—PLAINTIFFS—APPELLANTS

versus

M. E. MOOLLA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XLI, r. 5—Letters Patent (Ran.) cl. 13—Stay of execution, —Security—Order declaring sufficiency of security, whether "judgment"—Appeal, whether lies.

Execution of a decree was stayed by the Appellate Court pending the decision of the appeal. The order directed that the security already furnished by the judgment-debtor may be accepted with liberty to the decree-holder to apply for fresh or further security if it was decided that the security already furnished was invalid or insufficient. The Trial Court, on the application of the decree-holder, declared that the security already furnished by the judgment-debtor was sufficient:

Held, that the order declaring the sufficiency of the security did not fall within the purview of s. 47 of the C. P. C., nor was it a "judgment" within the meaning of cl. 13 of the Letters Patent of the Rangoon High Court and that consequently no appeal lay against that order. [p. 742, col. 1.]

Saraswati Barmonya v. *Moti Barmonya*, 20 Ind. Cas. 72; 41 C. 100; 17 C. W. N. 1240, *Justices of the Peace for Calcutta* v. *Oriental Gas Co.*, 8 B. L. R. 433; 17 W. R. 364, *Ahmed* v. *Ayeshabai*, 2 Ind. Cas. 167; 11 Bom. L. R. 248 and *Tuljaram Row* v. *Alagappa Chettiar*, 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1, referred to.

Appeal against an order of the High Court, Original Side, in C. E. No. 114 o 1924.

Mr. *Das*, for the Appellants.

Mr. *Keith* (with him Mr. *Doctor*), for the Respondent.

JUDGMENT.—The plaintiffs, Messrs. Mooljee Dharsee & Co. in Suit No. 138 of 1922 on the Original Side of this Court, obtained a decree against M. E. Moolla for Rs. 16,63,570 with costs and subsequent interest. In execution of that decree they applied on the 9th of April, 1924, for the arrest and imprisonment of the judgment-debtor. On the 10th April the matter was placed before the Judge and on that day the Advocates for the judgment-debtor mentioned in Court that they were instructed to file and appeal but had not yet been able to obtain the necessary copies. The learned Judge on the Original Side in the exercise of the discretion allowed by O. XXI, r. 40 ordered the judgment-debtor's release on his furnishing security to the extent of 17 lakhs. This was clearly an *interim* order because the learned Judge said expressly that the question of staying execution was a matter to be decided in the Appellate Court. The judgment-debtor entered into a bond himself and offered E. M. Moolla & Sons, Ltd., a limited liability Company as his security and that Company deposited the title-deeds of certain properties with the Bailiff of the Court as security. On the 29th of April, 1924, the decree-holder again applied for execution by the arrest and imprisonment of the judgment-debtor on the ground that the judgment-debtor had not obtained from the Appellate Court an order for stay of execution. On the 3rd of May 1924 the decree-holder filed an application asking that the judgment-debtor be called on to furnish other and sufficient security. In that application two objections to the security were taken: (1) that the security itself was insufficient; (2) that the property offered as security belonged to E. M Moolla & Sons, Limited, and that, therefore, in law it could not be a valid security. But, on the 2nd May, an order had been received from the Appellate Side of the Court ordering *interim* stay of execution of the decree pending the disposal of an application for stay which had been made in the appeal. The application filed on the 3rd May for furnishing further security was, therefore, kept pending. On the 28th May an order was passed on the Appellate Side to the following effect: "After considering the matter from all points of view I am of opinion that execution should be stayed upon terms. Execution may be stayed pending the decision of this appeal The security already given being accepted with liberty to the respondent to apply for fresh or further security if it is decided that the security given is invalid or insufficient and subject to the further condition that if the appeal fails the appellant will pay interest on the decretal amount from date to the date of decision at 9 per cent. per annum." That order, in our opinion, contemplates a decision by the Original Side on the sufficiency and validity of the security offered and accepted and left it open to the decree-holders, if the security should be found invalid or insufficient, to apply for fresh or further security. The Advocates on both sides construed the order as meaning that a further enquiry should be held on a fresh application and on the 4th of June, 1924, an application was filed by the decree-holder praying for an enquiry as to the sufficiency and legal value of the security. The next day the earlier application dated 3rd May was withdrawn On the 16th June the learned Judge on the Original Side, after disposing of certain objections, remanded the matter for enquiry and report to the Official Receiver as to the sufficiency and legality of the security. The Official Receiver reported on the 11th July that, in his opinion, the security offered was not sufficient and that the validity of the security was doubtful because it was not clear that Messrs. E. M. Moolla & Sons, Limited, had power to mortgage the property. The report was considered by the learned Judge on the Original Side and on the 28th July he passed an order in which he found, after personal inspection of the property, that it was worth, on a conservative estimate, at least 20 lakhs and he ordered a registered mortgage to be executed by all the share-holders of Messrs. E. M. Moolla & Sons, Limited. The last part of this order disposes of the objection of the validity of the security. It is this order holding that the security tendered was sufficient which is the subject-matter of the present appeal. It is objected before us that it was not a "judgment" within the meaning of cl. 13 of the Letters Patent and that, therefore, no appeal lies. If the order came within the ambit of s. 47

of the C. P. C., it would be a decree and as such appealable; and even if it did not, it would still be appealable; if it came under the wider term "judgment" used in cl. 13 of the Letters Patent. It is clear that an order relating to the sufficiency of the security tendered is not one which comes within the purview of s. 47. There is direct authority on the point in the case of *Saraswati Barmonyar* v. *Moti Barmonya* (1), the facts of which are very similar to the facts of the present case. The High Court of Calcutta, during the pendency of an appeal, ordered stay of proceedings in execution on the petitioner furnishing security to the satisfaction of the lower Court. Security was furnished and was held by the Court to be sufficient. The decree-holder appealed on the ground that the security was insufficient. The learned Judge of the High Court said: "The order assailed in the present case determines no rights of the parties that are in controversy. It was this Court that directed that the proceedings should be stayed; and this Court attached the condition that security should be given to the satisfaction of the Court below. That security has been given to the Court below and it is satisfied with it. It is not proper to say that this order can possibly be regarded as an order determining any of the rights of the parties, or can be treated as a decree and be the subject of an appeal." The passage disposes of the argument that such an order is appealable because it comes within the purview of s. 47 of the Code, and, in our opinion, it also shows that such an order is not a "judgment" within the meaning of that word in cl. 13 of the Letters Patent. The word "judgment" has been the subject of discussion in many cases beginning with the now classic case of the *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (2). It has also been the subject of exposition in two later cases, *Ahmed* v. *Ayshabai* (3) and *Tuljaram Row* v. *Alagappa Chettiar* (4). The result of these rulings seems to be that the effect of the order as a whole must be considered. If after consideration as a whole the decision is one which, to use the language of Couch, C. J., "affects the merits of the question between the parties by determining some right of the law," then it will be appealable. Almost every order does, in a sense, determine some right in law, but that this *dictum* of the learned Chief Justice was not to be understood in this wide sense is shown by the succeeding sentence where he states that a final judgment determines the whole case or suit and a preliminary or interlocutory judgment determines only part of it. Applying the test given by the learned Chief Justice as explained in the later judgments, it cannot be said in this case that any question determining the rights or liabilities of the parties was decided by the order now under appeal. The execution of the decree had already been stayed on the Appellate Side. That side had also ordered the security already given to be accepted with liberty to the decree-holder to apply for fresh or further security if it should be decided by the Judge on the Original Side that the security given was invalid or insufficient. As soon as the Judge on the Original Side decided that the security was valid and sufficient, the order of the Appellate Court becomes unconditional. All that the order of the Original Side determined was the right of the decree-holder to apply for fresh or further security. That right was a creation of the order made on the Appellate Side and cannot, in our opinion, be regarded as being one of the rights or liabilities of the parties in the execution proceedings on the Original Side. It is true that it is a primary right of a decree-holder to have his decree satisfied, but that right is subject to the discretion of the Appellate Court as to stay, and in this case the Appellate Bench ordered stay. It also ordered an enquiry on the Original Side as to the sufficiency of the security, and the learned Judge on the Original Side, when he made the order which is under appeal was merely carrying out the orders of the Appellate Bench and not determining any right or liability which arises between the parties in the execution proceedings on the Original Side. For these reasons we hold that his order was not a "judgment" within the meaning of cl. 13 of the Letters Patent and we dismiss the appeal with costs. Advocate's fee to be five gold *mohurs*.

Z. K. *Appeal dismissed.*

(1) 20 Ind. Cas. 72; 41 C. 160; 17 C. W. N. 1240.
(2) 8 B. L. R. 483; 17 W. R. 364.
(3) 2 Ind. Cas. 167; 11 Bom. L. R. 248.
(4) 8 Ind. Cas. 310; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2790 OF 1921.
March 5, 1925.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Harrison.

SRI RAM—DEFENDANT—APPELLANT
versus
KIDARI PARSHAD-CHEDDI LAL—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (2)—Sale of immoveable property—Title, covenant for—Presumption—Burden of proof—Time, whether of essence of contract.

A covenant for title is implied in a sale of immoveable property, and the onus lies on the vendor to prove a contract displacing that presumption. In a contract for the sale of immoveable property time is not of the essence of the contract.

Jamshed Khodaram Irani v. *Burjorji Dhunjibhai*, 32 Ind. Cas. 246; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A. 26 (P. C.), relied on.

First appeal from a decree of the Senior Subordinate Judge, Ferozepore, dated the 1st October 1921.

Messrs. *Sardha Ram* and *Kanhsi Ram*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of an action for specific performance, and the question for determination is whether the plaintiffs are entitled to the relief claimed by them. The Subordinate Judge has decided that they are entitled to that relief, but the correctness of his decision is impeached by the defendant who has preferred an appeal to this Court.

The facts may be stated briefly. On the 1st July 1919, the defendant agreed in writing to sell a bungalow known as Jamshed Jiwali *kothi* situate in Ferozepore Cantonment to the plaintiffs for Rs. 22,000 and received Rs. 2,000 as earnest-money. He promised to execute the conveyance within one month from the date of the agreement, but the plaintiffs allege that he failed to carry out his contract. They accordingly brought the present action in order to compel the defendant to perform the contract in specie.

The action was resisted on various grounds, but the Subordinate Judge has demonstrated the frivolous character of the pleas set up by the defendant, and after hearing the arguments advanced by Mr. Kanshi Ram we have no hesitation in endorsing the conclusion of the Trial Court.

One of the pleas urged by the defendant was to the effect that he was not liable to deliver possession of the property to the plaintiffs immediately after the execution of the sale-deed, but the written agreement signed by him does not lend any support to this plea nor is there any reliable evidence to show that the plaintiffs agreed to let the defendant stay on in the bungalow after the completion of the sale transaction. The same remarks apply *mutatis mutandis* to the contention that the defendant was not liable for any defect which might subsequently be discovered in his title. Section 55, sub-s (2) of the Transfer of Property Act provides that, in the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same. A covenant for title is implied in a sale of immoveable property and the onus was clearly on the defendant to prove a contract displacing that presumption. The evidence produced by him is wholly unsatisfactory, and the Trial Judge has rightly come to the conclusion that no contract such as is contemplated by the aforesaid section has been proved.

The contention of the defendant that the plaintiffs did not send to him a draft of the sale-deed within the period of one month prescribed by the agreement is refuted by the documentary evidence on the record, and it is further clear that in a contract of the sale of immoveable property time is not of the essence of the contract —*vide, inter alia Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1).

The defendant agreed to sell the property to the firm known as 'Kidari Parshad-Chhedi Lal', and they were, therefore, entitled to bring the suit for specific performance. There is nothing to show that they committed a breach of the contract; on the other hand all the circumstances point irresistibly to the conclusion that, as the price of property was rising, the defendant was endeavouring to put an end to the contract. It is admitted that, on the 15th September 1919, he returned the earnest-money and informed the plaintiffs that "the transaction had

(1) 32 Ind. Cas. 246; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A. 26 (P. C.).

fallen through." After waiting for a few months the plaintiffs invoked the aid of the Court, and we consider that there was no answer to the suit brought by them for the specific performance of the contract.

We accordingly affirm the decision of the lower Court, and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 41 AND 48 OF 1923.

February 26,1925.

Present :—Mr. Kennedy, J. C. and Mr. Raymond, A. J. C.

PEVANDBAI—APPELLANT

versus

THAOOMAL PANJOOMAL—RESPONDENTS.

Jurisdiction—Decree duly passed, whether can be treated as nullity—Award directed to be filed, effect of.

Where there is a Tribunal having jurisdiction and there are parties over whom that jurisdiction is exercised and a decree is issued, it is not open to any body to treat that decree as a nullity; on the contrary it must be taken, until it is set aside in due course of law, to be valid, being in effect the command of the sovereign power which regulates the relations of the parties to the litigation and to others. [p. 745, cols. 1 & 2.]

As soon as the Court decides to file an award it is to all intents and purposes a decree of the Court and has precisely the same binding effect on the parties affected by it as a decree of the Court. [p. 745, col. 2.]

Obiter.—This principle applies even to the case of a consent decree which has been passed by a Court being deceived or defrauded, and so long as the decree stands it cannot be treated as a nullity. [*ibid.*]

Appeals against the judgments and decrees of the Additional Judicial Commissioner, Sind, dated the 13th September 1923, in Suits Nos. 1207 and 1112 of 1919.

Mr. *Issardas Udharam*, for the Appellant.

Mr. *Dipchand Chandumal*, for the Respondents.

JUDGMENT.—There were two brothers, Khushaldas and Tharumal. The widow of Khushaldas is Pevandbai and Tharumal is now represented by Jethibai his daughter who is the wife of Thaumal. The litigation between Tharumal and Pevandbai took the form of two Suits Nos. 1207 and 1112 of 1919. In the suit filed by Pevandbai she asked for a declaration that she has at least a widow's estate in certain property of Khushaldas and for an injunction directing the representatives of Tharumal from interfering with her. On the other hand Jethibai who subsequently died brought an action against Pevandbai asking for her ejection from part of the property which is alleged originally to have belonged to Khushaldas. Two suits were tried together and the principal issue was as to the effect of a certain award between Khushaldas and Tharumal which award was made under the Indian Arbitration Act and was filed as the procedure then was in this Court as Suit No. 326 of 1910. The effect of that award that there was a declaration that the whole of the property was the property not of Khushaldas but of Tharumal. That award has never been rescinded or set aside and is still in full force and in effect. If that award is a good award, it is clear that Pevandbai cannot succeed in her suit for a declaration and injunction and, on the contrary, the representatives of Tharumal are entitled to possession of property as against Pevandbai. That was the finding of the learned Additional Judicial Commissioner and against that finding Pevandbai has appealed.

The decision took place upon a preliminary point as to whether Pevandbai could go behind the award without bringing an action to have that award set aside. In consequence none of the facts have been ascertained. The allegation is that Khushaldas was a maniac that he was deluded into signing a reference and the award was thus obtained by fraud inasmuch as Khushaldas was not capable of acting in a legal capacity, the whole proceedings beginning up the award are void and the award itself is a nullity. Whether those facts are as stated we do not know, though it may be noted that it is not pleaded that Khushaldas was ever found to be a lunatic on an inquiry.

But assuming the facts to be stated and assuming that by a proper proceeding it would have been possible for Pevandbai to have obtained rescission of the award and a declaration that the award was not binding on any of the parties to the reference, the question still remains whether she is entitled to proceed with her suit on the basis that she need take no notice of the award.

We are of the opinion, that she cannot. It is, no doubt, well-established that in a case of a conveyance or an instrument no one is bound to sue to rescind a void conveyance or instrument although he may, if so advised, do so. Thus a minor who has alienated his property is not bound to bring an action for the rescission of the deed or conveyance. He may proceed to deal with his property as if the conveyance which is an actual nullity had never existed. But, however, true this may be, as regards conveyance and other instruments executed by private parties, there is no warrant for the doctrine that an order of a Court having jurisdiction can be treated as a nullity without the formal order of the Court which passed the decree or of some superior Court. It would be a very strange thing if that doctrine were sound, persons who wish to purchase property for instance know well enough that they must verify the chain of conveyances by which the property has devolved upon the persons from whom they are seeking to acquire it, and they must carefully scrutinize the title of each successive owner in turn. But it would be an exrtaordinary thing that it should be required that persons dealing with property should satisfy themselves whether what was apparently a valid and binding decree of the Court was, as a matter of fact, effective. The Courts will not find that the decree is a nullity except in the case where the Court was openly acting beyond its jurisdiction or where it turns out, as a matter of fact, the decree is not between parties. That is to say, if a Court which has no jurisdiction whatsoever in the matter passes a decree which purports to effect property not subject to its jurisdiction, that decree apparently would be a mere nullity and might possibly be disregarded. Similarly if one of the parties to the proceedings had died before the conclusion of the case and the Court had proceeded to decree without having the representatives of the person been brought upon the record, then the decree in so far as it affected that person might very probably be a nullity and be disregarded. In both cases it would indeed probably be better to apply to the Court for rectification even if that course is not strictly speaking necessary. But where there is a Tribunal having jurisdiction and there are parties over whom that jurisdiction is exercised and the Court has issued its decree, it is not open to any body to treat that decree as a nullity. On the contrary it must be taken until it is set aside by due course of law to be valid being in effect the command of the sovereign power which regulates the relation of the parties to the litigation and to the others.

It is true that there have been cases in which persons have sought to execute what is really a voluntary transfer by means of consent decrees but there is no authority that even in such cases it is possible to deal with a consent decree precisely on the lines of a conveyance. If any body has so deceived or defrauded the Court into passing a consent decree, which it would not have passed having been better advised, then the correct course would be to attack the decree itself by some appropriate proceedings. As long as even a consent decree stands it cannot be treated as a nullity.

The fact that this is an award but not a decree makes no difference in the principle. As soon as the Court decides to file the award, it becomes to all intents and purposes a decree of the Court and has precisely the same binding effect on the parties affected by it as a decree of the Court.

Now inasmuch as the award in Suit No. 326 of 1910 is still in full force and vigour and has never been rescinded it must be held that the rights and liabilities of Khushaldas and Tharumal are definitely ascertained by that award. And that being so, it is perfectly clear that Pevandbai's claim to hold this particular property as widow of Khushaldas is done away with by that award because it distinctly declares that the property was not of Khushaldas but of Tharumal. Similarly, on the other hand, Pevandbai has got no defence to the action of Thaumal because he is clearly the representative of Tharumal by virtue of the same award and Pevandbai is merely a trespasser on the property.

The result is that both these appeals should be dismissed with costs.

Appeals dismissed.

P. B. A.

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1305 OF 1923.

June 5, 1925.

Present:—Mr. Justice Sulaiman.

B. BHAGWAN RAI—PLAINTIFF—APPELLANT

versus

JADDU RAJ RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Landlord and tenant—Abadi *land—Plot lying close to tenant's house, user of—Tenant, rights of.*

Where an open piece of land in a village lying close to a tenant's house has been used by him for his domestic or agricultural purposes, there may be a presumption that his occupation of the plot is a part of his original contract of tenancy and that he is entitled to its user so long as he is not turned out of the village; but the user must be confined to the way in which it has been exercised in the past for the grant of which alone there can be a presumption. The tenant is a licensee of the plot for the purpose for which he has been using it, and he has no right to alter its user and to utilize it for a different purpose altogether. For instance, a tenant would not be entitled to make constructions on an open site when he has been allowed to use the site for tying cattle or storing heaps of cow-dung cakes. [p. 746, col. 2.]

Basa Mal v. *Ghayas-ud-din*, 27 A. 356; 2 A. L. J. 27; A. W. N. (1904) 276, and *Jagan Nath* v. *Gurdiyal Singh*, 10 Ind. Cas. 284, followed.

Second appeal against a decree of the Second Additional District Judge, Gorakhpur, dated the 24th of April 1923.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession of land comprising 5 *dhurs* by demolition of a wall 20 cubits in circumference and 5 cubits in height. The plaintiff's case was that the defendants without the permission of the *zemindar* had started constructing a *gola* (turret) 20 cubits in circumference and 5 cubits in height on the plaintiff's land, but that the wall had not been completed, and that it had not yet been covered with thatch. The defence was that the plaintiff was never in possession of this plot, and the claim was barred by time. In para. 7 of the written statement it was further pleaded that the defendants used to build or repair such a *gola* for storing chaff every year when it was damaged by rain or flood. The Court of first instance found that the construction was a new one and was on plot No. 3 of which the plaintiff was the owner. It found against the defendants on the question of limitation and the question of estoppel, which points were not argued before it. On appeal the learned District Judge has dismissed the suit. He has not set aside the finding of the First Court that the plaintiff is the owner of the plot; nor has he set aside the finding that the claim is not barred by limitation, and the defendants are in adverse possession of the site. He has nowhere suggested that the *gola* in dispute is not new. He has said nothing about the defendants' plea that in previous years they used to have such a *gola* on this plot and used to repair it year after year. The learned Judge has found that the piece of land in dispute has been "in the use and occupation of the defendants" as a sort of a second courtyard appertaining to their house. Although the learned Judge unfortunately has not stated clearly that the use and occupation has been for a very long number of years, I take it that when he thought that it was a sort of a courtyard appertaining to the defendants' house he meant to find that the defendants have been using and occupying it for a very long time. The learned Judge has, however, thought that because the land has been in the use and occupation of the defendants, the latter are entitled to build upon it.

It is true that, if an open piece of land lying close to a tenant's house has been used by him for his domestic or agricultural purposes, there may be a presumption that his occupation of the plot is a part of his original contract of tenancy and that he is entitled to its user so long as he is not turned out of the village; but the user must be confined to the way in which it has been exercised in the past for the grant of which alone there can be a presumption. The tenant is a licensee of this plot for the purpose for which he has been using it. He would have no right to alter its user and utilize it for a different purpose altogether—*vide Basa Mal* v. *Ghayas-ud-din* (1) and *Jagannath* v. *Gurdiyal Singh* (2). Nor would a tenant be entitled to make constructions on an open site when he has been allowed to use the site for tying cattle or storing heaps of cow-dung cakes. From the pleadings I gather that the construction complained of is a sort of a *kachcha* building which will ultimately be covered with

(1) 27 A. 356; 2 A. L. J. 27; A. W. N. (1904) 276.
(2) 10 Ind. Cas. 284.

thatch and in which chaff would be kept and preserved. If the defendants have never before made any construction of this kind on the land in question, in my opinion, they would not against the will of the *zemindar* be entitled to do so. It would be putting the land to a slightly different use and would be erecting constructions on it which never existed before, and for which there is no presumption that the *zemindar* ever granted permission. It is true that a *kachcha* building and one of small value may be removed at any time, but this would not deprive the *zemindar* of his right to object to its being constructed. If once a *kachcha* building is allowed to be built there would be nothing to prevent the tenant from gradually extending it or raising its height as it is washed away by flood year after year.

On the other hand, it is possible that the defendants have been utilizing this land in past years for this purpose. Their own case was that they used to have such a *gola* on this land year after year and when washed away or damaged by rain or flood they used to repair it. The learned Judge has not said a word about this defence. If it were established that the defendants have had *golas* over this plot of land in previous years, there would be a justifiable presumption that the occupation of this land was for this purpose also.

I accordingly send down the following issue to the lower Appellate Court for a finding :—

Have the defendants had similar *golas* in previous years over the plot of land in dispute ?

No fresh evidence will be allowed. The usual ten days are allowed for filing objections.

Z. K. *Order accordingly.*

PATNA HIGH COURT.

CIVIL REVISION No. 554 OF 1924.

March 25, 1925.

Present:—Mr. Justice Kulwant Sahay.

W. K. DANSFORD—DEFENDANT—PETITIONER

versus

B. D. SHAW AND CO.—PLAINTIFFS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 52—Goods supplied on credit—Suit to recover price of goods—Limitation, commencement of—Part payment of principal—Limitation, extension of.

A suit to recover the price of goods supplied by a tradesman on credit for which payment was to be made on presentation of bills is governed by Art. 52 of Sch. I to the Limitation Act and limitation begins to run from the date of the delivery of the goods. [p. 748, col. 1.]

A part payment of principal will not give a fresh start of limitation under s. 20 of the Limitation Act unless the fact of the payment appears in the handwriting of the person making the same. [p. 748, col. 2.]

Appeal from an order of the Subordinate Judge, Darbhanga, dated the 19th September 1924.

Mr. *B. C. De*, for the Petitioner.

Messrs. *Murari Prasad, Anirudhji Barman* and *Anand Prasad*, for the Opposite Party.

JUDGMENT.—This is an application in revision on behalf of the defendant in a Small Cause Court suit. The suit was for recovery of a sum of money, principal with interest, for price of goods sold and delivered by the plaintiffs to the defendant. The claim was for Rs. 207-12-0 as principal and Rs. 148 14-0 as interest, making a total of Rs. 356 10-0. The defendant admitted a sum of Rs. 55-8-0 and deposited the same in Court and denied his liability to pay the balance He further pleaded limitation.

The Small Cause Court Judge has decreed the entire claim, and has held that the plaintiffs have proved their claim by production of their *bahis*. On the question of limitation he held that it was a case of running account and the claim was not barred by limitation.

The only point raised in the present revision by the defendant is that the claim for the balance not admitted is barred by limitation. The plaintiffs are tradesmen and they used to supply goods to the defendant on credit and used to make up their bills and present the same to the defendant with vouchers. It appears that the transaction between the plaintiffs and the defendant has been going on from sometime before November 1920. On the 29th November 1920, the plaintiffs presented a bill to the defendant for a sum of Rs. 309-12-0 for goods supplied during the period from 19th May to 29th November 1920. This sum of Rs. 309-12-0 was made up of Rs. 157-8-0 being the price of goods supplied during the same period and a sum of Rs. 152-4-0 being the balance due on account of a previous bill. The defendant's case is that when the previous bill was presented to

him he denied his liability to pay the price of the goods valued at Rs. 152-4-0 and admitted the rest of that previous bill which was paid. His allegation is that no vouchers were produced for the goods for which Rs. 152-4-0 was demanded and he refused to pay the same. In the bill presented on the 29th November 1920, the amount of Rs. 152-4-0 was again included without any vouchers, and he again refused to pay the same, but paid the balance of the bill. Subsequently bills were presented for goods supplied and the defendant says that the sum of Rs. 152-4-0 was again included in those bills which he refused to pay. The present claim of Rs. 207-12-0 is made up of Rs. 152-4-0 due on account of the previous bill, and Rs. 55-8-0 for goods supplied subsequently. The defendant admits his liability to pay the Rs. 55-8-0 and did in fact deposit this amount in Court. As regards Rs. 152-4-0 he denies his liability and pleads limitation.

The learned Judge in the Court below has found that Rs. 152-4-0 was due from the defendant and this question cannot be agitated in the present case. The only question for consideration, therefore, is as to whether the claim for Rs. 152-4-0 is barred by limitation.

It is not disputed that this sum of Rs. 152-4-0 is the balance due on account of the bill presented before November 1920. But, it is contended that, as there was a running account between the parties, and there was payment made within the period of limitation in part satisfaction of the debts, the claim is saved from limitation. On behalf of the plaintiffs it is contended that the Article applicable is No. 85 of the First Schedule to the Limitation Act. To my mind, this Article has no application to the present case. It was not a case of a balance due on a mutual, open and current account where there have been reciprocal demands between the parties. It was a case of supply of goods by a tradesman on credit for which payments were made on presentation of bills. I think the Article applicable is Art. 52 of the Act, and the period of limitation is, therefore, three years from the date of the delivery of the goods. Admittedly the goods were delivered beyond three years of the institution of the suit, and the claim would, therefore, be barred by limitation. The learned Vakil for the plaintiffs-opposite party, however, relies on s. 20 of the Limitation Act, and contends that part of the principal of the debt having admittedly been paid before the expiration of the period of limitation a fresh period began to run from the time of payment. But, in order to save limitation, on the payment must appear in the handwriting of the person making the same. The payment alleged is that of the principal and not of interest, and under the proviso to s. 20 a fresh period of limitation cannot be computed from the time when the payment was made, unless the fact of the payment appears in the handwriting of the person making the same. There is no allegation, much less proof, of there being any such handwriting of the person making the part payment in the present case, and the claim must, therefore, be held to be barred by limitation.

The decree of the Court below must, therefore, be set aside and the suit dismissed with costs. The plaintiffs, will, of course, be entitled to withdraw the sum admitted and deposited by the defendant in the Court below.

Z. K. *Decree set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1408 OF 1922.

February 24, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

Srimati FAZARA KHATUN BIBI—PLAINTIFF—APPELLANT

versus

MATIOR RAHAMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Marriage—Minor parties—Contract, nature of.

In a case of marriage between Muhammadans the real contracting parties are the husband and the wife and under their personal law they are entitled to enter into a contract of marriage even before they have become major under that law; and the contracts of such minors are entered into through their guardians specified by their personal law. Those contracts are as good as those entered into by the minor himself or herself for the purpose of creating rights and obligations. [p. 749, col. 2.]

Mir Sarwarjan v. *Fakhruddin Mahomed Chowdhury*, 13 Ind. Cas. 331; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156; 11 M. L. T. 8; 39 I. A. 1 (P. C.), distinguished.

Appeal against a decree of the Subordinate Judge, First Court, Chittagong, dated the 15th March 1922, affirming that of the Munsif, Third Court of that place, dated the 3rd February 1921.

Babu *Narendra Kumar Das*, for the Appellant.

Babu *Ramdayal Dey*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—In this suit for dower by a Muhammadan widow, one of the pleas raised by the defendants is that the suit is barred by the Law of Limitation. According to the plaintiff her husband died on the 27th February 1914. According to the defendants his death took place sometime in 1913. There were several issues raised in the case but the only issue tried by the Courts below was one of limitation. The learned Munsif was of opinion that Art. 103 of the Limitation Act was applicable; but he proceeded to examine the case on the assumption that it was governed by Art. 116, and found on the evidence that Yar Ali (the husband of the plaintiff) had died more than six years before the institution of the suit. He, therefore, held that the plaintiff's suit was barred by limitation. On appeal the learned Subordinate Judge did not agree with the Munsif that Yar Ali had died more than six years ago as alleged by the defendants. He was inclined on a consideration of the evidence to accept the version of the plaintiff; but as he was of opinion that in any case the suit was barred by limitation he did not enter any finding to that effect. On the question of limitation his view is that the plaintiff being a minor at the time when the *kabilnama* was executed and registered, the marriage having taken place with the consent of the father the *kabilnama* did not create any contract between the plaintiff and her husband and, therefore, Art. 116 did not apply to the present case which was governed by Art. 103 of the Limitation Act.

In my judgment the opinion of the Court below cannot be supported. It is well known that in marriages among Muhammadans where one of the contracting parties is a minor, it is solemnized with the *izu* or permission of the marital guardian of the infant which has the effect of the contract being entered into between the parties who are married. In this particular case the *kabilnama* was executed in favour of the wife (the plaintiff). There is no question, therefore, that she was a party to the contract. It is argued on behalf of the respondent that as she was a minor at the time when this contract of marriage was entered into and as there could not be any specific performance of this contract against her the contract of marriage was void. It is surprising to me that such an argument is advanced from the bar. In support of the indefensible position taken by the respondent reference has been made to the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1), I fail to see any connection between that decision and the present case. In that case it was held that if a contract was entered into on behalf of a minor by a person who had no authority to bind the minor's estate, the minor is not in law entitled to enforce such a contract for want of mutuality between the contracting parties: That was the case of specific performance of a contract relating to property. In a case of marriage between Muhammadans the real contracting parties are the husband and the wife and under their personal law they are entitled to enter into a contract of marriage even before they have become major under that law; and the contract of such minors are entered into through their guardians specified by their personal law. Those contracts are as good as those entered into by the minor himself or herself for the purpose of creating rights and obligations. The result of the adoption of the view urged by the respondents is that though the wife surrenders her person and enters into material obligations she is not entitled to claim the dower which the husband promised to pay to the wife as consideration for the marriage. The *kabilnama* was executed in favour of the plaintiff. The contract thus evidenced by it does not lose its character if the marriage was solemnized through the agency of a guardian. In my opinion the judgment of the lower Appellate Court cannot be upheld and must be set aside. It is hardly necessary to say that the law as to what Article of the Limitation Act is applicable to a registered *kabilnama* is practically settled. See the cases of *Aisat-*

(1) 13 Ind. Cas. 331; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156; 11 M. L. T. 8; 39 I. A. 1 (P. C.).

ulla v. *Danes Mohammad* (2) and *Mahammad Mazaharal Ahad Mahammad Azimuddin Bhuian* (3).

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and the case remanded to the Court of first instance for trial of all the issues raised in the case including the issue of the date of death of Yar Ali the husband of the plaintiff. The appellant is entitled to the costs of this appeal. The costs of the lower Courts will abide the result.

Duval, J.—I agree.

N. H. *Appeal allowed.*

(2) 70 Ind. Cas. 169: 50 C. 253; 36 C. L. J. 379; (1923) A. I. R. (C.) 152.

(3) 73 Ind. Cas. 17; 27 C. W. N. 210; 37 C. L. J. 108; (1923) A. I. R. (C.) 507.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 774 OF 1923.

February 6, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

BHAGVANLAL CHUNILAL—PLAINTIFF—APPELLANT

versus

BAI DIVALI—DEFENDANT—RESPONDENT.

Hindu Law—Will by wife relating to property inherited by her from her paternal relations, validity of—Consent of husband—Wife living separately from husband, effect of.

Where a Hindu wife has lived separately and independently of her husband for a long number of years he loses all rights of control over her including the right to control any disposition which she might make by Will of property inherited by her from her paternal relations.

Second appeal from a decision of the First Class Subordinate Judge, A. P., at Ahmedabad, in Appeal No. 139 of 1922, confirming that of the Joint Subordinate Judge at Nadiad, in Civil Suit No. 74 of 1921.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *M. H. Mehta*, for the Respondents.

JUDGMENT.—The original plaintiff to this suit was one Parshottam Hargovan-Das, who sued to recover from the defendants possession of the property in suit, alleging that his wife Bai Adat died on January 9, 1921, leaving behind her that property to which the plaintiff was the heir at law; that the defendants were withholding possession of the same from him on the strength of an alleged Will by Bai Adat; and that as the plaintiff had not consented to it, it was not operative.

The defendants went to trial on the issues whether the Will by Bai Adat was valid, and whether the suit properties, or any of them, were other than Saudayika *stridhan* of the deceased Bai Adat. The Trial Judge found that the Will was valid, and that the property in suit was not Saudayika *stridhan* of Bai Adat. He considered in the circumstances of the case that Bai Adat was entitled to dispose of such property by Will, although her husband was alive, because the Will was not made during coverture, which was still understood to mean a state during which the wife was under the power of her husband, and as it was admitted that Adat was living separate and independently of her husband at her father's house for thirty or forty years till her death, she was not under coverture.

In appeal the Judge said.

"Bai Adat stayed with her husband Purshottam for a few years. She gave birth to four or five children who died long ago. Purshottam then married a second wife with the result that Bai Adat had to seek the shelter of her parents. She lived with her parents and in their house for about forty years prior to her death. During this time her husband never maintained her nor did he ever care to know how she was doing. She seems to have been treated as an abandoned wife."

He agreed with the learned Trial Judge that Bai Adat really got her father's property as his heir, and referring to the decision of *Bhau* v. *Raghunath* (1) said—

"The ruling quoted by the appellant lays down that it is not open to a wife to dispose of her *stridhan* property except Saudayika *stridhan* without her husband's consent or permission during coverture. The principle on which the ruling is based is that females are always subject to the control of males even in a matter of disposition of their separate property. This condition of control can exist when the females reside with and are members of the family of the controlling male persons. If a husband abandons his wife and fails to fulfil the obligations enjoined by Hindu Law to

(1) 30 B. 229; 6 Bom. L. R. 936.

his wife for more than a generation, he cannot claim the right of control over the property she acquired in her paternal house. The law which gives a husband powers of control over the person and property of his wife also presents corresponding obligations. If the latter are not discharged, the former must be treated as lost to a great extent. Bai Adat had virtually ceased to be a member of her husband's family. Her husband had, therefore, lost all control over her property and over her person to a great extent."

The appeal was, therefore, dismissed.

The correctness of that decision has been contested in second appeal. We do not dispute for a moment the principles of Hindu Law as stated in *Bhau* v. *Raghunath* (1) with regard to the power of disposition by a wife over her non-Saudayika *stridhan*. But it is perfectly clear, as pointed out by the lower Appellate Judge, that the texts which are referred to in that judgment contemplate quite a different state of facts from those which have been proved to exist in this case, and we cannot know what would have been laid down, supposing the possibility of a wife being separated from her husband for forty years could have been contemplated in those times. We think that the facts in this case are sufficient proof that although Bai Adat at law was still the wife of Purshottam, he had lost all rights of control over her, so as to lose also the right to validate any disposition which she might make by Will of property inherited by her from her paternal relations. We think this decision is in consonance with the views which would prevail at the present day in the community. Both the Judges who heard the case in the lower Courts are Hindus, and we do not think that they would have decided the case, as they have done, if they thought that their decisions would in any way offend the sense of the Hindu community. We, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL REVISION No. 192 OF 1924.

November 17, 1924.

Present:—Mr. Justice Godfrey.

MAUNG KHANT GYI AND OTHERS—APPLICANTS

versus

MA THET HNIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9, O. XI, rr. 12, 21, O. XLIII, r. 1 (f)—Order directing discovery of document, failure to comply with—Dismissal of suit—Restoration—Appeal—Remedy, proper.

During the pendency of a suit the plaintiff was directed by an order of Court passed under r. 12 of O. XI of the C. P. C. to make discovery on oath regarding documents which were or were not in his possession relating to the matters in question. The plaintiff failed to comply with this direction and failed to put in appearance on the date fixed with the result that the suit was dismissed for want of prosecution under r. 21 of O. XI. This order was subsequently set aside by the Court purporting to act under O. IX, r. 9 of the Code and holding that the dismissal order was really one passed under r. 8 of O. IX:

Held, that the order of dismissal was one passed under r. 21 of O. XI of the C. P. C., and that the provisions of r. 9 of O. IX of the Code were inapplicable to the case, inasmuch as the order of dismissal was appealable under O. XLIII, r. 1 (*f*) of the Code and the plaintiff's remedy was either by way of appeal or by way of review, and that consequently the order restoring the suit must be set aside.

Civil revision against an order of the District Court, Insein, in Civil Regular No. 13 of 1924.

Mr. *Doctor*, for the Petitioners.

JUDGMENT.—In this matter the petitioners seek to revise an order passed by the District Court of Insein setting aside a dismissal order passed in Suit No. 13 of 1924 of that Court and restoring that suit to the file. The present application is uncontested, the respondents not now appearing.

It seems that during the pendency of the suit above referred to the respondents, who were the plaintiffs, were directed by an order of Court passed under O XI, r. 12, C. P. C., to make discovery on oath of the documents which were or had been in their possession relating to the matters in question. They failed, however, to comply with this direction, although the case was adjourned on three occasions to enable them to do so, and in fact failed to put in any appearance, with the result that the suit was dismissed for want of prosecution under O. XI, r. 21, C. P. C., and it was this order of dismissal, which the District Court set aside, purporting to act under

O. IX, r. 9, C. P. C., and holding that the dismissal order was really one passed under O. IX, r. 8, C. P. C.

It is clear that the order of dismissal was one passed under O. XI, r. 21, C. P. C., and that the provisions of O. IX, r. 9, C. P. C., have been misapplied. The latter rule provides for the setting aside of a dismissal order passed under O. IX, r. 8, C. P. C., upon sufficient cause being shown by a plaintiff for his non-appearance when the suit was called on for hearing; but it has no application to the present circumsances, where the case was fixed for the plaintiffs' compliance with the direction of the Court under O. XI, r. 12, and the suit dismissed for their default in this respect under O. XI, r. 21, C. P. C. Such an order was a decree and was appealable under O. XLIII, r. I (*f*), C. P. C., and the plaintiffs' (respondents') remedy was either by way of appeal or perhaps by way of review.

A Court's powers to set aside decrees are those that are given to it by Statute and to apply a rule, which could have no application, was clearly irregular and the order passed in such circumstances must be held to have been without jurisdiction.

It, therefore, seems to me that the order of the District Court must be set aside and the dismissal order restored, this application being allowed with costs two gold *mohurs*.

Z. K. *Application allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 29 OF 1924.

June 19, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Sulaiman.

Syed TAJAMMUL HUSAIN—PLAINTIFF—APPELLANT

versus

BANWARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Occupiers of houses in village, whether entitled to transfer houses—Instances, large number of, effect of—Presumption—Burden of proof—Appeal, second—Finding as to custom, whether can be questioned.

Although the findings of an Appellate Court so far as they are findings of fact are binding in second appeal, nevertheless it is open to a Court in second appeal to consider whether evidence which has been found to be proved and instances which have been established do or do not establish a custom having the force of law. [p. 753, col. 1.]

Where the question for decision is whether the occupiers of houses in a village are entitled by custom to transfer their houses and a large number of sale-deeds is proved which show that occupiers in the village have been transferring their houses, the presumption is that such a large number of transfers could not have taken place unless there was a right in the occupiers to make such transfers. When a large number of such instances has been established the burden lies on the *zemindar* to explain how it is that so many transfers were allowed to be made and the Courts are entitled to draw an inference in such a case that there must have been a custom to which the *zemindar* submitted. [p. 753, cols. 1 & 2.]

Letters Patent Appeal against a judgment of Mr. Justice Kanhaiya Lal, dated the 29th of November 1923.

Mr. *S. A. Haider*, for the Appellant.

Dr. *S. N. Sen*, (for whom Messrs. *B. Malik*), and Mr. *A. Sanyal*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for ejectment on the ground that the plaintiff is a *zemindar* of the village and the contesting defendant is a person who has without any right purchased a house in the village and is occupying it. The pleas raised in the written statement were that the defendant vendor was the owner of the house and was entitled to transfer it. There was also a further plea that in this village under a custom the occupiers of houses were entitled to transfer their houses.

Both the Courts below came to the conclusion that the evidence produced by the defendant did not establish a custom having the force of law. They accordingly decreed the claim. On appeal a learned Judge of this Court has come to a contrary conclusion.

We may note that there was another suit instituted by other *zemindars* of this village against other transferees which had however been dismissed by the Courts below. A second appeal was preferred in this Court in that case and at the instance of the learned Counsel for the appellant who was also Counsel for the appellant in the other case the two appeals were connected together and were ordered to be put up for hearing together. At the time when these two connected appeals came up for disposal the learned Judge of this Court referred to the evidence on the records of both the cases inasmuch as both related to the same custom in the same village and disposed of the two appeals by one judgment. There were altogether 91 sale-deeds produced by

the defendant in the connected appeal and 35 sale-deeds were on the record of the present case. He found that the custom was established, but that the defendants had no proprietary right in the site and were mere *raiyats* without adverse possession.

Although the findings of the lower Appellate Court so far as they are findings of fact are binding in second appeal nevertheless it is open to a Court in second appeal to consider whether the evidence which has been found to be proved and instances which have been established do or do not establish a custom having the force of law. In the present case the plaintiff relied on an entry in the *wajib-ul-arz* of the year 1872 as well as on a judgment of the year 1912 and three compromise decrees besides certain oral evidence. The defendant on the other hand relied on a judgment of the year 1865 as well as a large number of sale-deeds of houses by occupiers in favour of either *zemindars* or strangers.

Assuming that the interpretation put upon the *wajib-ul-arz* by the Courts below was correct and that it does not show that the right of residence could be transferred, nevertheless there was a volume of evidence consisting of so many instances of transfer for the last 60 years on which the learned Judge of this Court could hold that there was legally sufficient evidence to establish the custom. The lower Appellate Court had brushed aside the sale-deeds by saying that they merely indicated that transfers had taken place, and had thought that unless the defendant established the circumstances under which those sales took place and also showed that the consent of the *zemindars* had not been obtained they were not of much importance. If the number of sale-deeds had been very small this view might have been sound, but as the number of transfers increases it becomes more and more probable that such a large number of transfers could not take place unless there was a right in the occupiers to make such transfers. When such a large number of instances had been established it did lie on the *zemindar* to explain how it was that so many transfers were allowed to be made. A very large number of these transfers were made in favour of strangers who were not *zemindars*. It is impossible to believe that the *zemindars* would not come to know of the appearance of these strangers in the village and if they took no step to object the Courts are entitled to draw the inference that there must have been a custom to which they submitted. As to the judgment of the year 1912 we may note that the evidence produced before the Munsif was by no means so voluminous. The Court had to decide the existence or non-existence of the alleged custom on the evidence before it. The evidence which was produced in that case was not considered sufficient to establish the custom. Although, therefore, the judgment is of some importance it cannot by any means be conclusive. On the other hand we find that at least in the year 1865 when the case mentioned above was decided, it was stated that there had been numerous transfers in the village. We also like to add that although the entry in the *wajib-ul-arz* is a strong *prima facie* evidence of custom it is by no means conclusive particularly as the *raiyats* and other occupiers of houses are not parties thereto.

In this case, therefore, we find it impossible to differ from the view taken by the learned Judge of this Court that the evidence adduced by the defendant was legally sufficient to establish the custom. We accordingly dismiss this appeal with costs, including fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 3 OF 1924.

February 6, 1925.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

NILKANTH VASUDEO SAMANT—AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALVANT PANDURANG SAMANT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 104, O. VII, r. 10, O. XLIII, r. 1 (a)—Order directing return of plaint for presentation to proper Court—Appeal, second, whether lies.

Under O. XLIII, r. 1 (*a*) of the C. P. C., an appeal lies from an order directing a plaint to be returned for presentation to the proper Court. From the order of the Appellate Court, however, no second appeal is competent in such a case.

Appeal from the decision of the District Judge at Ratnagiri, in Miscellaneous Appeal No. 13 of 1922, reversing an order of the Joint Subordinate Judge at Malvan.

Mr. *K. S. Parulekar*, for the Appellants.

Mr. *T. N. Walavalkar*, for Appellant No. 1.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.—The plaintiff filed this suit in the Court of the Joint Subordinate Judge at Malvan who held that the Court had no jurisdiction and directed the plaint to be returned for presentation to the proper Court. The plaintiff appealed to the District Judge, who held that the Malvan Court had jurisdiction in the case, and accordingly sent it down for trial according to law. The defendants filed a second appeal to this Court, and the preliminary objection has been taken by the respondent's Pleader that no second appeal lies. The order made by the Subordinate Judge was under O. VII, r. 10. Under O. XLIII, r. 1 (*a*), an appeal lies under the provisions of s. 104 from an order under O. VII, r. 10. Section 104 says: "An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders...(*i*) any order made under rules from which an appeal is expressly allowed by rules." Sub-section (2) says: "No appeal shall lie from any order passed in appeal under this section." It is clear, therefore, that this is an order passed by the District Judge in appeal from the order of the Subordinate Judge. That appeal was admitted under O. XLIII, but no further appeal is allowed under s. 104. The appeal is dismissed with costs on the ground that no second appeal lies.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL CIVIL JURISDICTION Nos. 88 AND 89 OF 1924.

November 11, 1924.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Buckland.

SIR HUKUMCHAND KASLIWAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RADHAKISSEN CHAMARIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Companies Act (VII of 1913), s. 171—Company in liquidation—Suit by secured creditor, whether should be stayed—Calcutta High Court Original Side Rules—Sale of property pending dispute, effect of.

Where a Company is being wound up a secured creditor has *prima facie* a clear right to apply for and obtain leave to enforce his security. [p. 758, col. 2.]

Where a suit is brought by a plaintiff against a Company which is being wound up alleging that he is entitled to a charge on the assets of the Company, and the defendants deny that the plaintiff is entitled to a charge, the issue involved in the suit ought in the ordinary course to be decided in a suit, and such a suit ought to be allowed to proceed in spite of the winding up proceedings. [p. 757, col. 1.]

On the Original Side of the Calcutta High Court when it appears that a property will have to be sold eventually, such property is frequently sold under conditions which may promptly secure the best possible price entirely without prejudice to all rights and contentions of the parties of any kind whatsoever, the object being to obtain the best value for the property when conditions are most favourable and to allow such contentions as may be raised to be argued at leisure thereafter. [p. 758, col. 2; p. 759, col. 1.]

Appeals from an order of Mr. Justice C. C. Ghose, dated the 3rd April 1924.

The Advocate-General (with him Mr. *S. C. Roy*), for the Appellants.

Mr. *Langford James* (with him Mr. *S. M. Bose*), for Bilasroy Hurdutt Roy.

Sir *B. C. Mitter* (with him Mr. *N. N. Sircar*), for the Respondents.

JUDGMENT.

Sanderson, C. J.—These two appeals, which are No. 88 of 1924, and No. 89 of 1924, have been argued one after the other. They arise out of an application made by the respondents Radhakissen Chamarai and Motilal Chamaria, which was disposed of by my learned brother Mr. Justice C. C. Ghose on the 1st of April 1924.

In Appeal No. 88 the appellants are Sir Hukumchand Kasliwal and another: and in Appeal No. 89 the appellants are Bilasroy Hurdut Roy.

The facts, which have been stated both by the learned Advocate-General who appeared for the appellants in Appeal No. 88 and by the learned Counsel who appeared for the appellants in Appeal No. 89, are as follows:—

It is alleged that on the 14th of February 1920 Sir Hukumchand Kasliwal and Harkissen Das Bhattar entered into an agreement with the Pioneer Mills Limited (which was a Joint Stock Company having its registered office in Calcutta and carrying on business as refiners, manufacturers and dealers in sugar at Unao in the United Provinces of Agra and Oudh) by which Messrs. Hukumchand Harkissen Das were to be the *banians* of the Company; and, it was alleged that the appellants advanced Rs. 1,50,000 to the Company upon condition that this sum should be secured

upon the factory, plaint and machinery of the Company and its stock-in-trade at Unao. It was further alleged that after the sum of Rs. 1,50,000 had been advanced the Company wrongfully put an end to the agreement and a suit was eventually instituted by Messrs. Hukumchand Kasliwal and Harkissen Das Bhattar against the Pioneer Mills Ltd., the Tata Industrial Bank, Limited, Bilasroy Hurdut Roy, Radhakissen Chamaria and Motilal Chamaria, the second, third and fourth defendants being joined on the ground that they alleged that they were also mortgagees of the properties of the Company. The relief which was asked for in that suit was, amongst other things, a declaration that the defendant Company's factory at Unao together with the lands, machineries, implements, building and structures and its stock-in-trade should stand charged with the payment of the amount which might be found due to the plaintiffs for the advances made by them to the Company.

The next date which is material is that on the 16th of April 1920 the Company entered into a *banianship* agreement with Messrs. Bilasroy Hurdut Roy; and, it was alleged by Bilasroy Hurdut Roy that on the 10th of August 1922 the Company executed a mortgage in their favour for the sum of rupees 4 lacs and on the same date executed a mortgage in favour of the Tata Industrial Bank, Limited.

It was further alleged that on the 31st of August 1922 the Company executed a mortgage in favour of Messrs. Chamarias.

On the 21st of September the Chamarias' mortgage was registered but Bilasroy Hurdut Roy's mortgage was not registered until the 21st of November 1922, leave having been obtained to extend the time. It was further alleged that on the 2nd of January 1923 the Tata Industrial Bank Ltd., assigned their mortgage to Messrs. Chamarias. The date on which Hukumchand Kasliwal's suit to which I have already referred, was instituted, was the 10th of February 1923.

Bilasroy Hurdut Roy also instituted a suit; and, the defendants in that suit were the Company and Messrs. Chamarias. Messrs. Hukumchand Harkissen Das were not joined as a party in that suit. The relief claimed was a decree in favour of the plaintiffs for Rs. 4,00,000 as principal and Rs. 18,666-10-0 as interest together with costs and that the plaintiffs should be declared entitled to withdraw the decretal amount from the sale-proceeds of the Pioneer Mills Sugar Refinery and Distillery which was in deposit with the Imperial Bank of Calcutta under the orders of the Calcutta High Court. That last prayer, as I understand, was added by way of amendment. The exact date on which that suit was instituted has not been stated to this Court but it has been taken that it was instituted before the date on which the High Court at Calcutta made an order for the winding up of the Company, which was on the 4th of June 1923.

On the 6th of August 1923, an order was made on Bilasroy Hurdut Roy's petition and with the consent of Messrs. Chamarias that the property of the Company which was subject to the alleged mortgages and charges, to which I have already referred, should be sold by the winding up Court. The bids were not to be accepted without the order of this Court and it was ordered that bids should be invited for the sale of the property subject to the incumbrances and that bids should be further invited for the sale of the property free of all incumbrances.

On the 13th of August 1923, my learned brother Mr. Justice Greaves made an order giving leave to Messrs. Bilasroy Hurdut Roy to continue their suit in the Unao Court. That order was necessary because of s. 171 of the Indian Companies Act, VII of 1913, which provides as follows:—"When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court, and subject to such terms as the Court may impose." That order was made by my learned brother in the presence of Messrs. Chamarias.

In September 1923, my learned brother Mr. Justice C. C. Ghose sanctioned the sale of the property free from incumbrances to a purchaser, whose name is not material for my present purpose. The property was sold free of incumbrances and the proceeds, as I have already mentioned, were deposited in the Imperial Bank Limited by the order of the learned Judge.

On the 21st of November 1923, my learned brother Mr. Justice Ghose made an order that Messrs. Hukumchand Harkissen Das's suit should proceed. That order was made *ex parte* on the application of the plaintiffs in the suit. On the 18th of December 1923 Messrs. Chamarias filed

their written statement in the suit which was brought by Messrs. Hukumchand Harkissen Das in the Unao Court: and, in that written statement, amongst other defences, they set up the case that the plaintiffs had no charge or mortgage over the properties of the defendant Company described in the plaint. They also alleged that the mortgage which was relied upon by Bilasroy Hurdut Roy and which purported to have been executed by the defendant Company, was a collusive transaction and was invalid and inoperative in law. An order was made in Messrs. Hukumchand's suit in the Unao Court that on the 26th March 1924 the parties should appear and that issues should be settled. Before that date arrived, *viz.*, on the 5th of February 1924, the application which gave rise to these proceedings was made before my learned brother Mr. Justice Ghose.

In the application which related to Hukumchand Harkissen Das's matter the prayers in the petition were that the Liquidators should be directed to pay a certain sum to the petitioner, that the claims of Bilasroy Hurdut Roy and Sir Hukumchand Kasliwal and Harkissen Das Bhattar to rank in priority to the petitioner's claim might be adjudicated and that pending such adjudication the Suits Nos. 28 and 37 of 1923 (which were the suits brought by Hukumchand Harkissen Das and Bilasroy Hurdut Roy respectively in the Subordinate Judge's Court at Unao) might be stayed, and if necessary the leave granted to Bilasroy Hurdut Roy to proceed with their suits in the Unao Court might be revoked.

Upon this application coming before my learned brother Mr. Justice Ghose the following order was made:—"It is ordered that the said Hukumchand Kasliwal and Harkissen Das Bhattar and Bilasroy Hurdut Roy, the plaintiffs in Suits Nos. 28 of 1923 and 37 of 1923 respectively filed in the Court of the Subordinate Judge at Unao, do not continue further these suits in the said Court: and it is further ordered that this application be set down for hearing in this Court for the purpose of determining the question of priority of the respective claims of the said mortgagees and such other incidental questions as may arise on the contentions of the parties."

It is from the learned Judge's judgment and his order that these two appeals have been preferred by Hukumchand Kasliwal and Harkissen Das, and Bilasroy Hurdut Roy.

I propose to deal in the first instance, with the appeal by Hukumchand Kasliwal and Harkissen Das.

In this case, as in the other, it has not been disputed that the mortgagee or the person who claims to be the mortgagee, in the ordinary course would be entitled to enforce his rights by means of a suit, irrespective of the winding up Court, and, it was upon that basis, I assume, that the learned Judge on the 21st of November 1923 made his order that Messrs. Humkumchand Harkissen Das should be at liberty to proceed with the suit which they had instituted.

It has been argued, however, on behalf of the respondents that that principle does not apply to these cases because the property in question has been sold by the order of the learned Judge presiding over the winding up Court and that the two suits in question are no longer mortgagees' suits in the ordinary acceptance of the term.

It was further argued that the appellants should not be allowed to approbate and reprobate in the sense that the appellants having taken advantage of the winding up proceedings to have the properties sold, cannot object to the order which has been made by my learned brother Mr. Justice Ghose.

I am not prepared to accept that argument. It seems to me on the facts of the case with which I am now dealing (No. 88) that it must have been the intention of the parties that the property should be sold by the winding up Court without prejudice to the rights of those who claimed to be secured creditors, and without prejudice to such proceedings as the secured creditors might ordinarily be entitled to take for the purpose of enforcing their securities. It is not necessary for me to deal in detail with the facts which induce me to come to that conclusion. It is desirable, however, to draw attention to the fact that in Hukumchand Harkissan Das's case, the sale had actually taken place before the learned Judge gave leave to proceed with the suit, that Messrs. Chamarias subsequently filed their written statment in that suit and that an order was made that the parties should appear to settle the issues in that suit.

Having regard to those facts I have no

doubt that the sale of the property by the winding up Court was a proceeding, which was carried out for the sake of convenience and with the object of getting the property sold at a time and in a place where a good price might be obtained for it. There is no doubt in my mind that it was not intended that the plaintiffs should thereby be debarred from enforcing their rights in the usual way if they were so advised.

It is also desirable to point out that the defendants-respondents have not in any way, as far as I know, changed their position for the worse by reason of the property having been sold which was done with their consent under the order of the winding up Court.

The position in this case, therefore, is that the plaintiffs are alleging that they are entitled to a charge. The defendants are denying that the plaintiffs are entitled to the charge. That issue ought in the ordinary course to be decided in a suit. The learned Judge, in fact, made an order that the suit, which had been instituted, should be continued; and certain proceedings were taken by the defendants in the suit.

The question then arises, in my opinion, whether the order, which the learned Judge made on the 21st of November 1923 was a correct one. In my judgment it was.

That being so, I cannot find that anything has occurred since the 21st of November 1923 which would justify that order being set aside by the learned Judge.

It seems to me that the position was practically the same when the matter came before my learned brother in April 1924 as it was when the matter was before him on the 21st of November 1923. There does not appear to have been with respect to the learned Judge any real ground for departing from the order which he made in November 1923.

It has been argued by the learned Advocate-General and by Mr. Langford James that the learned Judge had no jurisdiction to set aside his previous order or to make an order which would in effect revoke the previous order which had been made giving the plaintiff leave to continue the suit.

In my judgment, it is not necessary for this Court to express any opinion upon that point, because the matters to which I have already referred, are, in my opinion, sufficient to dispose of this appeal.

The result is that, in my judgment, the appeal of Hukumchand Kasliwal and Harkissen Das Bhattar must succeed.

Then the question arises whether there is anything in the appeal of Bilasroy Hurdut Roy which would induce me to come to a different decision from that at which I have already arrived in the appeal of Hukumchand.

The facts, as I have already stated, are not quite the same but upon the question as to what was the intention of the parties when the property was sold by the winding up Court it seems to me that it is even more clear in this case that the parties had only the intention which I have already stated.

As I have already mentioned, on the 6th of August an application was made by the appellants with the consent of Messrs. Chamarias that the properties should be put up for sale and on the 13th they applied that the suit which they had instituted in the Unao Court should be continued and they obtained an order from the learned Judge in the presence of Messrs. Chamarias to that effect.

With the exception that the properties were sold under the circumstances to which I have already referred, there does not seem to me to have been any real difference between the position of affairs when the matter was before my learned brother Mr. Justice Greaves on the 13th of August 1923 and when the matter was before my learned brother Mr. Justice Ghose in April 1924; and, inasmuch as the order made by my learned brother Mr. Justice Greaves was made in the presence of the respondents, the Chamarias, the facts in this respect present a strong case in support of the appellants' contention.

The question which is in dispute between the parties in Bilasroy's appeal is not the same as the question between the parties in Hukumchand Harkissen Das's appeal. In this case the defence set up by the respondents was that Bilasroy's mortgage was invalid and was obtained by certain fraudulent representation. Sir Binode Mitter who argued the case for Messrs. Chamarias stated that his clients would not rely upon the alleged fraud but that they intended to call upon the appellants to prove the consideration for their mortgage and they would rely upon the point raised in con-

nection with the delay in registering the mortgage.

The learned Counsel for the appellants, however, urged that whether the dispute is a large one or a small one, there is a material dispute between the parties in respect of this mortgage, and that being the case, it seems to me that the principle, to which I have already referred, applies to this case as well as to Hukumchand's case and that the order which my learned brother Mr. Justice Greaves made on the 13th of August 1923 giving the plaintiffs leave to continue the suit was a proper one and I see no reason why it should be departed from or set aside.

There is one other matter to which I must refer and that is the case which was mentioned by my learned brother in his judgment, the case of *In re Pacaya Rubber and Produce Company* (1). It is not clear as I read the learned Judge's judgment, whether the learned Judge placed any real reliance upon the decision in that case and whether it affected his mind in coming to his judgment, because all that the learned Judge said was:—"Reference is also made to r. 95 of the Rules of the Court under the Companies Act and it is claimed that in accordance with the practice which obtains in England [see in this connection, *In re Pacaya Rubber and Produce Company* (1)], the actions pending in Unao should be stayed and the question of the priority of the claims should be gone into in this Court where the winding up proceedings are pending."

But inasmuch as the case was mentioned by the learned Judge, I think, it is right to say that, in my judgment, that decision does not seem to affect the question which is now before us. In the cited case the question was whether the learned Judge of the winding up Court had power to transfer to that Court an action by or against the Company which at the date of the winding up was pending in another Court when it appeared that the action which was sought to be transferred extended to other parties as well as the Company as defendants; it was held by the Appeal Court that the learned Judge of the winding up Court had power to transfer such an action under r. 42 of the Companies (winding up) Rules, 1909. It was merely a question of transferring a suit from one Court to another and no question of staying a suit arose in that case; I do not see how it has any bearing upon the question which is now before us.

For these reasons, in my judgment, both the appeals must be allowed and the order of the learned Judge of the 1st of April 1924 should be set aside and the application of Messrs. Chamarias, in respect of which this appeal arises, must be dismissed.

Having heard the learned Counsel on the question of costs the order which we make is that Messrs. Chamarias do pay the costs of Bilasroy Hurdut Roy and of Hukumchand and his partner in respect of the proceedings before Mr. Justice Ghose and that the respondents Messrs. Chamarias do pay the costs of the appellants in each appeal in this Court.

Buckland, J.—It is well established that a secured creditor has *prima facie* a clear right to apply for and obtain leave to enforce his security.

The appellants have filed suits to enforce their securities and the question is whether or not the order re-calling leave should be allowed to stand.

The appeals have been argued on several grounds and I will say at once that I am not impressed by the argument that the Court has no power to re-call leave once granted, nor by that which suggests that the machinery at the disposal of the Judge in the winding up would be inadequate to enable him to decide the questions which may arise in the suits should they come before him. Possibly the want of authority on these points is due to the fact that the circumstances are unusual. There is, however, no need to decide them, for, the appeals can be disposed of upon other grounds.

On behalf of the Chamarias the argument substantially is based—and, I think, exclusively—upon sale of the properties. This has been put in many ways, but it comes to this, that by reason of the sale of the properties there has been a change in the position of the parties of which they are entitled to take advantage.

Now, first one must consider what was the order under which the securities were sold. It is well-known that on the Original Side of this Court when a property eventually will have to be sold such property frequently is sold under conditions which may promptly secure the best pos-

(1) (1913) 1 Ch. 218; 82 L. J. Ch. 134; 108 L. T. 21; 20 Manson 37; 57 S. J. 143; 29 T. L. R. 129.

sible price, entirely without prejudice to all rights and contentions of the parties of any kind whatsoever, the object being to obtain the best value for the property when conditions are most favourable and to allow such contentions as may arise to be argued at leisure thereafter. It has been argued that though the sale may have been without prejudice to the contentions of the parties, it was not without prejudice to the rights of the secured creditors as regards procedure. I can only say that if there was any reservation made at the time I should have expected that to have appeared either in the order or in the minutes or somewhere where my attention could be drawn to it. I think that the order must be taken—and it is the only way in which one can take it—as without prejudice to any of the parties whether as to their rights to any property or whether as to their rights to enforce such rights. However, be that as it may, what do we find? The Chamarias made no reference to such change of position, if any, as was induced by that sale until this application was made. Sir Hukumchand Kasliwal and his partner moved *ex parte* and leave was granted *ex parte.* Beyond all question leave so granted could have been revoked. But so far from making any application to revoke it I find that the Chamarias filed their written statement in the Court at Unao. It may be—as to this we have no information——that at that time they were not aware of the leave granted; but that seems improbable; at all events, it is not so asserted. Thirdly, as has been pointed out by my Lord, even if it is to be taken that the position was changed it certainly has not been suggested that the change was in any degree to the prejudice of the Chamarias. On the contrary I think one may take it that so far as any benefit has been derived from sale of the properties such benefit will enure to the Chamarias if they have any rights against the funds in Court. The appellants are entitled to insist upon their rights, and upon this ground, in my judgment, the appeals will have to succeed and upon the ground that the appellants are entitled to rely upon their right to enforce their securities by suits.

It is unnecessary to make any differentiation between the two appellants; but I must say that I have come to my conclusion with considerable reluctance because I cannot but feel that the balance of convenience and expedition is entirely in favour of dismissal of these appeals. These are not, however, sufficient grounds for disposing of a case when the appellants have rights which they seek to enforce and I agree with the order which my Lord has proposed to make.

Z. K. *Appeal accepted.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATIONS NOS. 60 AND 234 OF 1924.

February 23, 1925.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Gyi.

In the matter of MAUNG WIN PAN AND ANOTHER—PETITIONERS.

Court Fees Act (VII of 1870), s. 19-C—Letters of Administration, grant of—Full fees, payment of—Application for, Letters of Administration de bonis non—*Fresh fees, whether payable.*

Section 19-C of the Court Fees Act provides that where the full fee chargeable under the Act has been paid, no further fee is to be chargeable when a like grant, *i. e.*, a grant of Probate or Letters of Administration, is made in respect of the whole or any part of the same property belonging to the same estate. There is nothing in the wording of the section to confine its application to the case of some executors coming in to take out Probate after one of their members has already taken out Probate. It will apply equally to a subsequent application for administration of the whole estate and to an application to administer that which has been unadministered so far. When the appointment is made *de bonis non*, there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court-fees must be paid. [p. 760, cols.1 & 2.]

Messrs. *Burjorjee* and *Ah Yain*, for the Petitioners.

JUDGMENT.—These were two applications for Letters of Administration *de bonis non.* Previous grants had been made, and the proper Court-fees on the value of the whole estate had been deposited. The question is whether any further Court-fee is chargeable on these applications.

On the matter coming before the learned Registrar, Original Side, he was of opinion that the case did not fall within the purview of s. 19-C of the Court Fees Act, and having regard to the wording of the form given in Sch. III of the Act he was of opinion that Court-fees must be paid on the increased value of the property and on certain other realizations.

The matter has been laid before this Bench for consideration because of a previous decision by a Single Judge of the late Chief Court the correctness of which is questioned.

In *In re Samuel Balthazar* (1) in which exactly the same question arose, it was held: "Letters of Administration have previously been issued in respect of the whole of the property in respect of which Letters are now asked for. The full fee chargeable on the property at the value there placed upon it was levied. The property has since apparently risen in value. I am of opinion that this cannont affect the question. The full fee chargeable was paid when Letters were previously issued. Consequently no fee is leviable now in spite of the rise in value." This decision was passed with reference to the provisions of s. 19-C of the Court Fees Act.

There can be no question that the wording of s. 19-C is wide enough to cover the present cases. It lays down in clear terms that "whenever a grant of Probate or Letters of Administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate." The Legislature is careful to use language which covers the case of a subsequent grant such as a grant *de bonis non*. Section 19-I shows that the amount of the Court-fee is to be calculated on the value of the property at the time the application is made. This may be at some interval after the death of the last owner, and the form given in Sch. III to the Act provides for an increase in value between the date of the death and the date of the application for Probate or Letters. That form is directed to be used with such modification as may be necessary, and we can see no ground for holding that the reference therein to increased values refers to increased values between the first and second grant of Probate or Letters, and not merely to increased values between the date of the death and the date of the application. By s. 19-C, provided that the full fee chargeable under the Act has been paid, no furher fee is to be chargeable when a like grant, *i. e.*, a grant of Probate or Letters of Administration, is made in respect of the whole or any part of the same property belonging to the same estate There is nothing in the wording of s. 19-C to confine its application to the case of some executors coming in to take out Probate after one of their members has already taken out Probate. It will apply equally to a subsequent application for administration of the whole estate, and to an application to administer that which has been unadministered so far. When the appointment is made *de bonis non*, there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court-fees must be paid.

The decision in *In re Samuel Balthazar* (1) was cited with approval in the case of *Swarnamoyi Debi* v. *Secretary of State for India* (2) which is an authority on the point arising in the present case.

We agree with the learned Judges, who decided that case. There are some old rulings to the contrary effect, but these were either passed before s. 19-C was enacted, or were cases to which s. 19-C could not apply, because that section applies only when both the first and the subsequent grants were made after the Court Fees Act came into force.

For these reasons, we are of opinion that no further Court-fee is chargeable on these applications.

Z. K. *Order accordingly.*

(1) 4 L. B. R. 255.

(2) 30 Ind. Cas. 394; 43 C. 625; 20 C. W. N. 472; 22 C. L. J. 370.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 147 OF 1924.

March 9, 1925.

Present:—Mr. Daniels, J. C.

BHAGWAN DIN—PLAINTIFF—APPELLANT

versus

THE DEPUTY COMMISSIONER OF KHERI—DEFENDANT—RESPONDENT.

U. P. Court of Wards Act (IV of 1912), ss. 9, 17, 20—Proof of debt in proceedings under s. 9—Estate taken over by Court of Wards—Failure to notify claim—Sufficient cause.

Proof of a debt in proceedings under s. 9 of the Court of Wards Act is not a sufficient ground for failure to notify the claim under s. 17 of the Act after the estate has been taken over by the Court of Wards.

Appeal against a decree of the Third Additional District Judge, Lucknow at Sitapur, dated the 26th February 1924, reversing that of the Subordinate Judge, Kheri, dated the 30th November 1922.

Mr. *A. P. Sen*, for the Appellant

Mr. *N. N. Goshal*, R. B., Government Pleader, for the Respondent

JUDGMENT.—The appellant brought a claim against the Court of Wards. It is an admitted fact that when the Court of Wards took charge of the estate, notices were issued in accordance with s. 17 of the Court of Wards Act calling upon all persons having claims against the estate to notify those claims. It is also an admitted fact that the appellant failed to notify his claim. He claims to have shown good and sufficient cause for such failure within the meaning of the proviso to s 20, on the ground that he tendered proof of his debt to the Deputy Commissioner when the latter was making a preliminary enquiry under s. 9 of the Act in order to decide whether the estate should or should not be taken under the Court of Wards. It has been held by a Bench of this Court in *Sheo Dayal* v. *Deputy Commissioner, Kheri* (1) that proof of a debt in proceedings under s. 9 is not a sufficient ground for failure to notify under s. 17 after the estate has been taken over. It is impossibe to distinguish that case from the case before me. Following the ruling in that case I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 88 Ind. Cas. 488; 2 O. W. N. 322; 12 O. L. J. 446; (1925) A. I. R. (O.) 326; 28 O. C. 127.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1832 OF 1923.

March 20, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KEHAR SINGH—PLAINTIFF—APPELLANT

versus

JAHANGIR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Pre-emption suit—Property re-conveyed to vendor—Lis pendens, *doctrine of, applicability of.*

It is intolerable that a vendee, after a suit for pre-emption has been filed, should be allowed to re-convey the property purchased by him to the vendor and thus to defeat the suit which has been brought by the pre-emptor. In a case of this kind parties who enter into such a transaction are not entitled to the protection of the Court while the plaintiff, on the other hand, ought to have the full benefit of the doctrine of *lis pendens*, as laid down in s. 52 of the Transfer of Property Act.

Second appeal from a decree of the Subordinate Judge, Meerut, dated the 4th August 1923.

Mr. *A. P. Pandeya*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—After hearing Counsel for the parties in this case we have decided that the appeal must prevail. The facts may be briefly stated. The suit for pre-emption was filed on the 7th September 1922, to pre-empt a sale, which was carried out on the 19th September 1921.

On the 14th September, that is one week after that suit had been filed, the vendee re-sold the property to the vendor, and on the 11th October 1922, he put in a written statement saying that the plaintiff had no cause of action inasmuch as he, the vendee, had got rid of the property by re-transferring it to the vendor. The Court of first instance applied the doctrine of *lis pendens* and decreed the suit. The lower Appellate Court has reversed the First Court's finding on the strength of the ruling to be presently referred to, that the doctrine of *lis pendens* did not apply.

In our opinion the decision of the Court below is erroneous. The case upon which the lower Appellate Court relied is reported as *Herkeshi* v. *Meura Ram* (1).

We have lately had before us a case which was on all fours with the case now under consideration. This is Second Appeal No. 1708 of 1923 [*Durga Prasad* v. *Gangadin* (2)] which was decided on the 27th February 1925. We cannot, on the facts, make any distinction between that case and the case now before us.

In that case we had occasion to refer to the judgment upon which the lower Appellate Court has relied in this case and we pointed out that the judgment did not apply to the facts before us. We also quoted other rulings of this Court to show that the doctrine of *lis pendens* applied to suits of this kind. We referred to *Ghasitey* v. *Gobind Das* (3) and *Kamta Prasad* v. *Ram Jag* (4).

(1) 72 Ind. Cas. 247; (1923) A. I. R. (A.) 294; 9 O. & A. L. R. 495.

(2) 88 Ind. Cas. 202; L. R. 6 A. 320 Civ.

(3) 30 A. 467; 5 A. L. J. 477: A. W. N. (1908) 221.

(4) 22 Ind. Cas. 266; 36 A. 60; 12 A. L. J. 9.

We are satisfied that the doctrine of *lis pendens* has to be applied in the present case. We think it is intolerable that a vendee, after a suit for pre-emption has been filed, should be allowed to re-convey to the vendor and to defeat the suit which has been brought by a pre emptor. In a case of this kind parties who enter into such transactions are not entitled to the protection of the Court, while the plaintiff, on the other hand, ought to have the full benefit, of the doctrine of *lis pendens*, as laid down in s. 52 of the Transfer of Property Act. Applying that principle, therefore, we reverse the decree of the Court below and restore that of the Court of first instance. The appellant is entitled to his costs here and, heretofore, in this Court costs will include fees on the higher scale.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1896 OF 1918.

January 29, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

FIRM CHALA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KISHEN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Necessity—Onus of proof—Debt incurred by karta—*Family property, liability of.*

In determining the validity of a debt incurred by the manager of a joint Hindu family, there is no general and inflexible rule as to whether the onus to prove necessity rests on the creditor or on the joint family to prove the want of necessity; the presumption proper to be made will vary with circumstances and must be regulated by and be dependent on them. [p. 764, col. 2; p. 765, col. 1.]

Maheshar Bakhsh Singh v. *Ratan Singh*, 23 C. 766; 23 I. A. 57; 7 Sar. P. C. J. 19; 6 M. L. J. 127; 12 Ind. Dec. (N S.) 508 and *Amar Nath* v. *Bulaki Das*, 38 Ind. Cas. 363; 21 P. R. 1917; 62 P. W. R. 1917: 50 P. L. R. 1917, relied on.

Where necessity has been proved the mere fact that the creditor made no enquiries as to the necessity for the loan, or the purposes for which it was required is immaterial. [p. 765, col. 1.]

Appeal against a decree of the Senior Subordinate Judge, Rawalpindi, dated the 16th March 1918.

Mr. *R. C. Soni* and Bakhshi *Tek Chand*, for the Appellant.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by the firm of Chela Ram-Sant Ram, Bankers of Rawalpindi against Bhagat Kishen Chand and Sons of the same City claiming recovery of a sum Rs. 5,655-15-3 due on a cash credit bond. The principal amount was stated to be Rs. 4, 861-3-9, interest being claimed at the rate of 12 annas per cent. per mensem. Various defences were set up and the learned Senior Subordinate Judge dismissed the suit on the 17th June 1915, holding that it could not proceed owing to the fact that the plaintiffs' names had not been correctly set forth in the plaint. This decision was upset by a Division Bench of this Court on the 6th December 1917, and the case returned for trial of the remaining issues that had been struck. The same learned Senior Subordinate Judge has again dismissed the suit and the piaintiffs have come up to this Court in appeal through Mr. Tek Chand, while Mr M. S. Bhagat has appeared on behalf of the respondents other than Bhagat Baldev Das who is said to have gone away to Japan and, although substituted service has been effected, has failed to put in an appearance.

It appears that one Bhagat Kishen Chand died somewhere about 1906-7 leaving him surviving a widow, *Musammat* Lakshmi and four sons, *viz.*, Baldev Das, major, and Shanti Sarup, Lajpat Rai and Chandar Dev, minors. The family had been carrying on a brick-making business, according to the plaintiffs under the style of Kishen Chand and Sons. Upon Kishen Chand's death the same business was continued by Bhagat Baldev Das who then became the head of this joint Hindu family and its *karta*. On the 22nd April 1910, the said Bhagat Baldev Das executed the cash credit bond on which the suit was based. This bond is printed in the original paper-book at pages 6 and 7 and was duly registered. Under it certain joint property was charged with the payment of such sums, up to Rs. 5,000, as might be found due, by the firm of Bhagat Kishen Chand and Sons, when demand was finally made. This bond was executed by Bhagat Baldev Das for himself and on behalf of his three minor brothers. Bhagat Baldev Das pledged his own personal credit as well as the joint property as stated above. Bhagat Baldev Das has never put in an appearance throughout the entire proceedings. His brothers

and his mother *Musammat* Lakshmi have, however, contested the suit pleading that Bhagat Baldev Das was not the agent of any firm of which they were members but was working for his own ends. It was also pleaded that the house hypothecated had been gifted to *Musammat* Lakshmi by Kishen Chand in his lifetime. It was pleaded further that as at one time the accounts showed that there was a credit of Rs. 88 14-9 the charge created on the property by this particular deed had come to an end. The issues with which this appeal is concerned are:—

3. Had Baldev Das the right to mortgage the property on behalf of his family.

4. Was the property in suit assigned by Bhagat Baldev Das's father to *Musammat* Lakshmi? If so, what effect has this assignment on the present claim.

5. Is the property in suit ancestral? If so, what effect has this on the present claim?

6. Is the property in suit liable for debts contracted after 22nd October 1912?

7. To what amount are plaintiffs entitled?

Issues Nos. 4, 5 and 6 need not be discussed. It was found by the Court below that *Musammat* Lakshmi had failed to prove the gift set up by her in her favour and that the property was ancestral. It has not been urged that the decision on these two points is erroneous, and the evidence on the record clearly shows that they had been correctly decided. As to issue No. 6 the finding was in favour of the plaintiffs and has not been seriously challenged by Mr. M. S. Bhagat. It is true that at one time the accounts stood to the credit of Bhagat Baldev Das or Kishen Chand and Sons, but the terms of the deed itself as well as Ex. P-7 (page 33 of the first printed paper-book) clearly show that if Bhagat Baldev Das had the power to charge the ancestral property with the monies due under that bond, the plaintiffs' suit is not affected by the fact that on 30th of July 1912, the account of Bhagat Kishen Chand and Sons was at credit. P-7 is a letter dated the 28th October 1912 addressed to the plaintiffs by Bhagat Kishen Chand and Sons although actually written by Bhagat Baldev Das.

The real point for decision in this case is the one involved in the issue: "Whether Bhagat Baldev Das had the right to mortgage the property on behalf of his family."

As to this it was contended by Mr. Tek Chand that Bhagat Baldev Das was on the death of his father Kishen Chand, the head of the family and its manager or *karta*. As such it was claimed that he had the right to raise money on the joint family property for the purposes of the joint family business. This business as stated above consisted of brick-making and it was urged that it was carried on under the name and style of Bhagat Kishen Chand and Sons in the lifetime of Kishen Chand himself. This fact was denied by Mr. Bhagat, but on a reference to the statement of *Musammat* Lakshmi herself at page 45, line 30 we find that she clearly states that Kishen Chand worked as "Bhagat Kishen Chand and Sons" for four or five years before his death. It is also clear that after the death of Kishen Chand the family continued joint and to live as such up to the time when Bhagat Baldev Das went over to Havelian in the Hazara District where he took up certain Railway contracts. It is these contracts that are now in question in the case, for it is alleged by Mr. M. S. Bhagat that there was no justification for Bhagat Baldev Das to commence an entirely new business, namely, that of contracting, and for the purposes of this business to pledge the credit of the joint family. The first point to consider here is, whether Bhagat Baldev Das started this contracting business on his own account or on the account of the joint family. That the contract was taken in the name of Bhagat Kishen Chand and Sons cannot seriously be disputed. P. W. No. 3, Lakhmir Singh who is the son-in-law of Kishen Chand has clearly stated that the contract was taken in the name of Bhagat Kishen Chand and Sons and he also has stated that the contract was entered into in order that Bhagat Baldev Das's brothers might benefit therefrom. Seeing that this Lakhmir Singh was instrumental in securing the contract for Bhagat Kishen Chand and Sons his evidence on this point is of the utmost importance and should be considered conclusive. It must, therefore, be held that Bhagat Baldev Das entered into these contracts not for himself but for, and on behalf of the joint family of which he was the manager.

For the appellants it has been contended that this loan was taken by Bhagat Baldev Das in connection with the family businesses, including the business of making bricks, and it has, therefore, been urged

that the entire family is responsible for the payment of the present claim up to the sum claimable under the cash credit bond. It must be held that the business of making bricks was the ancestral business of the family: the business relating to the contract cannot be regarded as an expansion of the ancestral business or an extension of it but must be treated as an entirely new venture on the part of the family. It remains to be seen how far, under the Hindu Law, the manager of a joint family business can render the joint family property liable for debts incurred in connection with a new business. On this point Mr. Tek Chand has referred to the following rulings: *Raghunathji Tarachand* v. *Bank of Bombay* (1), *Johurra Bibee* v. *Sreegopal Misser* (2), *Joharmal Ladhooram* v. *Chetram Harising* (3), *Ayyasamy Pillai* v. *Gurusami Naicken* (4), *Wedhawa Shah* v. *Rattan Chand* (5), *Brij Lal* v. *Jaishi Ram* (6), *Bissonath Prosad Malita* v. *Bindesri Prosad Singh* (7), *Mul Chand* v. *Sadhu Singh* (8), *Bichha Lal* v. *Jai Pershad* (9) and *Sheotahal Singh* v. *Arjun Dass* (10).

He has also referred to *Amar Nath* v. *Bulaki Das* (11), and Gour's Hindu Code, page 77. On the other hand Mr. Bhagat has relied on *Ganpat Rai* v. *Munni Lal* (12), approved of in *Bhura* v. *Banarsi Das* (13), *Ram Dhan Das* v. *Ramji Das* (14), *Firm Paras Ram-Jwala Prasad* v. *Gian Chand* (15), *Har Kishen Singh* v. *Lahore Bank* (16), *Bankhandi Rai* v. *Kishori Mandal* (17), followed in *Lachhman Prasad* v. *Sarnam Singh* (18), and *Kalika Nand Singh* v. *Shiv Nandan Singh* (19). He also laid stress on *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (20) and *Anant Ram* v. *Collector of Ettah* (21), and Mulla's Hindu Law, pages 219, 221. The cases relied on by Mr. Tek Chand dealt with joint Hindu family carrying on family businesses and Mr. Bhagat contended that in those cases the businesses were of such a nature as necessitated the raising of funds from time to time which entailed charging the joint family property with their payment. He contended that under Hindu Law the onus was on the creditor to prove that a debt incurred by the manager of a joint Hindu family had been incurred for the benefit of the minor members of that family or for recognized necessity. There can be no doubt that the authorities cited by Mr. Bhagat support his contention. On the other hand the authorities relied on by Mr. Tek Chand support his arguments. The case reported as *Anant Ram* v. *Collector of Ettah* (21) is, however, distinguishable, for that proceeded on the Dayabhaga and not the Mitakshara. A reference to that case clearly shows that it was really decided on the fact that the new business started by the head of that Dayabhaga family could not be held to have been started on behalf of his minor brother inasmuch as he (the elder brother) had been appointed a guardian of that brother and the business had been started without the permission of the Court. At page 37 of the 9th Edition of Mayne, Hindu Law, the main differences between the position of the manager of a Hindu joint family under the Dayabhaga and the Mitakshara respectively are very lucidly stated and there can be no doubt that the position of a *karta* of a joint Hindu family governed by the Mitakshara is vastly different from that of a *karta* of a joint Hindu family governed by the Dayabhaga rule. In the present case it will be seen that when in this case the cash bond was executed Bhagat Baldev Das was, undoubtedly, its head. An attempt has been made to show that the family was not on good terms but that effort has, on the record, failed completely, and there is no

(1) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.
(2) 1 C. 470; 1 Ind. Dec. (N. S.) 293.
(3) 28 Ind. Cas. 538; 39 B. 715; 17 Bom. L. R.
(4) 33 Ind. Cas. 691; 3 L. W. 463.
(5) 30 Ind. Cas. 813; 126 P. W. R. 1915; 189 P. L. R. 1915.
(6) 30 Ind. Cas. 500; 172 P. L. R. 1915; 106 P. W. R. 1915.
(7) 17 Ind. Cas. 577; 40 C. 342; 17 C. W. N. 1025.
(8) 59 P. R. 1893.
(9) 45 P. R. 1899.
(10) 56 Ind. Cas. 879; 1 P. L. T. 136; (1920) Pat. 155.
(11) 38 Ind. Cas. 363; 21 P. R. 1917; 62 P. W. R. 1917; 50 P. L. R. 1917.
(12) 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 54.
(13) 30 Ind. Cas. 481; 174 P. L. R. 1915; 113 P. W. R. 1915.
(14) 50 Ind. Cas. 215.
(15) 50 Ind. Cas. 36.
(16) 51 Ind. Cas. 712 at p. 714; 64 P. R. 1919.
(17) 61 Ind. Cas. 102; 2 P. L. T. 17; 6 P. L. J. 72; (1921) Pat. 113.
(18) 40 Ind. Cas. 234; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 339; 44 I. A. 163 (P. C.).
(19) 63 Ind. Cas. 625.
(20) 67 Ind. Cas. 124; 49 C. 560; 30 M. L. T. 228; 20 A. L. J. 409; 24 Bom. L. R. 700; 35 C. L. J. 498; 43 M. L. J. 41; (1922) M. W. N. 364; 26 C. W. N. 954; (1922) A. I. R. (P. C.) 237; 16 L. W. 536 (P. C.).
(21) 44 Ind. Cas. 290; 40 A. 171; 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 226; 16 A. L. J. 245; 23 M. L. T. 228; 22 C. W. N 484; 27 C. L. J. 363; 20 Bom. L. R. 524; (1918) M. W. N. 446 (P. C.).

reason to think that Bhagat Baldeo Das was at that time, in any shape or form, inimical to his brother or mother. Further, it seems to be also beyond any serious doubt that the contract business was entered into in consultation with other relations of the family. Lakhmir Singh is the son-in-law of Kishen Chand and *Musammat* Lakshmi, and he not only managed to secure the contract in question for Bhagat Beldev Das, but it was at his instance that it was entered into in the name of Bhagat Kishen Chand and Sons, so that the minor brothers should benefit from it. Again, the same witness was instrumental in inducing the plaintiffs to enter into this arrangement, for it has been proved beyond question, and admitted by him, that he recommended the plaintiffs to make the advance to Bhagat Baldev Das. In these circumstances it may safely be held that Bhagat Baldeo Das did take this contract for the benefit of the entire joint family. There is, undoubtedly, a conflict of authority as to whether the onus in such cases rests on the creditor to prove necessity, or on the joint family to prove want of necessity. In *Maheshar Bakhsh Singh* v. *Ratan Singh* (22), it was held by their Lordships of the Judicial Committee that, "in such suits no general and inflexible rule can be laid down; the presumption proper to be made will vary with circumstances and must be regulated by and dependent on them." This *dictum* was approved of and followed in *Amar Nath* v. *Bulaki Das* (11) and appears to be the safest rule to lay down. Applying that rule to the present case it seems to us that the plaintiff has succeeded in proving that there was necessity for the action taken by Bhagat Baldev Das. It is true that the plaintiffs made no enquiries as to the necessity for this loan or the purposes for which it was required, but having regard to the decision reported as *Kalika Nand Singh* v. *Shiv Nandan Singh* (19), the absence of such an equiry is immaterial when necessity has been proved. Here the statement of *Musammat* Lakshmi at page 45 of the paper-book shows that on the death of Kishen Chand he left no cash, the assets being outstandings of about Rs. 7,000. As against that the sum of Rs. 12,000 was due to Sant Singh and Rs. 6,000 to S. Raocha Ram. This being the case it cannot be considered that the brick business was in a flourishing condition at the time of Kishen Chand's death. A reference to the accounts shows that the first item taken under this cash credit bond, *viz.*, Rs 3,500 was entered in the brick account *vide* statement of Sahib on page 52.

We, therefore, accept this appeal and grant the plaintiffs a decree for Rs. 5,655-15-3 recoverable from the property hypothecated by the cash credit bond dated the 22nd April 1910. The plaintiffs will also receive their costs throughout and interest at 6 per cent. per annum from date of suit to date of realization. Bhagat Baldev Das will also be personally liable for the amount due under this decree, the decree being *ex parte* as against him.

N. H. *Appeal accepted.*

(22) 23 C. 766; 23 I. A. 57; 7 Sar. P. C. J. 19; 6 M. L J. 127; 12 Ind. Dec. (N. S.) 508.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 441 OF 1922.
November 5, 1924.

Present:—Mr. Justice Venkatasubba Rao.

BHALLAMUDI KAMA SASTRI—
PLAINTIFF—APPELLANT

versus

THIRUMAMIDI KANNAMMA
AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Alienation—Representations made by reversioner—Suit to challenge alienation—Estoppel—Ratification by reversioner—Assignee from reversioner, whether bound.

On the death of a Hindu widow, and during the lifetime of her daughter, a reversioner, by his representations induced a third person to purchase properties from an alienee from the widow and subsequently himself obtained from the daughter a sale-deed of all her rights in the properties so purchased. In a suit by the reversioner as assignee from the daughter to set aside the alienation:

Held, that he was estopped by his conduct from maintaining the suit. [p. 766, col. 2.]

Gur Narayan v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.), relied on.

An alienation by a Hindu widow is only voidable. Where on the death of a Hindu widow her daughter, who is the next reversioner, receives and enjoys the sale-proceeds of an alienation by the widow she is not thereafter entitled to question the same as not being binding on her. An assignee from her is equally estopped from challenging the alienation. [p. 767, col. 1.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Vizagaptam, in A. S. No. 255 of 1921 (A. S. No. 224 of 1919 on the file of the District

Court, Vizagapatam), preferred against that of the Court of Razam, in O. S. No. 44 of 1918.

Mr. *Y. Suryanarayana*, for the Appellant.

Mr. *G. Lakshmanna*, for the Respondents.

JUDGMENT.—This is a speculative suit. Both the lower Courts have dismissed it and after carefully hearing the arguments of the learned Vakil for the appellant, I am satisfied that the decision reached by the lower Courts is correct.

One Vizanna died in 1888 leaving his widow Lingamma and two daughters, Kannamma and Sitamma. Sitamma predeceased her mother and we are not concerned with her. Lingamma died in January 1914; during her lifetime, she made two sales and the present suit has been instituted questioning their validity. On the 8th of October 1890, Lingamma sold what is described as one and one-fourth *vrithi* (share) to one Garimillakurmayya (Ex. VI). The consideration for the sale is stated in the deed to be Rs 500. The learned Subordinate Judge has held that the sale can be upheld only to the extent of Rs. 207-12-0, one of the three items of consideration mentioned in the conveyance. The second transaction impeached is that evidenced (dated 20th March 1894) by Ex. VI (*a*). The widow sold another one-fourth *vrithi* and a house-site to the father of defendants Nos. 2 and 3. The deed mentions that the consideration was Rs. 500, but the learned Subordinate Judge has held that no part of it was utilised for any purpose which would be binding on the estate. These are the two transactions questioned by the plaintiff.

On the death of Lingamma, Kannamma, her daughter, the first defendant in the suit, executed in favour of the plaintiff a sale-deed dated the 10th May 1914, conveying to him such rights as she possessed in the suit properties (Ex. A)' The sale-deed was taken obviously with a view to file a suit and recover the properties from the possession of the vendees or their representatives.

In order to understand the grounds on which the decision of the Subordinate Judge is based, a few further facts must be stated. Kurmayya, the vendee under Ex. VI died, and, on the first May 1907, his representatives sold the property covered by Ex. VI to defendants Nos. 2 and 3 (Ex. II). The learned Subordinate Judge has found that this transaction was brought about by the plaintiff. He attested the sale-deed and he identified the executant before the Registrar. It is in evidence that he himself advised defendants Nos. 2 and 3 to purchase the property. The plaintiff was at the time the nearest reversioner barring the first defendant and by his conduct he induced defendants Nos. 2 and 3 to purchase the property and part with the price. There is not the slightest doubt that he caused defendants Nos. 2 and 3 to believe that he approved of the sale and that such rights as he had, he was willing to give up. In these circumstances, the plaintiff would be clearly estopped from questioning the transaction. The learned Vakil for the appellant, has, however, argued that any representation that the plaintiff made, was made in his character as a possible reversioner, that in the present suit, he claims under the first defendant, and that he ought not to be held bound by an estoppel which would not attach to the first defendant. For this position, the learned Vakil has relied upon *Gur Narayan* v. *Sheolal Singh* (1) but that very case shows that the argument is untenable on the facts as they exist here. At page 580* this passage occurs in the judgment:—"In their Lordships' opinion, there is no estoppel. Besides, it should be observed that Hanuman did not acquire the property as a contingent reversioner to Maha Sundar." In the present case, however, a perusal of Ex. A the conveyance in favour of the plaintiff shows clearly that the first defendant transferred to him her rights in the property on account of the fact that he happened to be the reversionary heir to the estate. The recital is very clear and admits of no doubt. I agree, therefore, with the learned Subordinate Judge, that the plaintiff cannot impeach the sale of the properties covered by Ex. VI.

Next, I proceed to deal with the second alienation effected by the widow, that is, the sale evidenced by Ex. VI (*a*), dated the 20th March 1894 in favour of the father of defendants Nos. 2 and 3. The facts connected with this transaction are these: Lingamma received Rs. 500 from defendants Nos. 2 and 3 and deposited

(1) 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M.L.J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

*Page of 46 C.—[*Ed.*]

the amount with Kondayya, the husband of Sitamma with a direction that the sum should be paid to the two daughters on their attaining majority. The first defendant after she became an adult, received a moiety of this Rs. 500 that is, Rs. 250, with another sum of Rs. 250 representing interest from this Kondayya. She at that time was aware that her mother had sold the property to the father of defendants Nos. 2 and 3 under Ex. VI (*a*). She was further aware that the amount had originally been deposited with Kondayya for the purpose of a moiety of it being paid over to her. The transaction of sale was voidable. The first defendant was the reversioner who was entitled to question the transaction. With the knowledge of these facts, she received from Kondayya Rs. 500. By these acts the first defendant adopted and ratified the transaction. The plaintiff, who claims through the first defendant, has no higher right than the first defendant herself has. I agree, therefore, with the learned Subordinate Judge that the plaintiff is bound to fail in respect also of the items to which Ex. VI-(*a*) refers.

It has been faintly suggested that Ex. VI (*a*) was executed by Lingamma only as guardian of her minor daughters, Kannamma and Sitamma, and that, as on the date of the transaction, the daughters had, a mere expectancy, a mere hope, of succeeding, the transaction is void. As a matter of fact, however, the document was not executed by her only as guardian of her daughters. The recital in the document makes this perfectly clear. The document, moreover, was signed by Lingamma in her individual capacity and not as representing her daughter. The argument that Ex. VI (*a*) is void, therefore, fails.

The judgment of the learned Subordinate Judge is correct. The second appeal fails and is dismissed with costs.

V. N. V.
Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 257 OF 1922.

February 17, 1925

Present :—Mr. Justice Das and Mr. Justice Adami.

CHAKRADHAR JHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHABKANT MISRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Adverse possession—Property acquired, whether stridhan.

A Hindu widow is not a tenant for life but has a widow's estate in her deceased husband's property and if while she is in possession of such property as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate.

Appeal from a decision of the District Judge, Darbhanga, dated the 10th December 1921, confirming that of the Munsif, Second Court, Madhubani, dated the 25th July 1921.

Mr. *L. K. Jha*, for the Appellants.

Mr. *S. K. Mitter*, for the Respondents.

JUDGMENT.

Adami, J.—The plaintiff in this case sought for a declaration of his title to a 1/6 share of certain properties and for joint possession of the same on the ground that the said properties were *stridhan* properties of his maternal grandmother. His case was that his maternal grandmother had acquired these properties under a deed of sale. The lower Appellate Court found, that the *kobala* relied upon by the plaintiff was not a genuine document; but found, however, that the maternal grandmother had been in possession of the properties for more than twelve years and that that possession had been adverse to her step-son. The learned District Judge held that this being so, the properties acquired by adverse possession became the *stridhan* of the plaintiff's maternal grandmother and, therefore, descended to the plaintiff. The plaintiff's suit was, therefore, decreed.

The only question which arises in this appeal is whether the finding of the lower Appellate Court that the property in this case was the *stridhan* of the maternal grandmother is correct. Mr. Jha has relied on the case of *Lajwanti* v. *Safa Chand* (1) decided by their Lordships of the Privy

(1) 80 Ind. Cas. 788; 28 C. W. N. 960; 22 A. L. J. 304; (1924) A. I. R. (P. C.) 121; 5 L. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 Pat. L. R. 245; 26 Bom. L. R. 1117; 47 M. L. J. 935; 6 P. L. T. 1; 51 I. A. 171; L. R. 5 A. (P. C.) 94 (P. C.).

Council. There it was held that a Hindu widow is not a tenant for life but has a widow's estate in her deceased husband's estate, and that if possessing as a widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. That decision seems to conclude the present case. But Mr. Mitter on behalf of the respondent argues that the case I have just cited relates only to a case in which the widow takes possession as a widow and holds adversely. He argues that in the present case the husband's step-son was alive and, therefore, the maternal grandmother had no widow's estate but was only entitled to her maintenance, and that, if a woman is in possession of property not as a widow but otherwise, and obtains a title by adverse possession, that property will not be taken to form part of her husband's estate but will become her *stridhan*. In the present case, however, it is clear from the judgment of the lower Court that the maternal grandmother did enter upon the property in suit as the widow of her husband, for we find that she approached the landlord and had her name substituted for her husband's name in his *sherista* after the death of the husband. This proves to our satisfaction that the maternal grandmother did, as a matter of fact, take possession of the land as widow of her husband and that being so, it is clear that the decision of their Lordships of the Privy Council to which I have referred above must hold good and the property cannot be held to be *stridhan* of the maternal grandmother.

This appeal must, therefore, succeed and the decree of the lower Courts must be set aside and the suit be dismissed with costs in all the Courts.

Das, J.—I agree.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.
FULL BENCH.

APPLICATION IN FIRST APPEAL No. 118 OF 1922.

March 27, 1925.

Present:—Mr. Justice Walsh, Mr. Justice Kanhaiya Lal and Mr. Justice Mukerji.

GAJENDRA SINGH—DEFENDANT—APPLICANT

versus

DURGA KUMARI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 89, O. XXIII, r. 3, Sch. II—Appeal—Arbitration, reference to, pending appeal—Award, validity of—Award, whether can be treated as adjustment of dispute—Inherent power of Court to refuse to allow appeal to be proceeded with—"Any other law" in s. 89, meaning of—Interpretation of Statutes—Marginal notes, whether can be referred to—Duty of Judges.

Held, by the majority (Mukerji, J., dissenting), that where an arbitration is entered into in a pending suit without the intervention of the Court, the Court may on the application of any party stay the hearing of the suit, and on an award being subsequently made act on the award if it finds that it is otherwise valid, treating it as an adjustment of the suit. There is no reason why when an award is brought to the notice of the Court in a pending suit, it should not try the issue whether the award is not binding on the parties under the general principles of the law of contract by a proceeding under O. XXIII, r. 3 of the C. P. C. [p. 772, col. 1; p 774, col. 2.]

Per *Walsh, J.*—Forbearance to sue and forbearance to take definite steps to enforce legal rights are adequate consideration to support an agreement, particularly an agreement where there are mutual considerations and both the parties intend and agree to make an end of their dispute. [p. 772, col. 1.]

The High Court has an inherent discretion to decline to allow an appellant to prosecute an appeal the moment it is satisfied that the appellant by his solemn act and deed testified to by his signature, for what he considered adequate consideration, has expressly abandoned his right and undertaken to withdraw his appeal. [*ibid.*]

Per *Kanhaiya Lal, J.*—The procedure provided by Sch. II to the C. P. C. is by no means the only manner in which an award can be enforced. The language of s. 89 of the C. P. C. does not exclude the applicability of O. XXIII, r. 3, or any other portion of the C. P. C., to an arbitration. The failure to adopt the procedure provided by Sch. II of the Code deprives a party of his right to claim advantages which that Schedule gives. It does not deprive him of his right to enforce the contract embodied in the award otherwise, unless the subject-matter of the reference has meanwhile been disposed of by suit. Where during the pendency of an appeal the parties refer their dispute to arbitration and an award is made by the arbitrator and is carried into effect, the award must be treated as good so far as it operates as a complete accord and satisfaction of the decree under appeal. It makes no difference whether such a settlement is a direct settlement between the parties themselves, or made by a third person to whom the parties have referred their dispute as arbitrator. [p. 774, cols. 1 & 2; p. 775, col. 1]

Per *Mukerji, J.*—The words "any other law for the

me being in force" in s. 89 of the C. P. C. do not refer to the Schedules appended to the main Code of Civil Procedure. [p. 781, col. 1.]

A compromise is the direct result of an agreement between the parties. Rule 3 of O. XXIII of the C. P. C. must, therefore, be taken as directed only to cases where the parties have agreed that the Court should decide a matter between them in a particular way. An arbitration cannot come within the purview of r. 3 of O. XXIII. [p 780, col. 2.]

An award which has been arrived at by a reference of the subject-matter of an appeal to arbitration pending the appeal cannot be recognized as an "adjustment by lawful agreement" by the parties to the appeal or as a "compromise" within the meaning of r. 3 of O. XXIII of the C. P. C. If both parties accept the award, there would be no difficulty in the acceptance of it by the Court. But then the award would be accepted not as an award but as a document embodying what has been accepted by the parties as a proper basis for the settlement of their dispute. [p. 781, col. 1.]

The marginal notes to a section in a Statute are no sure guide to the real object of the Legislature, but they may sometimes be looked at if there be any doubt about the meaning of the words used in the section. [p. 780, col. 2.]

No Judge has a right to override the clear provisions of an enactment on the plea that probably the Legislature forgot something or had not something in their mind at the time of framing the enactment. [p. 782, col. 2.]

Case-law referred to.

Messrs. *Shiam Krishna Dar*, *Harnandan Prasad*, *Sheo Dihal Sinha* and *Kamla Kant Verma*, for the Applicant.

Mr. *Iqbal Ahmad*, for the Opposite Party.

JUDGMENT OF THE FULL BENCH.

Walsh, J.—This matter arises in the following way :—An appeal was filed in this Court on the 7th of April 1922 on behalf of Rai Bahadur Chaudhri Gajendra Singh against Srimati Durga Kumari, the relief sought by which was to set aside a decree of the Subordinate Judge of Moradabad, dated the 23rd of January 1922, and the value of such appeal was stated at Rs. 73,841-10. On the 23rd of January 1924, that is to say, nearly two years afterwards, an application was filed on behalf of the respondent to the above-mentioned appeal, which, it should be mentioned, was an Execution First Appeal, asking that the said appeal should be dismissed. The application did not in terms ask this Court to record an adjustment, or to decide any question under O. XXIII, r. 3. The affidavit in support of it set out the fact that an agreement and what was called an award made under the said agreement, had been come to between the parties and alleged that the appellant in the said appeal had no right to continue the appeal. The appeal itself together with the application to which I have just referred, which was described by the office of the High Court as a miscellaneous application in Execution First Appeal No. 118 of 1922, were connected and heard together before a Bench consisting of my two brothers, Mr. Justice Kanhaiya Lal and Mr. Justice Lal Gopal Mukerji. In an order, dated the 27th of June 1924, which sets out very clearly the course of events and the authorities which have led to a difference of opinion between certain of the High Courts in India as to the applicability of O. XXIII, r. 3, they expressed the opinion that the matter ought to be referred to a larger Bench for decision, and it happened that I myself was then acting in the capacity of Chief Justice, and on the 11th of July, 1924, I made an order directing the case to be finally disposed of by a Bench consisting of these two learned Judges and myself. It came before us on the 31st of July, 1924, when the point was taken that on a question of fact with reference to the so-called award and payment, the evidence of the Collector, Mr. H. G. Walton, who was away on leave, was material, and the case was adjourned generally and has now come before us for final disposal with the addition of Mr. Walton's evidence. Speaking for my own part, I am not satisfied that any question of law arises at all. The agreement before us is such that upon general principles of law I am not satisfied that it is necessary to apply any provision of the Code. The provisions of the Code only apply to such proceedings as purport to be taken thereunder. It happens from time to time that things are done by the consent of parties without reference to any special provision of the Code. It also happens sometimes that the parties are governed by some general principle of law analogous to a provision in the Code, which is not actually to be found in the Code. The most familiar illustration of that is where there has been a binding decision in interlocutory proceedings, in the course of a suit, and one of the parties seeks to question it at a later stage. The Privy Council have held that a decision between the parties in the course of a suit is governed by the principles of *res judicata*, independently altogether of the special provisions of s. 11 of the Code, and indeed there is no provision of the Code which

applies to it. In this case the unfortunate dispute, which is sufficiently described in the previous orders of my brothers and dealt with in great detail by my brother Mr. Justice Mukerji in the judgment he has prepared, was settled by a solemn agreement entered into in writing and executed by the parties on the 10th of February, which is admittedly binding upon both of them unless there is something outside the agreement sufficient in law to destroy it, or to render it of no effect. By that agreement the appellant, who seeks to appeal in Execution First Appeal No. 118 of 1922, agreed for certain consideration therein set out, that he would get his application for permission to appeal to the Privy Council, which was then under consideration in the High Court, and his appeal in the suit for mesne profits, which was pending in the High Court, struck off, and that after the appeal and the application were struck off, he should pay to the present respondent, the lady, the amount which might be determined by Mr. Walton, the Collector, on account of all kinds of mesne profits, debts of the time of Kunwar Sardar Singh which are alleged to have become time barred, expenses incurred in connection with mutation cases, which of course were on the revenue side, civil suits, application for permission, which, although it does not say so, is the application for sanction to prosecute the appellant which had been applied for by the said respondent against the appellant for having forged a Will, a suit for mesne profits, criminal case and enquiries in connection therewith, High Court appeal, Privy Council appeal and appeal in the suit for mesne profits. The other party covenanted that she would accept the amount which might be determined by the Collector aforesaid on account of her demands, setting out the various heads under which she was making demands. In the event of these conditions not being carried out, that is to say, the amount determined not being paid, and the appeal and the application not being struck off, the agreement went on to provide that the lady's rights and decrees were not to become null and void. It is clear from this agreement that the striking off of the appeal and the payment of the demands determined by the Collector were concurrent conditions. That is to say, the actual date of the order of any Court withdrawing or striking the appeal off the list, would be of no importance. If the contracting party did not take the necessary steps to have his appeal struck off, the Court could do it for him on an application by his opponent, as the Court could treat that as done which ought to be done. Certain arguments have been addressed to us as to the nature of the demands made by the lady, and as to the prospect of her being able to establish them either in a civil Court, or in any other Court, or in any other way as a matter of strict legal right. Such demands, which certainly cannot be complained of on the score of economy or moderation, are set out in the schedule to the agreement. If parties choose to submit their disputes informally to a mutual friend and to agree to accept and do respectively, whatever he decides, it is no business of anybody else that they chose to include claims or demands which might not be recoverable in a Court of law, or which might be recoverable with great difficulty. The whole essence and meaning of such an agreement is to make an end of legal proceedings and to avoid further controversy.

In the course of argument before us by the appellant, who claims to go on with this appeal, an effort had been made supported by his affidavit, to show that the agreement was really provisional. That is to say, its performance on both sides was conditional upon an event which was then uncertain, namely, the withdrawal of the prosecution which had been begun against him, Gajendra Singh, for forgery. The case had been actually committed for trial, and the date for the first hearing before the Sessions Judge had been fixed. There is no doubt that Gajendra Singh himself, and probably the Collector, would have been glad to see these proceedings abandoned or withdrawn. There is also no doubt that the lady, if she had been master of the situation and able to withdraw the case by the sole exercise of her discretion, would have been willing to have exercised that discretion for a price. So that if the matter were one of contract only, Gajendra Singh could have bought immunity from prosecution. But the matter was obviously not one of contract. Proceedings under s. 476 of the Cr. P. C. had been set in motion by the Civil Court itself and the decision as to whether they should be allowed to continue, rested not with her, nor even with the District Magis-

trate, but with the Local Government. In fact the sentence upon Gajendra Singh was one year, and the Local Government released him after he had served for a month and-a-half. Hopes, however confident, and inducements, however, strong, are not in themselves consideration for an agreement, and are only evidence what the learned Vakil called circumstantial evidence pointing to the possibility of the existence of some condition precedent of the kind suggested. I can only say, after reading the evidence of the Collector, that I am satisfied that whatever operated upon the mind of Gajendra Singh in entering into this agreement, it was no part of the contract between the parties that the execution of the agreement should be conditional upon the withdrawal of the prosecution. To my mind that contention in fact fails. A further suggestion is made that Gajendra Singh was not in fact a free agent, that is to say, that undue advantage was being taken by the lady of the position into which he had got himself by committing forgery, and that she was in a position to dominate his will, and that the circumstances of the contract are such as to show that it was made by him under undue influence. I will set out as well as I can what are the facts upon which we are invited to arrive at this conclusion. Mr. Walton, the Collector, undoubtedly recommended to the Local Government that the prosecution should be dropped. He evidently thought that it was not in the public interest that it should continue; that Gajendra Singh was a person who had earned by meritorious conduct in the past a reputation in the neighbourhood, and that if this unfortunate dispute with the lady came to an end, the matter might be quietly dropped. He was willing to pay and the agreement left it to Mr. Walton to decide how much the lady should get towards the costs which she had spent in obtaining sanction, and in attending the case for the prosecution before the Magistrate, and it is a just observation made by the learned Vakil that a party does not as a rule voluntarily contribute towards the costs of his own prosecution unless at any rate that prosecution is withdrawn. Further, the case was adjourned from day to day and ultimately indefinitely, until the month of July no doubt by the order of some authority which had reason to believe that the possibility of a withdrawal was under consideration and there is the final observation of a Government official, I think the Legal Remembrancer, that the prosecution must proceed and that the Government had decided upon this course, even if it resulted in the re-opening of what was called the arbitration. The difficulty about this allegation to my mind is two-fold. In the first place, in his affidavit filed in support of this application the appellant does not himself say that he was not a free agent, or that he entered into the agreement under undue influence, nor does he allege anything in the nature of undue influence, or any particular instance of it exercised by any particular individual at any particular moment, and, in the second place, I find it difficult to accept a case which sets up a charge of undue influence alleging that a party to an agreement was not a free agent, while at the same time it is contended, and some of the same material is cited in support of it, that he deliberately entered into a provisional agreement with a condition precedent that he should not be prosecuted. The conduct which is relied upon as indicating that he intended to enter into a conditional agreement seems to me inconsistent with the view that he was not acting as a free agent. I am satisfied that this agreement was absolute and unconditional, and that it was the result of the free will and contracting power of the appellant Gajendra Singh. I find myself unable to hold that there was no consideration for it. The lady was a decree-holder and she was executing her decree. She had claims which she was in a position to enforce in the Execution Court. She had contingent rights, in the event of the appeals brought against her being unsuccessful, to receive costs already incurred in such proceedings. She had an alleged claim for damages in respect of a large number of bonds or documents of the late Sardar Singh which we call in England "choses in action," which she complains had been neglected and allowed to become time-barred by reason of the wrongful acts of her opponent, and although she or her advisers did not take much pains to lay the material with regard to this before the Collector, yet to the extent to which material existed, or could be obtained by the machinery of the law in the course of a civil suit, she would undoubtedly have been entitled to recover damages against Gajendra

Singh for such loss as she had suffered in that matter. Forbearance to sue and forbearance to take definite steps to enforce legal rights, have always been held to be adequate consideration to support an agreement, particularly an agreement of this kind, where there are mutual considerations and both parties are intending, and agree, to make an end of their dispute. On general principles of law, independently of any provision in the Code, I hold that this Court has an inherent discretion to decline to allow an appellant to prosecute an appeal the moment it is satisfied that the appellant by his solemn act and deed testified to by his signature, for what he considered adequate consideration, has expressly abandoned his right and undertaken to withdraw his appeal. To my mind to allow the appeal to go on under such circumstances would be giving effect to a breach of contract, and committing an injustice to the respondent, who is equally bound by the agreement, and would be, on the part of the Court itself, *pessimi exempli*, suggesting that this Court had sanctioned and approved a deliberate departure from the solemn act and deed of the party appearing before it. Under these circumstances, according to my view, this appeal, on the facts before us, ought to be dismissed without reference to any of the decided cases. As the matter has been fully argued before my brothers on a previous occasion and before us, I do not hesitate to hold that whatever may be the state of the law under the Code with reference to a case where parties have submitted to arbitration the whole of their dispute arising in a particular suit without the intervention of the Court (which I may observe is not this case, the transaction proved before us seems to me to be an agreement, compromise and satisfaction of the whole of the subject-matter in this appeal), that the appeal has been adjusted by this compromise, and if we were asked to do so, it seems to me that we ought under O. XXIII, r. 3, to pass a decree in accordance with such compromise. The matter has been argued before us as though this Court had been asked to record such a compromise I cannot find that there is any actual application before this Court asking it to record such compromise, but even if we are entitled to treat the case upon that footing, I am satisfied that the facts in this case bring it within this provision of the Code. I do not propose to consider the differences which have arisen in the various cases cited to us from different High Courts with regard to the difficulties in applying r. 3 of O. XXIII, I agree in the main with the judgment in the case of *Manilal Motilal* v. *Gokaldas Rowji* (1). The agreement of the 10th of February before us is really the decisive factor in my judgment. The reference to Mr. Walton was only a secondary and consequential part of that agreement, though no doubt as regards the money a very important feature of it. It has been carried out, and whether you describe the machinery as an arbitration and award, or a reference, or a decision, or an opinion by a third person, seems to me unimportant. It has been carried out in every particular by both parties. It is merely ancient history, and the only thing outstanding is that in spite of his agreement to the contrary, and in spite of his having paid the money, which he agreed that he would pay, the present appellant has not struck out the appeal in accordance with his promise. I think we ought to dismiss the appeal and to direct it to be struck out with costs.

Kanhaiya Lal, J.—I agree generally with the view taken by my learned brother and wish to add a few observations regarding the facts which have given rise to the matter in controversy and the different aspects from which the question can be examined. It appears that *Musammat* Durga Kunwar was claiming certain property, which had been left by her father, Sardar Singh, and her claim was opposed by Chowdhry Gajendra Singh and his son, Shambhu Singh, on the strength of a Will alleged to have been executed by Sardar Singh in favour of Shambhu Singh who was then a minor. In the suit filed by *Musammat* Durga Kunwar for the recovery of possession of that property, there was also a claim for mesne profits. She succeeded in her suit and got a decree for possession and mesne profits which were left to be determined in subsequent proceeding. That decree was upheld by this Court. The mesne profits were subsequently adjudged at Rs. 73,841-10 on the 23rd of January, 1922. The present appeal was filed by Gajendra Singh and Shambhu Singh from that decree.

While that appeal was pending, the prosecution of Gajendra Singh was started

(1) 59 Ind. Cas. 53; 45 B. 245; 22 Bom. L. R. 1048.

under s. 476 of the Cr. P. C. An application for leave to appeal to the Privy Council from the decree obtained by *Musammat* Durga Kunwar for the possession of the disputed property was also pending in this Court. On the 10th of February, 1923, the parties to the appeal entered into an agreement by which they provided that the application for leave to appeal to the Privy Council from the decree obtained by *Musammat* Durga Kunwar for possession of the estate and the appeal filed by her from the decree adjudging the mesne profits at the figure above-mentioned should be withdrawn and that the question of the amount of mesne profits to which *Musammat* Durga Kunwar claimed to be entitled should be determined by the Collector of Moradabad, who was appointed arbitrator for the purpose and for the settlement of certain other claims for costs and damages, which *Musammat* Durga Kunwar had put forward. The agreement provided that after the amount of the various claims put forward by *Musammat* Durga Kunwar was determined by the arbitrator, the party made liable for the same should discharge it, and that until such discharge was made, the right of *Musammat* Durga Kunwar under her decree would remain unaffected. In other words, the agreement consisted of two parts, one of which provided for the withdrawal of the present appeal and of the application for permission to appeal to the Privy Council and the other was for the settlement of the disputed claims by the arbitrator. To that agreement was appended a schedule of the claims which were then said to amount to Rs. 2,72,255. The claim was subsequently reduced before the arbitrator to Rs. 1,55,000 exclusive of the expenses connected with the criminal proceeding, the exact amount of which was not then stated.

Gajendra Singh and Shambhu Singh were represented before the arbitrator by Mr. Jackson and *Musammat* Durga Kuar by Mr. Qadri. On the 23rd of February 1923, the arbitrator made an award by which he declared *Musammat* Durga Kunwar to be entitled to the entire amount awarded to her by the decree which is now under appeal with interest thereon at 6 per cent. per annum besides certain costs incurred extra-judicially in the previous litigation connected with the estate and that incurred in the committal proceeding. In regard to the debts due to Sardar Singh, which were stated to have become time-barred owing to the negligence of Gajendra Singh, the arbitrator stated that in absence of any evidence as to the existence and value of those debts, he would not at present award anything to *Musammat* Durga Kuar on that account, but it was open to her to raise that question again, if she was so disposed, within three weeks. She did not, however, raise that question again, and the award, as it then stood, became final. The total amount awarded was Rs. 1,26,743-5-3 including the amount of the decree now under appeal, and the arbitrator directed that Rs. 1,00,000 out of the said amount should be paid within a week and the remainder within 15 days from the date of the award, and that order was communicated to Gajendra Singh and the Counsel for the other side.

It is admitted that in persuance of the above award Gajendra Singh made payments partly in March and partly in April 1923 in full satisfaction of the amount awarded against him and that *Musammat* Durga Kunwar subsequently withdrew that amount. The decree for mesne profits was thus adjusted and paid up.

The decree-holder-respondent contends that in view of the agreement and the award, followed by the adjustment and payment aforesaid, the appeal is no longer maintainable. The reply of the judgment-debtors-appellants is that the agreement was conditional on their criminal prosecution under s. 476 of the Cr. P. C. being withdrawn, that it was without consideration, that the award was incomplete and invalid, and that it could not be enforced except by a proceeding under Sch. II of the Cr. P. C.

The agreement does not say that the withdrawal of the criminal prosecution was a condition precedent to the enforcement of the agreement or the award. The prosecutor was not the lady. She had applied for sanction to prosecute, but her application was refused. The prosecution was started under s. 476 of the Cr. P. C. and she could not have withdrawn it. Mr. Walton, the arbitrator, says that the withdrawal of the prosecution was not a condition precedent of the arbitration. He too could not have withdrawn it. At or about the time of making the award he had strongly recommended to the Government that the prosecution should be withdrawn, but the Government did not assent to it, and there the matter ended.

So far as the covenant contained in the agreement for the withdrawal of the present appeal was concerned, there can be no question that that agreement was, in view of the dispute then pending between the parties about the amount of the mesne profits, valid and for good consideration. The parties wanted to withdraw from the Court their dispute about the amount of mesne profits, and with that object they agreed that the appeal should be withdrawn, and the amount of the mesne profits determined by the arbitrator appointed by them. The arbitrator determined the amount according to the decree and that portion of the award cannot be seriously challenged. The respondent would have had to accept less, if a smaller sum than the amount of the decree had been awarded to her. That portion of the award is, therefore, good and binding.

The procedure provided by Sch. II is by no means the only manner in which an award can be enforced. Section 89 of the C. P. C., provides that a reference to arbitration, whether by any order in a suit or otherwise, and all proceedings thereunder shall, save in so far as otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, be governed by the provisions contained in the Second Schedule. The other law above referred to is clearly the law other than the Indian Arbitration Act, which might be applicable to the matter. It does not exclude O. XXIII, r. 3 or any other portion of the C. P. C., applicable to such a proceeding. In fact, as indicated by s. 121, O. XXIII, r. 3 is as if it were a part of the Code itself. The provisions relating to arbitration have only been relegated to a separate schedule for the sake of future legislative convenience with a view to their incorporation with the general law of arbitration, if it was hereafter necessary. Indeed, as pointed out in *Manilal Motilal* v. *Gokaldas Rowji* (1), the object of s. 89 clearly is to give effect to the provisions of Sch. II as if they had been enacted in the body of the Code, and it cannot be said that any material change of procedure, differing from what was in force prior to the enactment of the present C. P. C., 1908, was really intended. Section 96 of C. P. C. similarly lays down that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree, and it can hardly be argued that the reference there to "any other law" is not intended to apply to any law other than the law which is referred to in the immediately preceding clause.

On behalf of the appellant reliance is placed on the decision in *Amar Chand* v. *Banwari Lall* (2) where it was held that a submission to arbitration under the Second Schedule during the pendency of a suit could not be enforced in the suit under the general law of contract. Section 39 of the Specific Relief Act, however, lays down that an award is for purposes of specific performance treated *mutatis mutandis* as a contract. If an arbitration is entered into in a pending suit without the intervention of the Court, the Court may, on the application of any party, stay the hearing of the suit and, on an award being subsequently made, act on the award if it finds that it is otherwise valid, treating it as an adjustment of the suit. In *Manilal Motilal* v. *Gokaldas Rowji* (1) it was held that there was no reason why when an award was brought to the notice of a Court in a pending suit, it should not try the issue whether the award was not binding on the parties under the general principles of the law of contract by a proceeding under O. XXIII, r. 3, of the C. P. C. The difference between such a procedure and an application under the Second Schedule to enforce the award is patent. Under the former procedure the Court will only take cognizance of that portion of the award, which forms the subject-matter of the suit, leaving the rest out of consideration. Under the latter the Court can, if it finds that the award is valid, enforce it in its entirety and pass a decree in its terms. In other words, the failure to adopt the procedure provided by Sch. II deprives a party of his right to claim the advantages which that Schedule gives. It does not deprive him of his right to enforce the contract embodied in the award otherwise, unless the subject-matter of the reference has meanwhile been disposed of by suit.

It may further be mentioned that the award so far as it relates to the decree now in question has been complied with and the entire money payable under the decree has been deposited by the judgment-debtors concerned and accepted by the decree-holder.

(2) 69 Ind. Cas. 808; 49 C. 608; (1922) A. I. R. (C.) 404.

In the words of Voughan Williams, L. J., [*Doleman* v. *Ossett Corporation* (3)] the award is now an executed award and must be treated as good so far as it operates as a complete accord and satisfaction of the decree under appeal. It makes no difference whether such a settlement is a direct settlement between the parties themselves or made by means of a third person to whom the party has referred the dispute after suit for arbitration. The payment was not made under protest. The appeal, therefore, ought to fail and to be dismissed with costs.

Mukerji, J.—I find myself in the unfortunate position of dissenting from my learned brothers.

This is an application by the respondent for an order dismissing an appeal on the ground that the decree under appeal has been adjudged and satisfied. The application is supposed to be one under O. XXIII, r. 3, of the C. P. C. The history of the case briefly is this. One Sardar Singh died. The appellant, Gajendra Singh, claimed the estate on behalf of his son, Shambhu Singh, on the ground that the deceased had given away the property to the latter under a Will. The respondent, *Musammat* Durga Kunwar, is the daughter of Sardar Singh. She claimed as her father's heir. The Civil Court held that the Will propounded by Gajendra Singh was a forgery. The learned Subordinate Judge made a decree in favour of the respondent and this Court upheld it. Mesne profits were adjudged against Gajendra Singh as he had been in possession as a trespasser. The amount decreed is Rs. 73,000 and odd. It is the decree for mesne profits that is now under appeal. Gajendra Singh was prosecuted for forgery and while the case before the Sessions Judge was still pending, it appears, the parties, *viz.*, Gajendra Singh and his son on one side and *Musammat* Durga Kunwar on the other, executed an agreement by which they purported to refer their entire dispute under certain conditions to the decision of the Collector of the district, *viz.* Mr. Walton. Mr. Walton decided that a sum or Rs. 1,26,000 and odd should be paid by Gajendra Singh to *Musammat* Durga Kunwar, that Gajendra Singh and his son should withdraw the appeal now in question and their application for leave to appeal to the Privy Council against the decree in the main suit for possession of the property of Sardar Singh and that Gajendra Singh should pay up the money in this way that a sum of Rs. 1,00,000 should be paid up within a week and the balance in 15 days. It is common ground that the entire sum found due by Mr. Walton was put into the Government Treasury by Gajendra Singh and the money has been withdrawn by the respondent.

The appellants' reply to the respondent's application is, mainly, two-fold. First, they contend that the reference to arbitration without the intervention of the Court which was seized of the appeal is not an adjustment or compromise by mutual, consent within the meaning of O XXIII, r. 3 of the C. P. C. and, secondly, that the reference to arbitration was made under the distinct understanding that the Government would withdraw the prosecution against Gajendra Singh and his son and that, therefore, the payment which was made under the same understanding was not an unconditional payment. It is further urged on behalf of the appellants that as the Government refused to withdraw the prosecution, the whole arrangement, *viz.*, the reference to arbitration and the payment fell to the ground and could not be taken advantage of by the respondent.

The appellants did not file any written statement but filed an affidavit to explain the points taken up by them. The objections formulated by the learned Counsel in his argument on behalf of the appellants as to the invalidity of the reference and award were as follows :—

(1) The arbitrator had no jurisdiction till the appeal and the application were withdrawn.

(2) The consideration and object for the reference were unlawful as they meant and implied a withdrawal of a criminal prosecution.

(3) The award was incomplete as the question of debts for which compensation was claimed by *Musammat* Durga Kunwar was left undetermined and.

(4) The award was not published.

Two main questions arise for determination by this Court, one of fact and the other of law. The question of law is whether if the parties to an appeal make a reference to arbitration as to a matter being the subject-matter of the appeal without intervention of the Court, the award may

(3) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

be accepted by the Court as an adjustment by lawful agreement as a compromise by the parties even where the award is not accepted by one of the parties as binding on him. The question of fact is whether it was a condition precedent to the validity of the reference and the binding character of the award that the Government would withdraw the prosecution of Gajendra Singh and his son, and, if so, whether the award is invalid and the payment made thereunder cannot be accepted as a satisfaction by the appellants of the subject-matter of the appeal. I will take up the question of fact first.

As already indicated, the appellants' case is that they had already been committed to the Court of Session to stand a trial for forgery and it was on the distinct understanding that the prosection would be withdrawn and the Magistrate would recommend the withdrawal of the prosecution that they agreed to an arbitration by the District Magistrate. Having regard to the facts disclosed by the affidavits of the parties and the testimony of Mr. Walton, I have not the least doubt that such was the case.

Before entering into evidence I may point out that a most unsatisfactory feature of this case is that we are going to decide most important questions of fact on mere affidavits. This remark of mine will have material bearing when I come to examine the question of law. If a reference had been made through the intervention of the Court, the submission to arbitration would have been done under the supervision of the Court and in objecting to the validity of the award, the parties would have been entitled to adduce oral evidence by examining witnesses in Court. As it is, we are called upon to decide most important facts on mere affidavits.

The affidavit filed on behalf of the appellants by one Ulfat Rai discloses that the appellants, being anxious to avoid the criminal trial, had petitioned to Local Government for the withdrawal of the prosecution. On the 1st of February, 1923, the Government passed an order, the language of which is quoted *in extenso* in the affidavit. It said *inter alia* : "The petition has been forwarded to the District Magistrate of Moradabad for such action as he considers necessary and that any further communication on the subject must be addressed to that authority." The parties live in the District of Moradabad and that is why the reference was made to the District Magistrate of that place. This order was made on the 1st of February, 1923. The date fixed for the Sessions trial was the 31st of January, 1923. The trial did not take place on that day and was adjourned to the 3rd of February. When the orders of the Government were received, they were communicated to the learned Sessions Judge and the trial was adjourned *sine die*. On the 10th of February, 1923, the parties entered into the agreement of submission to arbitration. These facts alone would indicate that the learned District Magistrate was taking a keen interest on behalf of the appellants and this was reflected in the fact that the learned Sessions Judge too had been persuaded to postpone the trial of Sessions case (always an important case) *sine die*. These facts would easily induce any person against whom serious criminal charges were pending, much less to mention men of position as the appellants were, to come to any terms whatsoever to escape the prosecution. If on the top of these circumstances we look to the agreement of submission, no doubt would be left in the mind as to the reason for that agreement. By this agreement which is dated, as already stated, the 10th of February, 1923, the appellants undertook to withdraw, at once, their application pending before this Court for permission to appeal to the Privy Council against the decree affirming the Subordinate Judge's decree awarding possession of the estate to the respondent. The appellants agreed to withdraw at once the present appeal. They agreed to pay whatsoever might be found payable by Mr. Walton on account of a number of claims amounting to the large sum of Rs. 2,52,000 and odd preferred by the respondent. The appellants agreed, unconditionally, to give up certain properties which could not be successfully claimed by *Musammat* Durga Kunwar on account of the operation of O. II, r. 2, of the C. P. C. It appears that *Musammat* Durga Kunwar had omitted to claim these properties in her suit for possession against the appellants and accordingly she could not bring a fresh suit for these properties. As against all these agreements on the part of the appellants, the respondent, *Musammat* Durga Kunwar, agreed to accept the decision of Mr. Walton as to the several claims she was putting forward. She undertook to give up nothing except such part of her

extravagant and untenable claims as Mr. Walton might disallow. She knew that as to many of these claims she could get no relief in a Civil Court. The position was, therefore, this that the appellants were to give up their rights of appeal and thereby allow the decree for mesne profits amounting to Rs. 73,000 and odd to become final. They were to give up property which the lady, Durga Kunwar, could not recover in any Court of law. The appellants agreed to give up their remedy or supposed remedy in the Privy Council and they further agreed to pay anything for all sorts of claims, including such preposterous claims as the costs of their own prosecution, incurred by the respondent. I do not think that it requires much argument to see that the agreement of submission to arbitration was an entirely one-sided one, the advantage lying entirely on the side of the respondent.

If we examine the award we shall see that the respondent got the entire amount of mesne profits decreed to her, with further interest. She got the costs she incurred in prosecuting the appellants and she got further costs to the amount of Rs. 30,000 with an addition of 50 per cent. for her *worries* etc.

Now, it does not require much persuasion to see that the whole affair was an one-sided one, all the advantages lying with the respondent. What could then have been the reason for all this transaction? My clear answer is that the parties understood and the learned arbitrator himself understood that all this was going to be done for the sake of settlement, not only of the civil rights of the parties, but also *of the criminal prosecution.*

The arbitrator, who was examined on commission, was asked if it was a condition precedent to his arbitration that the prosecution of the appellants should be withdrawn. He replied: "It was not to be dependent on the withdrawal of the criminal prosecution. So far as I know, *Musammat* Durga Kunwar was entitled to enforce the award even if the prosecution was not withdrawn." He further says: "It is not correct to say that the consideration of the award was the withdrawal of the criminal prosecution." I consider these statements of Mr Walton to be nothing more than an opinion. From his own evidence I gather that it was intended to settle not only the civil but the criminal affairs. It was never intended that the civil dispute should be settled even though the criminal dispute (prosecution of one party by another) should remain unsettled The learned Magistrate says: "While the matter was in the Civil Court I and my predecessor-in-office made attempts to settle the dispute. The idea was if the dispute was settled it would be possible to have the *criminal proceedings withdrawn.* I told the parties that if the matter went to the High Court, criminal proceedings would certainly be ordered, whereas if the matter remained in the hands of the district authorities they might be *avoided.*" Then the learned Magistrate says that he did see a copy of the Government Order No. 393 of the 1st of February, *viz*: the order which referred the appellants to the District Magistrate of Moradabad, a portion of which has already been quoted above. Then Mr. Walton says: "It was certainly understood by the parties and myself that it was wished to have the criminal proceedings withdrawn." Again he says: "Referring to the respondent I believe that she wished to take advantage of the position he was in, owing to the criminal proceedings." Then the witness says: "I wrote to the Government at about the time of making the award *strongly recommending* the withdrawal of prosecution of Chaudhri Gajendra Singh." Then the learned Magistrate says: "If *Musammat* Durga Kunwar said that the arbitration is *entirely unconnected* with criminal proceedings, *her statement is not true.*" To my mind, the quotations from the learned District Magistrate's deposition is enough to show that the appellants entered into the submission with the sole view of the withdrawal of the prosecution. This would be made still clearer by the letter of the Government addressed to the District Magistrate on the 3rd of July 1923. The Sessions trial, that had been put off *sine die*, was still pending when this letter of the Government was received. A copy of the letter is on the record and the following is to be found in it:—"The Government refuses to sanction (the withdrawal) even if this results in the arbitration award being re-opened." When we remember that Mr. Walton says that he had strongly recommended to the Government the withdrawal of the prosecution, we can easily see that it was in reply to his letter that the Government said that they did not care even if the award had to be re-opened if the prosecution went on. Putting two and two together, Mr. Walton must have indicated in his letter to

the Government that a non-withdrawal of the prosecution would result in the futility of all his efforts to settle the other disputes between the parties and that the result of the non-withdrawal of the prosecution would be the setting aside and the re-opening of the award. After this, speaking for myself, I would not require any further persuasion to come to the conclusion that the parties and even Mr. Walton believed that the result of the non-withdrawal of the prosecution would be that the award would fall to the ground.

My conclusion, therefore, is that the appellants are right in their plea that the submission and the award have become void because it was a condition precedent to their validity and binding character that the prosecution should be withdrawn.

We may consider the position in a slightly different light. Even if we say that the withdrawal of the prosecution was not a condition precedent to the validity of the submission and the award, we can certainly say that the submission is an agreement which was obtained by exercise of undue influence.

There is some amount of inconsistency between the two pleadings, *viz.*, "the withdrawal of the prosecution was a condition precedent" and "the submission to arbitration was influenced unduly." But I do not think that it is not open to a party to plead like this in the alternative.

I have already shown that the advantages to be derived from the reference to arbitration were entirely one sided. It is the case that the respondent—the prosecutrix—was in a position to dominate the will of the appellants. It is common ground that the respondent asked for permission to prosecute the appellants and when her application was refused, she appealed. In the statement of her claims, appended to the document of submission, the respondent claimed two items, one of Rs. 772, and the other of Rs. 858 on account of these two applications. Then, it is clear that she herself and her people were to supply the evidence for the prosecution of the appellants. In the circumstances, she was clearly in a position to dominate the will of the appellants. The advantages due to the agreement of submission being almost entirely in favour of the respondent, the law would presume that the agreement for submission was influenced unduly, *vide* s. 16 of the Contract Act. The respondent has shown nothing against the presumption thus raised against her. I would, therefore, be prepared to hold that the agreement to submit to arbitration is not binding on the appellants. It would follow that the award also is not binding on them.

In the view I take of the agreement of submission and the award it is not necessary for me to consider the other grounds on which the award is sought to be impeached. But it is desirable to mention briefly the contentions raised. One contention is that the award was incomplete because the question of debts, said to have become time-barred owing to the trespass committed by the appellants over the property of the deceased Sardar Singh, was left undetermined. I do not think this contention is sound because the award simply said that if the matter was to be re-agitated, evidence was to be adduced in three weeks. If the respondent did not want to re-agitate the matter decided against her, certainly it was no duty of hers to adduce evidence.

The next point is that the award was not published. It is conceded that as soon as the award was made an order was issued to the appellants by the District Magistrate directing them to pay up a sum of Rs. 1,00,000 within one week and the balance in two weeks. This would be a sufficient publication of the award.

The third point is that the object of the submission was that the prosecution should be withdrawn. I have already dealt with the question and have come to the conclusion that it was a condition precedent to the validity and the binding character of the submission and the award that the prosecution should be withdrawn. But the withdrawal was to be by the Government themselves and it was never contemplated that the respondent should do anything illegal to stifle the prosecution. In the circumstances I do not think that this ground will hold good.

To summarise. On the question of fact I am of opinion that it was a condition precedent to the validity and the binding character of the submission and the award that the Government should withdraw the prosecution. It being a fact that the prosecution was not withdrawn and one of the appellants was convicted and sentenced, the submission and the award cannot be regarded as binding on either of the appellants. I am also of opinion that the submission

was voidable on account of exercise of undue influence.

It was finally suggested on behalf of the respondent that what has been termed as reference or submission to arbitration and what has been termed "award" were really no "submission" and "award" in the strictest sense of the terms and that these are mere "adjustment or compromise" within the meaning of O. XXIII, r. 3 of the C. P. C. I may, however, point out that the parties and the arbitrator himself regarded that the parties were making a reference to arbitration and Mr. Walton was constituting himself an arbitrator. On this point I would merely refer to the reference itself and to the award. In the award Mr. Walton says that he had been asked "to arbitrate on all outstanding questions" between the parties and that he had obtained the sanction of the Commissioner under Art. 1292 of the Manual of the Government Orders. This article requires that where a Government officer wants to act as an arbitrator in any matter he should obtain the permission of his superior officer. The reply of the Government that they did not care if the award had to be re-opened also indicates that Mr. Walton regarded his act as that of arbitration. I would, therefore, summarily dismiss the suggestion that what was done was not a reference to arbitration nor was an award given.

Coming to the question of law. It appears that it is a difficult one and that the High Courts of Madras, Bombay and Calcutta have given different answers to the question. Before the examination of the authorities it would be useful to examine the law itself. It is to be found within the four corners of the C. P. C., the law of precedure in India.

There can be no doubt that the C. P. C., uses a recognised expression for the proceeding which involves a reference of their dispute by the contending parties to a third party for his decision. This has been described as an "arbitration." Nowhere in the Code has the word "arbitration" been used in a sense co-extensive with that of an adjustment of a dispute by lawful *agreement* or *compromise*. Section 89 of the C. P. C., runs as follows:—

"Save in so far as it is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule."

In the Second Schedule, it will be noticed, provision has been made for three kinds of matter. Provision has been made in paras. 1—16 for reference to arbitration with respect to a matter, being the subject matter of suit (and an appeal) where the reference is through the Court. Then paras. 17—19 relate to procedure to be followed when parties have agreed to refer their dispute to the arbitration of certain parties and one of the parties wants that the reference should be made under the supervision of the Court, although no suit or appeal is pending before it. This is called the filing of an agreement for reference to arbitration in a Court. The remaining paragraphs in the Sch. II refer to the state of affairs where a reference has been made without the intervention of the Court and an award has already been obtained. In this last mentioned case, it is provided that, if any of the parties to the reference so desire, he may apply to the Court to have the award filed in Court so that a decree might be drawn up in terms of the award. It will thus be noticed that every possible case of an arbitration has been recognised and provided for. To repeat, there may be an arbitration pending a suit or appeal; then the reference should be through the Court. Then, there may be a reference without there being any suit pending. In such a case any party to a reference may apply to a Court to take up the conduct of the arbitration under its supervision. Lastly, when there has been an award after the completion of arbitration proceedings, any party may ask that the private award might be given the status of a decree of a Court by the award being filed and accepted in a Court of justice. Paragraph 3, sub-para. (2) of Second Schedule says that, where any matter has been referred to arbitration through the Court, the Court "shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit." This indicates that there is a complete ouster of the jurisdiction of the Court to decide the matter referred to arbitration, except in so far as the orders of the Court may be necessary for the conduct of the arbitration. Then para. 15, cl. 2 lays down that where an award has become void or is set aside, the Court shall make

an order superseding the arbitration and in such a case shall proceed with the suit. This rule indicates where the jurisdiction of the Court, which was taken away by the provision of para. 3, returns to it. Some such rules as are embodied in para. 3 and para. 15 of the Second Schedule, were necessary. For otherwise the two jurisdictions, *viz.*, that of the Court and that of the arbitrator, were likely to overlap. It will thus be seen that the C. P. C. provides a complete and self-contained set of rules by which a conflict of jurisdiction may be avoided.

Let us now examine r. 3 of O. XXIII of the C. P. C. It runs as follows :—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part *by any lawful agreement or compromise*, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

The question is whether the words "adjusted wholly or in part by any lawful agreement or compromise" can include an award obtained on a reference to arbitration without intervention of the Court. If we give the words their plain meaning, we must say at once that, an "award" is not meant by the plain and usual meaning of the words employed. An award is not the immediate result of an agreement or compromise. An award may be the ultimate result of an agreement, in so far as the parties have agreed to abide by the decision of a third party. But in that case we cannot say that the subject-matter of the dispute has been adjusted by an agreement by the parties. An award may be an *adjustment* of a dispute. But so is decision by a Court. But is an award an adjustment by an *agreement*? That is the question. The answer must be in the negative. Much less can we say that an award is the result of a compromise between the parties. As I have stated in an early part of this judgment, the law uses a particular expression, *viz.*, "arbitration" for the procedure by which parties agree to abide by the decision of a third party other than a Court. The Legislature which uses the word arbitration, must have been aware of what the word meant. Can it be said that in using the word "adjusted wholly or in part by any lawful agreement" the Legislature intended to include the proceeding by way of arbitration? To an unsophisticated mind only one answer is possible, namely, in the negative. The marginal notes of a section in a Code of law is certainly no sure guide to the real object of the Legislature. But it can sometimes be looked at if there be any doubt about the meaning of the words used. In this particular case, to my mind, there is absolutely no ambiguity. Still if we look to the marginal note, we find the words used to express in brief the object of r. 3 are "compromise of suit." The marginal note, therefore, indicates that the r. 3 was to deal with what is generally known as a compromise of a suit. A compromise is the direct result of an agreement between the parties. The r. 3, therefore, must be taken as directed only to cases where the parties have agreed that the Court should decide a matter between themselves in a particular way. Giving the words their plain meaning, an arbitration cannot come within the purview of r. 3.

If, however, there were any doubt on the point, it is entirely set at rest by the language of s. 89, C. P. C., already quoted. It lays down that (leaving out certain words in the beginning) all references to arbitration whether by order in a suit or otherwise and all proceeding thereunder shall be governed by the provisions contained in the Second Schedule. If the preliminary words left out from the quotation do not indicate otherwise, it must be admitted that a reference pending a suit which is not made through the Court in which the suit is pending cannot be recognised by the Court. Now, the question is whether there is anything in the words 'save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force which would exclude O. XXIII, r. 3, Sch. I, C. P. C. We have nothing to do with the Indian Arbitration Act in the particular case before us. Then there remain the words "or any other law" for the time being in force. It has been contended that "any other law" referred to therein may indicate O. XXIII, r. 3 on the C. P. C. This argument, in my opinion, should not carry any weight whatsoever. The Sch. II and O. XXIII, r. 3 are as much parts of the Code as s. 89 itself. In the circumstances, if the Legislature meant that

an exception was to be made in the case of O. XXIII, r. 3, would not one expect that this would have been stated in clearer terms? Then, it has been argued that the "any other law," mentioned by s. 89 is not known to be any definite law that may have been in the mind of the Legislature and, therefore, it is possible that they contemplated that any rule of law, that was not contradictory, might come in under the exception. So far as I can see, the Legisture used the words "or any other law for the time being in force" with this intention. There might be in force at the time of the passing of the C. P. C., 1908, any local law or law by the Indian Legislature dealing with arbitration, for special cases. Or some law might be enacted in future laying down special rules for special cases of arbitration. It was intended that those special cases should not be governed by the rules laid down in Second Schedule. This idea is perfectly intelligible, *e.g.*, a local Legislature dealing with, say the indebted agriculturists of Bundelkhand, may desire that a certain kind of dispute among these people should be referred to the arbitration of the Collector of the district. With this view, if the local Legislature should enact certain rules, according to the language of s. 89 of the C. P. C., those rules would not clash with the provisions of s. 89, C. P. C. Whatever meaning may be given to the words "any other law for the time being in force," I am absolutely clear in my mind that those words were never meant to apply to the schedules to be appended to the main C. P. C. Any such idea would suggest a clash between the main rule embodied in the Code and a rule contained in the Schedule. Any High Court may add to or alter the rules in the Schedule, but they can do so only subject to the provisions of the main Code. I am, therefore, definitely of opinion that an award which has been arrived at by a reference of the subject-matter of an appeal to arbitration pending the appeal cannot be recognised as an "adjustment by lawful agreement" by the parties to the appeal or as a "compromise." I need not repeat that if it were the case that both the parties accepted the award, there would be no difficulty in the acceptance of it by the Court. But then the award would be accepted not as an award but as a document embodying what has been accepted by the parties as a proper basis for the settlement of their dispute.

Now, coming to authorities, there are some cases decided prior to 1st January, 1909 when the new C. P. C. came into force and there are others which were decided after the new C. P. C., was brought into effect. The earlier cases are *Samibai* v. *Premji Pragji* (4), and *Prag Das* v. *Girdhardas* (5). These cases are no sure guide to us who have to construe the present Code. For Ch. XXXVII of the old Code did not contain any such rule as has been enacted in s. 89 of the new Code, *viz.*, that all proceedings of arbitration whether by an order in a suit or otherwise should be governed by the provisions of Second Schedule. Indeed the learned Chief Justice Jenkins, who was one of the Judges who decided the later case, expressly stated this to be a ground for not applying the rules on arbitration to be found in the old Code. He says: "I can find nothing, however, in Ch. XXXVII which invalidates a proceeding not in accordance with its provisions beyond the result that non-compliance deprives a party of a right to claim the consequences the Chapter prescribes, and I, therefore, think that the objection cannot succeed." The case in *Prag Das* v. *Girdhardas* (5), was decided in 1901 and of course the case in *Samibai* v. *Premji Pragji* (4), is a much earlier one.

The case of *Rukhanbai* v. *Adamji Shaik Rajbhai* (6), was decided in April, 1908, by Beaman, J., sitting alone. He held that where there was a reference to arbitration but it was an irregular submission, the award could not be accepted as an "adjustment by lawful agreement." The judgment shows that Beaman, J., was not disinclined to follow the earlier cases of *Samibai* v. *Premji Pragji* (4) and *Prag Das* v. *Girdhardas* (5). No other case under the old Code has been cited to us. I have already stated that any ruling given under the old Code cannot be a safe guide for us in construing O. XXIII, r. 3 read with s. 89 of the present C. P. C.

After the passing of the new Code, there are four Bombay cases. The earliest among these is the case of *Harakhbai* v. *Jamnabai* (7), decided by Davar, J., sitting alone. He had cited before him the case in *Prag Das* v. *Girdhardas* (5), but he was asked not to follow that case in view of the new enactment contained in s. 89 of the

(4) 20 B. 30; 10 Ind. Dec. (N. S.) 762.
(5) 26 B. 76; 3 Bom. L. R. 431.
(6) 1 Ind. Cas. 622; 33 B. 69; 10 Bom. L. R. 366.
(7) 19 Ind. Cas. 786; 37 B. 639; 15 Bom. L. R. 340.

C. P. C., Davar, J., confessed that, according to the Second Schedule of the C. P. C, no reference to arbitration was contemplated in a matter pending before a Court, without reference to it. His judgment shows that he was inclined to hold that the validity or otherwise of the award must be enquired into and the only point in question was whether the rules in Second Sch. should be followed or an enquiry should be made under the provision of O. XXIII, r. 3. For, he stated, that the opening words of r. 3, O. XXIII, showed that in the case of dispute there must be an enquiry. Then the learned Judge found what he thought was a way out of the difficulty and he proposed to treat (*vide* page 643 of the report) the words "any other law for the time being in force" in s. 89 as applicable to O. XXIII, r. 3 of the C. P. C. I have already given my reasons for this interpretation being erroneous. I shall content myself with pointing out that the learned Judge gives no reason whatsoever for his ruling, that the words "any other law for the time being in force" had reference to the provisions of r. 3, O. XXIII, as well, other than this that he found it expedient to do so. In my opinion the case in *Harakhbai* v. *Jamabai* (7), is entirely inconclusive and carries no weight. The next case cited to us is that of *Vyakatesh Mahadev* v. *Ramchandra Krishna* (8). In this case no award had yet been delivered and the only matter that was before the learned Judges was the reference. The learned Judges held that the agreement to refer to arbitration could not be treated as an adjustment Although there are remarks in the body of the judgment which may be cited as authority for the contention of the appellant, I do not think that the case can be treated as an authority for the point raised before us. The judgment of Hayward, J., is very instructive. He referred to the Privy Council case of *Ghulam Khan* v. *Muhammad Hassan* (9) and remarked that caution must be observed in giving weight to that distant authority, the case of *Prag Das* v. *Girdhardas* (5) in view of the observation of the Privy Council. In the case of *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (10) Macleod, J., held that it was not intended that a party might apply for a decree under O. XXIII, r. 3, if the award had been obtained by a reference to arbitration in a matter about which a suit was pending without reference to the Court itself In that case however, the parties agreed evidently in view of the previous decisions of the Bombay High Court, that the application (for acceptance by the Court of the award as an adjustment) might be treated as an application under para. 21 of Sch. II of the C. P. C The application was thereupon ordered to be set down for hearing accordingly. The last case in the Bombay High Court is that of *Manilal Motilal* v. *Gokaldas Rowji* (1) and it entirely favours the respondent-applicant's contention. Mcleod, C. J., went so far as to hold that either party could file a suit to enforce the award and apply for a stay of the original suit where a reference to arbitration of the subject-matter of a suit was made without the intervention of the Court. Fawcett, J., thought, and he was right so far as the Bombay High Court was concerned, that there was a very considerable weight of authority in favour of the view that an agreement to refer the matter in suit to arbitration and the award made thereon might amount to an adjustment of the suit by the lawful agreement within the meaning or O. XXIII, r. 3 of the C. P. C., (*vide* page 268 of the report). Then he considered the question whether s. 89 of the C. P. C. prevented the operation of O. XXIII, r. 3. He admitted (page 273* of the report) that no doubt the words "other law for the time being in force" were inappropriate for covering a *provision of the Code itself* such as O XXIII, r. 3. But he thought that the Legislature in enacting s. 89 probably had not that particular rule in their mind and had no intention of affecting it one way or the other. I have already attempted to show that s. 89 read with Sch. II provided a complete machinery for all kinds of arbitration and only required that proper methods should be followed. I have also attempted to show that O. XXIII, r. 3, was meant to apply to entirely different matters and if an arbitration award was ever in contemplation the Legislature would not have taken a very very roundabout and doubtful way of expressing their intention. I am clearly of opinion that no Judge has a right to override the clear provisions made by the Legislature on the plea that probably the Legislature forgot something or had not something in their

(8) 27 Ind. Cas. 46; 38 B. 687; 16 Bom. L. R. 653.

(9) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 6 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(10) 37 Ind. Cas. 140; 40 B. 386; 18 Bom. L. R. 559.

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mind. I may mention that this case in *Manilal Motilal* v. *Gokaldas Rowji* (1) was a Letters Patent appeal against the judgment of Kajiji, and that learned Judge held an entirely contrary view.

Coming to the Madras High Court we have but one case and that was an exceptional one. It was the case of *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (11). In this case the parties agreed to abide by whatever was decided by the Presiding Judge of the Court in association with two private persons. The three gentlemen came to a certain decision and the decree of the Court was made in accordance therewith. The question arose whether the decree could be appealed against. The learned Judges held that the decree must be taken to have been a consent decree and that no appeal lay. Further comment is needless. This case does not throw any light on the point in controversy before us

Coming to the Calcutta High Court, there are only two cases. In the case of *Amar Chand* v. *Banwari Lal* (2) Rankin, J., held that where in a pending suit parties went to private arbitration without the consent of the Court, the award could not be enforced either under O. XXIII, r. 3 or under the provisions of the Indian Arbitration Act. The learned Judge bases his opinion on the remarks of their Lordships of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan* (9). He points out that their Lordships of the Privy Council pointed out 'the scheme of the rules as to arbitration as contained in the old Code and held in effect that the rules covered all cases. Compare the remarks of Hayward, J., in *Vyakatesh Mahadev* v. *Ram Chandra* (8). Their Lordships of the Privy Council pointed out at page 182* of the report that, where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit, all proceedings from first to last are under the surpervision of the Court. Evidently the s. 89 of the C. P. C. was enacted on the basis of this Privy Council case, and it provided that all references to arbitration, to be of binding effect, must be made according to Sch. II of the C. P. C.

In the second case, Rankin, J., was associated with Sir Ashutosh Mukerji, J., and the two Judges in the case of *Rampratap Chamria* v. *Durga Prasad Chamria* (12) affirmed the opinion of Rankin, J., as expressed in the case in *Amar Chand* v. *Banwari Lal* (2) and in the still earlier case in *Dekari Tea Co. Ltd.* v. *Assam Bengal Railway Co.* (13).

The review of authorities shows that there is a complete divergence of opinion between the Calcutta and Bombay High Courts and that the opinion of the Madras High Court is inconclusive. The review further shows that the learned Judges of the Bombay High Court found it difficult to get over the provisions of s. 89 of the C. P. C., and Kajiji, J., thought that it was conclusive that an award arrived at, on a reference out of Court, could not be treated as an adjustment under O. XXIII, r. 3. The learned Judge Davar found it *expedient* to read s. 89 as if excluding O. XXIII, r. 3 out of its provisions. Fawcett, J., found that this was not possible to do, but he thought that the Legislature had *forgotten* what provisions they were going to make in the Schedules when they enacted s. 89 in the body of the Code. The authority of the Bombay High Court is, therefore, of doubtful strength.

I have already given my own reasons for my conclusion, *viz.*, (1) an award is not an adjustment by an agreement of parties within the meaning of r. 3, O. XXIII, and (2) even if any contrary opinion could be entertained before the passing of Act V of 1908, s. 89 of the Act makes it impossible to maintain such an opinion. I may point out that in this case the parties themselves contemplated that the appeal in which the present application has been made, and the application for leave to appeal to the Privy Council against the decree awarding possession to the present respondent, should be withdrawn before the arbitrator entered upon the arbitration.

On fact and law, therefore, I would hold that the respondent's application is without any force and I would dismiss it with costs.

By the Court.—In accordance with the view of the majority, the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(11) 51 Ind. Cas. 827; 42 M. 625; 36 M. L. J. 291; (1919) M. W. N. 221; 25 M. L. T. 397.

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(12) 83 Ind. Cas. 300; 28 C. W. N. 424; (1924) A. I. R. (C.) 567.

(13) 61 Ind. Cas. 919; 25 C. W. N. 127 at p. 128.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 39 OF 1924.
January 29, 1924.
Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.
SCOTT OLDFIELD—DEFENDANT—APPLICANT
versus
THE FIRM OF CO-OPERATIVE STORES—PLAINTIFFS—OPPONENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8—Club, nature of—Debts incurred by members of club—Liability of members.

A club is not a corporate body and has no existence in the eye of the law and is, therefore, incapable of contracting or entering into any legal relations with other persons and bodies.

The only persons who can be held liable for the debts owing by a club, which is not registered as a body politic, are such officials of the club who had actually contracted them and possibly such directing bodies or such members of the club as may be shown to have authorized or approved of the contracts, and members of the club who are not personally liable for such contract cannot be made liable by the application of O. I, r. 8, of the C. P. C.

Application to revise the judgment and decree of the Judge of Small Cause Court, Karachi, dated the 29th February 1924.

Mr. *Tolasing Khushalsing*, for the Applicant.

Mr. *Dipchand Chandumal*, for the Opponents.

JUDGMENT.—It appears that some person ordered from the Co-operative Stores who are the opponents in this application a considerable quantity of spirituous liquors. The person so ordering them was not the applicant. But the applicant has been directed by the learned Judge of the Small Cause Court to pay the balance due at the foot of the account which has been running for some years and on which payments have been made from time to time, on the ground that he was at the time of the action Secretary of a club known as "United Club, Karachi." Apparently this club is now dissolved and the ex-members are reluctant to meet their liabilities. It is no doubt a very sad state of affairs for the merchant. But the merchant is not entitled to sue and recover from members who are not liable to pay. That would be parallel to a case where *A* buys goods from a shop and *B* is held liable. That in effect is what the opponents are trying to get the Court to decree in the present case.

A club is merely a term of convenience. It is a short method of designating a certain body of persons who meet together for social or recreative purposes. But a club is not a corporate body and has no existence in the eye of the law and it is so far incapable of contracting or entering into any legal relations with other persons and bodies. Merchants who deal with such a club which is not registered as a body politic do so at their own risk and the only persons they can hold liable for their debts are such officials of the club who had actually contracted with them and possibly such directing bodies or such members of the club as may be shown to have authorized or approved of the contracts. Creditors cannot by any device make those secretaries or managers who have not entered into contracts with them or ratified such contracts liable under the contracts and they cannot by any device, *e. g.*, by application of O. I, r, 8, turn what is not a corporate body into corporate body and so render members of clubs who are not personally liable for such contracts so liable.

In the present case, it is not averred that Mr. Scott Oldfield was a Secretary or even member at the time when the contracts were entered into and, therefore, he could, in no case, be personally liable as such Secretary or as such member and it is to be noted that although the judgment ordered the decree to issue against him was solely in respect of the funds of the club in his hands yet the decree when drawn up is made against him personally. The decree as far as it refers to Scott Oldfield's personal liability is bad. But as regards that part of the decree which also extends to all present members of the club, it is also bad because it is impossible to put them on record under O. I, r. 8, inasmuch as there is not the same cause of action against past, present and future members of the club, and to allow an action of such a type would be in effect to allow the plaintiff at his will to turn what is not a corporate body into a corporation. If it is desired to sue any actual member of the club it must be specifically alleged in the plaint that such person authorized or ratified the contracts which is the basis of the suit. And a general decree against all the present members on the averments of the plaint is a bad decree.

It is certainly a grievous thing for the

plaintiff that he should lose his money in this way by trusting this apparently respectable club. But we are not able to help him in any way. It is, however, possible that some of the persons who have been made defendants in the present suit in the irregular manner described may be persons who are actually liable to pay because they were persons who gave the orders or authorized the orders, therefore, to dismiss the suit against all the present defendants would be to work the creditor injury and to prevent the plaintiff from recovering his debts by a proper suit against persons who are actually liable.

We, therefore, permit the suit be withdrawn with leave to file a fresh suit.

The defendant-applicant to have costs throughout.

P. B. A. *Decree set aside.*

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS CASE NO. 340 OF 1924.

March 27, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Mukerji.

In the matter of THE UNION BANK, ALLAHABAD, LTD., IN LIQUIDATION.

Companies Act (VII of 1913), ss. 235, 281—Limitation Act (IX of 1908), Sch. I, Arts. 36, 115, 116, 120—Misfeasance by Directors—Claim by Liquidator—Dividends paid out of capital—Reasonable conduct—Burden of proof—Duty and position of Directors—Auditor, duty of—Misfeasance proceedings—Limitation, commencement of—Registration under Art. 116, whether includes registration with Registrar of Companies.

The Directors of a Banking Company are fiduciary custodians of the money entrusted to the Company by the depositors and of the ordinary capital subscribed by the share-holders, and the more satisfactory on the face of it, and the more glowing in character the success of the Company appears to be, the more the Directors are called upon as ordinary responsible business men to satisfy themselves that the apparent profits are really being made. [p. 791, cols. 1 & 2.]

It may be that in the case of a good debtor it is legitimate to treat as profits earned for the purpose of declaring a dividend, a sum of interest which has accrued due although it has not been paid, but a Bank can only justify doing that, and the Directors can only justify a payment out of profits, which means realised profits, if they have satisfied themselves that the debtor, whose particular liability for interest has fallen due but has not been paid, is a man whose liability is as good as cash, and if in a succeeding year he again does not pay, it is their duty to write that off as a loss in the following year's Profit and Loss Account until the sum is realised. That is to say, that which is a legitimate risk for a business man to take in a sound business concern can only be justified where the Directors have taken reasonable care to satisfy themselves that the debtor is a solvent person, and that though he is temporarily in arrears the liability is a good one, and where it is shown afterwards that the debt was a bad one, a Director cannot escape from liability by merely saying that he did not know anything about the debtor. [p. 791, col. 2.]

Where an examination of the accounts of a Bank discloses the fact that dividends have been paid out of capital and that false balance-sheets and false statements have been published, the burden is thrown upon the Directors of showing that they acted reasonably and had real grounds such as would operate on the mind of a business man, for believing that the false balance-sheets and false statement that had been published were really true. In the absence of such proof the Directors would be liable to be proceeded against under s. 235 of the Companies Act. In such a case each Director would be liable for the payment which he approved either by resolution or by signing the balance-sheets or the report by which it was recommended that dividends should be paid out of capital. [p. 792, cols. 1 & 2.]

An Auditor is not a mere arithmetical machine to check the figures in the books. He must satisfy himself not only that the accounts are correct, but that the books represent the true state of affairs of the Company. He has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the Company is being conducted prudently or imprudently, profitably, or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duties to the shareholders. His business is to ascertain and state the true financial position of the Company at the time of the audit, and he must ascertain that position by examining the books of the Company. He does not discharge his duty by doing this without enquiry and without taking any trouble to see that the books themselves show the Company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, he fails to discharge his duty. Assuming the books to be so kept as to show the true position of the Company, the Auditor must frame a balance-sheet showing that position according to the books and must certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the Company. [p. 797, col. 2; p. 798, col. 1.]

A claim by the Liquidator of a Company against the Directors for misfeasance under s. 235 of the Companies Act is governed not by Art. 36 but by Art. 120 of Sch. I to the Limitation Act and the "right to sue" within the meaning of the latter Article would accrue only after the appointment of the Liquidator, if not after he discovers the misapplication of the money. [p. 799, col. 1.]

Registration with the Registrar of Companies is as much a registration within the meaning of Art. 116 of Sch. I to the Limitation Act as registration under the provisions of the Registration Act. [*ibid.*]

Mr. *H. C. Desanges*, for the Official Liquidator.

Messrs. *Peary Lal Banerji* and *Shiva Prasad Sinha*, for the Directors

JUDGMENT.

Walsh, J.—This is a claim by the Liquidator of the Allahabad Union Bank Ld., in liquidation, against several Directors, and also against a Director, who, in the later years of the Bank's existence, became Auditor, for various alleged acts of mis-application of the Company's funds, and of misfeasance under s. 235 of the Indian Companies Act of 1913. The particulars originally filed show a claim of Rs. 1,41,000 odd representing the cumulative liability of all the Directors in respect of all the charges. That total is divided into three classes, namely, a sum for payment of dividends year after year when the Company was making no profit but a loss, and, therefore, out of capital, a further large sum of Rs. 56,000 described as value of grain but being in fact an alleged loss which the Company suffered by reason of the failure of certain of the Directors to obtain adequate security by way of grain from a Company called the Annapurna Company, Ld., and a further item stated at Rs. 42,000 described as a floating account. The latter claim was withdrawn in the course of the proceedings on the ground, as we understood it, that it was included in the mis-statements contained in the accounts in the Company's books and if it really represented a sum of money which had disappeared, it was for the purposes of this section included in and, therefore, overlapped the dividends which have been alleged to have been improperly paid. With regard to the second item, namely, the loss which the Company incurred through the failure of certain of the Directors to obtain adequate security over the grain, we have come to the conclusion that although some of the Directors cannot be acquitted of the charge of negligence in respect of this matter, and although as will appear hereafter, we are of opinion that the circumstances connected with this transaction were such as to put them on enquiry and to arouse their suspicion as to the way in which the business of the Bank was being carried on, on the other hand, the evidence which the Liquidator has been able to lay before us falls short of satisfying us that any amount of grain which the Annapurna Company had control of free from encumbrance, and which it could have by proper steps taken on the part of the Directors of the Bank, given as good security to the Bank, can be identified so as to be described as a direct loss resulting to the Company due to any specific act, or omission of which any particular Director or Directors can be said to have been guilty. We are, therefore, in substance, called upon only to deal with the very serious claim amounting to nearly Rs. 50,000 improperly paid by way of dividend which the Liquidator makes under this section against the various Directors jointly and severally who can be shown to be legally responsible for that undoubted loss. The matter has been very fully discussed before us both on the accounts, the report of the Liquidator and the conduct of each of the Directors respectively and on the legal aspect of the matter, assuming that the Directors, as we held, acted honestly, that is to say, without being guilty of any conscious fraud. Almost all the relevant English cases have been brought out in review before us with a view to showing what is the real legal test. I should have preferred to have taken time to consider my judgment but I am prohibited from so doing by the fact that this is the last day upon which it is possible for me to sit in this Court for at least another six months and it would be obviously undesirable from every point of view to postpone our decision in the matter especially having regard to the fact that the Court is unanimous with regard to all the matters which we have to decide. It seems to u that in the end the test of legal liability must depend upon our application of s. 281 of the Companies Act to the established facts of this case, although in discharging that duty it is no doubt useful for the Court to be guided by the way in which higher authorities have regarded this subject in other cases of the same or of similar character. If we come to the conclusion, as we do, that the monies of the Company were misapplied by being distributed to the share-holders in the shape of dividends or profits, when in fact no profits were being earned and that, therefore, such monies were part of the Company's capital and that such conduct on the part of the Directors was a breach of the Company's articles, a mis-application of the Company's funds, and a breach of such

trust as the law holds Directors of a Company to be under, we then have to consider under s. 281 whether in regard to each of these Directors who took part in such breach of trust, he has acted not only honestly, but also reasonably so as to show that he ought fairly to be excused for such breach of trust.

The story of the case is a painful and pathetic one. The Union Bank was established in 1905 with a nominal capital of Rs. 20,000 which was subsequently increased, and in a modest way appears to have done in its early stages, fairly satisfactory business and slowly to have earned a reputation and the confidence, at any rate, of the Bengali community, which is a very large one in Allahabad. The founder and moving spirit, and, as it is now shown, the master of its destinies was one Kedar Nath Mitra, himself a Bengali, a man, no doubt, of ability in whom every body who knew him believed and in whose honesty his colleagues, friends, and persons associated with him in business placed confidence. The task of the Liquidator in this case, and the task of the Court, and the burden of meeting the charge thrown upon the Directors, have not been rendered less onerous by the mysterious disappearance of this man. The Company winding up, a Judge of this Court issued a warrant for his arrest. The Criminal Investigation Department have done their best to find him. The properties which he is alleged to possess and to have acquired from his ill-gotten gains out of this Company have been attached, but since June 1924 he has vanished, it may be said, from off the face of the earth, and nobody seems to have the faintest idea what has become of him. It is to be put to the credit of the Directors charged in this case, and the main question which arises for decision is whether that fact affords them a complete defence or not that they and the shareholders and the creditors and depositors have been brought into the disaster which has attended the Bank by misplaced confidence in this undoubted knave.

One or two general observations seem to be relevant. Company business as understood and worked on a very large scale by business men in England is not understood and nobody would suggest that it was understood in India, and particularly in Allahabad to the same extent. It is to some extent and was no doubt to some of the gentlemen concerned in this Company to a considerable extent, unfamiliar ground. It is also relevant to observe that the Union Bank Ld., is not such an institution as is ordinarily understood by the word "Bank". It had no investments in the ordinary sense of the word, no gilt-edge securities, no current accounts or anything substantial in the way of current accounts, and nothing in the way of a large floating cash balance passing between itself and its customers daily, such as an ordinary old-fashioned Bank has with a large number of customers on its books dealing with it on current account. It was, if we may use the expression, a sort of glorified money-lender, or *bania* holding itself out to the Bengali community as willing to take charge of their savings on fixed deposit with a satisfactory rate of interest and to take care of those savings so common to many members of the Indian community which are put on one side to provide for the important domestic event, which occurs to most of them, of marrying their children. But the substratum of its business, and the source to which it looked for any profit which it could reasonably hope to make at any time, took the form of loans to customers upon securities. Now it does not require a high degree of business training or even of education to appreciate that the essence of such a business and the hope of its success must depend in the long run, as a matter of daily consideration by those responsible for its conduct, upon the solvency of the debtors to whom the money is lent, and the adequacy of the security which they are prepared to give. A Bank of this kind, or a money-lender who contented himself with lending money at random without regard to the solvency of the customers and without requiring either adequate or any security at all, would merely be rushing to his own ruin, and it cannot be disputed in considering the conduct of this particular Bank that if it was to make any profit at all, its debtors ought to be responsible persons who were able to keep up their payments of interest or who, if they got into arrears, had provided security adequate to enable the Bank to recoup its original loan with a reasonable profit by way of interest thereon. The Memorandum of Association describes the objects as including every description of banking, trading and mercantile specula-

tion, and to any body acquainted with this class of business in India, it is common knowledge that banking business of this kind is largely done by the deposit of ornaments, and the substantial business of this Company was that of granting loans upon ornaments. That this part of the business was not only the principal feature, but was also intended to be controlled by the Directors so that the Manager in carrying out the daily transactions of the Bank should not have a free hand, is clearly shown by Arts. 74 and 75 which restrict his powers in that respect. One further observation ought to be made, because it has an essential bearing on testing the degree of diligence and due care which these Directors from time to time exercised. The premises of the Bank were not on a large scale. Originally the Bank and also the Annapurna Company, Ltd. of which Kedar Nath was also the moving spirit and which figures to some extent in this case, were both of them situate in a room in the actual house in which he resided, such room constituting the offices of the two Companies. There Kedar Nath Mitra, who was to a large extent the Company's Secretary and to some extent his own clerk, was always to be found and transacted the daily business of the Bank. There were kept under the same roof in a safe or locked *almirah* some such modest receptacle as was considered safe and convenient, such ornaments as the Bank held by way of security against its debtors. There also the Board Meetings of the Directors were held. So that if, for example, at the time of the discussion of any monthly statement or abstract or at the time of the preparation or discussion of the balance-sheet, the amount of securities by way of ornaments which the Bank held, and which they ought to have held having regard to the loans which they had issued, was to be tested, all that was required was for one of the Directors to ask Kedar Nath Mitra to open the safe or *almirah* and show them what was there, and it would not be difficult for anybody to know whether the accumulated ornaments deposited in this Bank by way of security amounted at any one time to a lac of rupees or anything like that sum or whether they represented in value no more than Rs. 20,000 or Rs. 10,000. That observation is important because the Directors are not charged here with breach of duty in failing to obtain or make an accurate valuation of actual securities, which they took after having accepted security by way of ornaments nor is it said that they failed to take care to prevent such an accident as may happen such as a sudden theft or a dishonest Manager surreptitiously and suddenly removing a large quantity of such securities. The charge against them substantially is that they carried on unprofitable business and allowed Kedar Nath Mitra to make loans of large sums to worthless insolvent debtors. If the Directors had troubled to enquire into even their names, they would have known at once that many were unable to pay and that large sums were issued by way of loans without any security whatever. So that at any time during the years in respect of which these Directors are charged with neglect of their duty, a comparison of the paper statements of securities in possession of the Bank with the actual ornaments at that time in existence within the four walls of the Bank's premises, would have shown that the Bank was unsecured and on the road to ruin. The relevant articles to which our attention has also been drawn are Art. 81 dealing with payments of dividends, Art. 88 dealing with the keeping of accounts and of the monies received and Art. 73 dealing with the relation of the Manager to the Directors and the superintendence and control which they undertook to exercise over him.

With regard to the history of the Bank and its financial position from time to time and the causes which brought about its failure, the Liquidator's report, was admitted in evidence with the consent of the Advocate for the defendants, and of Mr. B. L. De who appeared in person, as showing accurately the figures to be found in the books subject to the defendants' objections to any omission, modification, addition or explanation which they might establish by their evidence and from the report and from the evidence of Mr. Maurice Govia, who although not actually responsible for the report, has worked as the representative of Liquidator in Allahabad and investigated the affairs of the Company on behalf of the Liquidator—the principal of the firm himself being unfortunately prevented from giving evidence by indiposition—it was clearly established, and not challenged by the defendants, that although possibly profits were made in the early years of the Company's existence—to what extent he was

unable to say—all profits ceased in the year 1915, and that from that year the Company was carrying on at a loss. Inasmuch as it was paying a large dividend throughout the course of the years with which we have to deal, namely, 1915 to 1923, things were slowly but steadily going from bad to worse, and at the date of the liquidation, it had substantially no securities in its possession against a liability of considerably more than 2 lacs. The Liquidator says that such ornaments as there had been in the possession of the Company as against this liability of 2 lacs, namely, about Rs. 21,000, had been surreptitiously and dishonestly re-mortgaged by Kedar Nath for his own purpose to other persons. This transaction of re-mortgaging was to some extent authorised by a resolution of the Directors. It has formed the subject of another litigation between the Liquidator and the sub-mortgagee, and need not be further considered as it has no real bearing on the question we have to determine. It merely illustrates one of those acts of a dishonest Manager which the most competent Board of Directors exercising due care may be unable to prevent. That is to say, they may authorise by a resolution the raising of a loan on security to a limited amount, and thereby give a dishonest Manager an opportunity of surreptitiously misappropriating securities not covered by the resolution and so rob the Company. The Directors are not charged in regard to this matter, but an inspection of the balance-sheets from year to year shows, when the statements in them are compared with the state of things disclosed when the Company came to grief, a startling contrast and a state of things, the knowledge of which could not have been withheld from any Director who took the least trouble to acquaint himself with the affairs of the Bank. The Company were paying and advertising themselves as paying to depositors $6\frac{1}{4}$ per cent. interest on fixed deposits for 12 months, $5\frac{1}{2}$ per cent. on 9 months deposit, $4\frac{1}{2}$ per cent. on 6 months, and no less than $6\frac{1}{4}$ per cent. on the Family Endowment Fund. They were at the same time paying to their shareholders dividends varying in the years with which we have to deal between 9 per cent. and $7\frac{1}{2}$ per cent. on paid up capital of about Rs. 64,000. They were advertising on the front page of their balance sheet a yearly increasing working capital which amounted in the last year to Rs. 2,18,743. That sum represented the total of the paid-up capital to which I have just referred and of the amounts of deposits and Endowment Fund which the public and their customers had entrusted to them. Substantially as against this liability the Bank was said to hold assets in the form of debts considered good in respect of which the Bank was fully secured in the last year stated at Rs. 2,18,600. The truth about that is that year after year nobody could possibly have considered the majority of these debts to be good at all. In substance, the only person who knew anything about them was Kedar Nath Mitra, and, as will appear in a moment, he knew perfectly well that a very large quantity of them were hopelessly bad. The Directors, as appears from their admissions, knew nothing whatever about them at all and certainly never considered them, and as to the securities, they never took the trouble to enquire into or to see the ornaments which were actually in the Bank's premises visible to the eye and which were the only goods which the Bank purported to hold. It is idle to contend that the Directors were not expected to exercise some judgment with regard to the acceptance of loans on security. No complaint, as I have already stated, is made in this charge against them that they are not experts in jewellery and that they have failed to estimate the value of the securities accurately. But from time to time loans were submitted to them for their approval and a statement was made of the security offered, and such matters were of course in the strict conduct of business bound to be submitted to them because of Arts. 74 and 75. But a very simple calculation will show that the amounts which each Director yearly stated to be debts fully secured, had no relation whatever to the amount of actual loans which they had approved during the past 12 months. It is admitted that not one of these Directors ever asked a question of the Manager with regard to the names of the customers, the character of the customers, their position in life, or the securities which they had either individually or cumulatively deposited with the Bank. If any single Director had spent a casual half hour either in perusing the list of the debtors, or in calling for the security or in looking at the books of the Company in which the debtors' names appeared, he

must have discovered certain obvious facts. To take one salient illustration, amongst the debts alleged to have been fully secured and entered in the Company's books as an asset was at the time of the liquidation an accumulated liability of principal and interest due to the Union Bank from the Tata Industrial Bank. At the time when these entries were made and the Tata Industrial Bank was being treated as a debtor of the Union Bank, the Tata Industrial Bank, it is not too much to say, was known by name throughout India as a substantial and, as far as the public knew, a very flourishing concern in Bombay bearing the name of a distinguished and successful man of business in Bombay. It is not disputed that the notion of the Tata Industrial Bank coming to Allahabad to borrow money from the Union Bank, was ridiculous upon the face of it, and would be bound to arouse the suspicion of any body. The account of the Tata Industrial Bank showed that they had borrowed from time to time not very large sums, Rs. 1,500 or Rs. 2,000 or perhaps even more and that they had agreed to pay for the advantage a high rate of interest. Of course they never paid a pice, because they had never borrowed the money. But the account, if looked at, shows on the face of it that they were in default and although there were cash entries suggesting that they had made payments, which took the original date of the loan out of the mischief of the Statute of Limitation, the principal and high rate of interest was running against them year by year so that the ultimate result bore to the original loan the proportion which is only to be found where an exorbitant money-lender is charging a high rate of compound interest against a poor defaulting debtor in need of immediate cash. Mr. De, who was a Director during a large portion of the currency of this loan, and the Auditor who included it in the debts fully secured, and, therefore, the assets of the Bank, said about this: "If I had properly examined the accounts, I would have found that the Tata Bank had not paid a farthing of interest. I think it was my duty to have insisted upon an explanation why the Tata Bank had not paid a pice. It would have aroused the suspicion of any ordinary man. The entry against the Tata Bank now looks to me as a palpable sham. I did not take the slightest trouble to ask the Manager Kedar Nath Mitra, the history of this debt." It is inconceivable how any Auditor doing his duty could possibly, finding the Tata Industrial Bank defaulters to such a large amount at such a high rate of interest with a small concern like the Union Bank in Allahabad, have failed to ask the Manager about it. The same observation applies to all the Directors who failed, as they did, undoubtedly, fail to ascertain from the Manager the names of their customers. Had one of them discovered this fact, he must have known at once that the Bank's business was being fraudulently conducted. The Directors' attention was specifically called to the Tata Industrial Bank in this way. Kedar Nath Mitra suggested to the Board, on the 19th of March, 1919, as appears in the evidence, that he should be allowed to invest the money of the Union Bank in the purchase of one hundred Tata Industrial shares. The fact is that this is almost the only attempt the Directors ever made to invest any part of the capital of the Bank in outside security, if not the only. The Directors in 1919, and those who approved the next balance-sheet, never took the least trouble to ascertain whether these shares had been purchased in whose name they were, and where they were kept. They were never seen. All we know about them is that according to the statement of the Company with which the Tata Bank has now been amalgamated, shares of the Tata Bank were purchased from Kedar Nath Mitra at some subsequent date, and the money was paid to Kedar Nath Mitra's agent in Bombay. That investment of the Union Bank authorized by the Directors apparently went straight into the pocket of Kedar Nath Mitra, and no one appeared to take any trouble to ascertain where the shares were, nor was the investment specially referred to in the subsequent balance-sheet. But one would have thought that a transaction out of the ordinary course of the Bank's besiness of that kind placed upon the Directors the business duty to see that it was carried out and if, as I have already pointed out, the name of the Bank had been searched for in the books of the Company, the state of this fictitious account would have been discovered. It is true to say and we accept the view that if the Directors had discovered the truth or anything like it, they would have immediately put down their foot and brought it to an end. The same observation, as has been made about

the Tata Bank, may be made about the series of family loans which at the date of the liquidation were outstanding against Kedar Nath Mitra's family. These loans included a deceased brother, a penniless brother, who has admitted in this Court that he signed a promissory note for Rs. 5,000 for an alleged loan made to him by Kedar Nath Mitra when no money passed at all and Kedar Nath Mitra's wife. The total amount of irrecoverable loans advanced by the Company through Kedar Nath Mitra to his own family together with accumulated interest amounts to Rs. 56,172. That figure includes his own overdraft of Rs. 18,000. Here again it must be observed that this class of debt which the Directors unknowingly permitted to be entered in the balance-sheets as debts fully secured, was not a sudden phase. They were all debts long outstanding carried forward year by year with the accumulation of interest which added to the total liability appearing year by year in the Company's books represented a large portion of the apparently substantial business of the Bank When it is said against the Directors that this money, alleged to have been lent to the Tata Bank and alleged to have been lent to the family of Kedar Nath Mitra, simply went into the pocket of the Managing Director and was a dead loss to the Company, can a Director be heard to say: "We knew nothing of all this, because we did nothing, we asked no questions, we never knew who the debtors of the Bank were, we never troubled to ascertain what the securities were which the Bank held." To pay as the Bank purported to pay a high rate of interest to depositors and a large yearly dividend, the Bank must have been earning a substantial gross profit. It could not do the business, and pay the dividends, which it was doing without earning substantial profits. Where did the Directors suppose that these large profits were coming from ? The law, according to my view, clearly established by the authorities in the English reports, makes them at any rate fiduciary custodians of the money entrusted to the Company by the depositors, and of the ordinary capital subscribed by the share-holders, and the more satisfactory on the face of it, and the more glowing in character the success of the Bank appeared to be, the more the Directors, one would have thought, were called upon as ordinary responsible business men to satisfy themselves that these large profits were really being made. In the course of the cross-examination of Mr. Govia a question was put to him suggesting that a Bank might in the case of a good debtor treat as realized income due by way of interest which had not been paid or in other words, that according to sound banking business, it is legitimate in the case of a good debtor to treat as profit earned that which has accrued due although it has not been paid, and Mr. Govia said that he would not be surprised if he found that Banks were in the habit of doing that. But, of course, a Bank can only justify doing that, and the Directors can only justify a payment out of profits, which means realized profits if they have satisfied themselves that the debtor, whose particular liability for interest has fallen due but has not been paid is a man whose liability is as good as cash, and if in a succeeding year he again does not pay, it is their duty to write that off as a loss in the following year's profit and loss account until the sum is realised. That is to say, that which is a legitimate risk for a business man to take in a sound business concern, can only be justified where the Directors have taken reasonable care to satisfy themselves that the debtor is a solvent person, and that though he is temporarily in arrears, the liability is a good one, and it seems to me that where it is shown afterwards that the debt was a bad one, a Director cannot escape from liability by merely saying: "I shut my eyes. I knew nothing about the debtor. It did not matter to me whether it was good or bad. I knew nothing about it." In matters of this kind it seems to me as an ordinary business consideration, that the share-holders must be taken to say to the Directors: "We select you as Directors and we entrust all our monies and the management of our interest with you, and we look to you to protect us." Taking the last year or two as an illustration of the extent to which the capital had disappeared, the working capital, as I have already mentioned, is there shown to be something more than two lacs. That capital is a security to the depositors who look for payment of the amounts which they have deposited, to the creditors who look to the Bank for payment of what is due to them, and to the share-holders who look for recoupment of their investments,

Taking a general view of the matter, it appears that in this case something more than half a lac, namely, Rs. 56,000, disappeared in the loan to the Mitra family, something like Rs. 56,000 or more than half a lac, disappeared in the bad debt which was never secured, of the Annapurna Company; something like Rs. 4,000 a year, representing, according to the evidence of the Liquidator, the actual loss that this Company was making multiplied by the 9 years with which we are concerned brings the figure to about Rs. 36,000; while the amount which was divided between the share-holders in dividends during the same period amounts to nearly Rs. 45,000. Without being able at this date to affirm positively, one can only say that these calculations appear to explain the disappearance of the capital which year by year the Directors were showing to the share-holders, the depositors, and other creditors, was in the possession of the Bank fully secured. The Liquidator in the course of his evidence showed how he arrived at the conclusion that the Company was carrying on at a loss. He drew our attention to the fact that at the end of 1917 the total arrears of interest were Rs. 30,819 but the way he put it was this. The interest which was actually paid by the debtors to the Bank in 1917, as shown by the books, was Rs. 4,660 as against expenses of Rs. 8,600 showing that on the actual working of the business there was a loss of Rs. 4,000 per annum, and inspite of that a dividend was declared of Rs. 4,464. He further stated that a study of the books showed that in order to justify on the face of the books the payment of these dividends, the interest which they were earning was roughly speaking 1/5th of the outstanding principal, or, in other words 20 per cent. on the outstanding loans, and he also showed that a careful examination of the books by the Auditor or any Director, who was desirous of checking the monthly statements or the yearly balance-sheet, would have shown, for example, that whereas in the year 1919 Rs. 11,862 was due as interest, only Rs. 5,000 was realized, in 1920 whereas Rs. 13,034 was due by way of interest, only Rs. 3,964 was realized, in 1921 whereas Rs. 13,638 was due by way of interest, only Rs. 5,256 was realized. It seems to me that all this, which appears from a cursory examination of the books, throws upon the Directors, the defendants to this charge, the onus of showing that they acted reasonably and had real grounds such as would operate upon the minds of business men, for believing that these false balance-sheets and false statements, that had been published, were really true. They have said over and over again—it is not necessary to repeat at length their depositions—that they had no reason to suspect. Mr. Ghose, for example, who was a Director throughout the whole period, and whose attitude fairly represents that of the others, said: "Had I looked at the books, I would have come to know the state of things. I never saw the Tata shares. I never saw any security. I did not know anything about them, and I did not know anything about the ornaments which the Bank held. I did my best at the meetings. I had no reason to suspect that anything was wrong." From time to time it does appear that an effort was made by individuals to keep some check upon the conduct of the Manager. In 1915 a Mr. Bhargava complained, and wrote a note in the minute book of the general meeting of share-holders, drawing the attention of the share-holders to doubtful debts, and saying that dividends should not be paid out of capital, and that the Articles of Association had been ignored. It is not clearly shown that this protest was brought home to any of the persons before us, as none of them, it appears, were Directors at that time. But it merely illustrates the sort of standard which a business man would ordinarily set himself as a Director who undertook to the share-holders to look after the business and control the management Again in 1923 Mr. Asutosh Mukerji in the month of June complained that the Directors of the preceding meeting in May had given the Manager too wide a power to deal with the investments of the Bank, and he was overruled by the other Directors in that particular meeting. It was that resolution which Kedar Nath used as the authority for re-mortgaging the ornaments. These are matters which indicate when certain Directors chose to open their eyes to anything at all, what they thought it their duty to do. The transaction with regard to the Annapurna Company, which came to the knowledge of many of them and which was a debt which was a constant source of enquiry, was one of those circumstances which, according to ordinary business standards, ought to have

put the Directors for the time being upon enquiry with regard to the other transactions of the Bank. In 1915 the liability of the Annapurna Company had amounted to Rs. 42,000 for which there was no security. A share-holder's meeting was called, a committee of the Directors was appointed and a resolution was passed distinctly prohibiting any further business with this Company without further security, but as the result of this, little or nothing was done. It looks from the Liquidator's report on page 9 as though inspite of the resolution that no further business should be transacted, further business was transacted. It is true that interest would be accumulating upon this account automatically. There is no evidence before us as to how the amount was accumulating. The Annapurna Company is hopelessly insolvent, is in liquidation, and its books of account are said to be in a state of utter disorder, but between 1915 and 1917 the amount increased by Rs. 4,000 and between 1917 and 1919 it increased by Rs. 8,400. A committee was appointed containing several persons besides Directors, and in the result the Bank was supposed to have secured possession and control of the Annapurna grain as a preliminary step to a complete mortgage. Ultimately in 1923, 8 years after the resolution of the share-holders, a mortgage-deed was brought into existence. It probably surprised nobody that by that time there was no grain. Where the grain went to—which so much trouble had been taken to capture and secure and to put under double locks, with one key in the pocket of each independent authority interested in it—nobody to this date has been able to explain, and probably no body ever will. Its disappearance as an asset of the Annapurna Company and as a security to the Bank, is as mysterious as that of Kedar Nath himself. But can any reasonable person say that the absence of security for this loan, as far back as 1915, and the complete failure on the part of Kedar Nath and of the Board to secure the Bank with regard to this large liability was not sufficient to create suspicion and doubt in the mind of any reasonable person with regard to the satisfactory nature of the business?

A further observation must be made with regard to the statement in the balance-sheet relating to the reserve fund. The Auditor, Mr. De, who signed this balance-sheet was re-called, and all he could say was that it was a misnomer. It is idle for Directors to say that they are not responsible to the share-holders or to the creditors, or under this section for failure to carry out their duty, because they did not understand the business or because they knew nothing about it. To accept such a dictum would involve holding that the less the Directors knew, the less their liability for misfeasance committed in the conduct of the business, and here although the ordinary meaning of a reserve fund is perfectly well known, and must have been perfectly well known to all as an accumulation from annual profits put by as security against some contingency for which it may be required, this reserve fund with accumulations entered in the balance-sheet with all the appearance of a flourishing and well secured Bank, had no meaning whetever. If it is put into the balance-sheet as the Liquidator, Mr. Govia, explained to the Court, as a liability being treated for that purpose in the same way as profits actually earned in the year's working, there ought to be an asset upon the other side corresponding to it generally in the shape of some gilt-edged security, or other sound investment. As a matter of fact this reserve fund was not only a misnomer, as Mr. De called it, it was a sham and a fraudulent statement, and was in fact money which had been issued by way of loan to the debtors of the Company.

Under these circumstances I come without hesitation, or perhaps I ought to say, I should come without hesitation, independently of any authority cited to us, to these definite conclusions. This Company made no profit whatever from and including 1915; every rupee distributed by way of dividend was part of its capital; all the dividends for the year 1915 onwards were paid out of capital; I am satisfied of that as a fact. I am satisfied as a fact that although the Directors honestly did what they did, trusting in Kedar Nath, the duty imposed upon them by the Articles were such—giving due weight to everything which they have said —as to place the onus upon them of showing that they acted reasonably. I, therefore, hold that they are *prima facie* liable under s. 235, and that they have failed to discharge the onus which the law imposes upon them by s. 281. Out of respect, however, to the learned arguments addressed to us on behalf of the defendants, and recognizing that the principle underlying the administration of these sections must be

governed by the authorities upon the question in England, which of course I am prepared in every way to follow as far as I can where they apply to the particular case before the Court, I propose to deal shortly with the cases upon the subject. The first point taken on behalf of the defendants—and it applies to every defendant in a greater or less degree, except Shanker Prasad, whose claims to be a Director, and whose understanding of the matters which he professed to carry out was less than that of anybody connected with this case—is whether this claim is, and to what extent, barred by sub-s. 3 of s. 235. It has been held in India by the High Court of Lahore —the case is not reported in the authorized reports—*Bank of Multan* v. *Hukum Chand* (1), that under this provision, Art. 36 applies to a claim by a Liquidator under s. 235. With great respect to the learned Judges who decided that case, I am unable to adopt that opinion for the reason that Art. 36 deals with compensation for malfeasance and misfeasance independent of contract, and I am of opinion that this claim is not independent of contract. I am unable also to see how Arts. 115 or 116 can be made to apply to a claim under this section. To my mind these deal with claims for compensation made in respect of a specific breach of a specific contract made by one or more individuals with the person making the claim. In the case of Art. 115 a reference to successive breaches or continuing breaches rather emphasises that view, and I find a difficulty in applying this Article to a claim by a Liquidator. It has been said that s. 235 creates no new rights, but as is pointed out in the latest Edition of Buckley on Companies (1924), the statement is only partially accurate. No doubt it provides machinery for enforcing claims which exist independently of the section, but so far as a Liquidator is authorized by this section to apply, in the interest of creditors and depositors who have lost their money, to enforce a claim against the Directors under the section, it seems to me that a new right in him is created. If any Article is to be applied at all to the date from which the liability first came into existence by reason of the act of misfeasance or breach of trust, which the person is proved to have committed, it seems to me that the only Article which at all fits the case is Art. 120, which provides a term of six years for every case not otherwise provided by the Act. If one were driven to do so, the fact that it would result in destroying the value of the section, would be no reason for refusing to apply a particular Article, but in asking myself the somewhat difficult question what the Legislature had in view when it enacted sub-s. 3 to s. 235, I cannot shut my eyes to the fact that if they intended that the liability of a Director for breach of trust and misapplication of funds should be barred, either from the point of view of tort after two years, or from the point of view of breach of contract after three years, they might just as well not have enacted s 235 at all. I do not hesitate to say that after an experience of nine years in this Court of winding up business, such a provision would render in India s. 235 almost a nullity. This much is clear, that the Legislature distinctly refrained from segregating the various claims which can be made under s. 235, and applying to them the appropriate Article in the Schedule. It may be said that they threw that extremely delicate and difficult task upon the Judges instead of discharging it themselves but giving the best effect I can to the apparent intention disclosed by the language used, I am of opinion that it is only a statutory bar to the right of the Liquidator to make his application against a defaulting Director, and that whatever Article of the Statute of Limitation is applicable, the time begins to run from the date when the liquidation took place when the Liquidator first had the right vested in him. The result is that no Article of Limitation can possibly be a bar to this application, and I hold that sub-s. 3 is no bar. *In re National Funds Assurance Co.* (2), it was held that the powers of Liquidator of a limited Company are more extensive than those of the Company prior to the winding up order. With regard to the meaning of s. 235 and the mischief which it aims at, and the question whether *bona fides* is an answer to a charge of having misapplied monies of the Company by payment of dividends out of capital, I refer to what the Master of the Rolls said at page 128*: "That being so, the only question which remains is, have the Directors, in the words of the Act of Parliament 'misapplied any monies of the Company'? I think they have misapplied

(1) 71 Ind. Cas. 899; (1923) A. I. R. (L.) 58.

(2) (1879) 10 Ch. D. 118; 48 L. J. Ch. 163; 39 L. T. 420; 27 W. R. 302.

*Page of (1879) 10 Ch. D.—[*Ed.*]

them by dividing the capital among a portion of their share-holders. That appears to me to be a plain case of misapplication within the very terms of the section." The next authority which is material is the well-known case *In re Oxford Benefit Building Society* (3), a case which so far as the Directors were responsible for having paid dividends out of capital in consequence of having invested the Company's funds on bad securities, is very like this case, and in principle almost on all fours with it. I refer to what Mr. Justice Kay said on page 511* :

"Now the basis of this estimate in every case was an assumption that every one of the securities on which the Company were advancing money was ample to provide for principal, interest and costs in respect of the advance. And for this they had nothing but the assurance of the Surveyor and Secretary, Mr. Galpin. He it was also who estimated, according to the 5 per cent. table, the present value of the instalments which each mortgagor had to pay. The Auditors neither checked the valuation of the securities nor the actuarial estimate of the mortgagors' re-payments, and yet the Directors, who were forbidden by their Articles to pay any dividends, except out of realized profits, paid every dividend out of whatever monies they happened to have in hand, which has been called in the argument the floating capital, and never attempted in any report or balance-sheet to distinguish realized profits from the estimated profits which they thus purported to divide, or to ascertain out of what fund the dividends were actually paid.

It has been argued that this was done *bona fide*, and that where Directors in good faith have made an error in the computation on which their balance-sheets are founded, the Court will not lightly visit them with the consequences of a *bona fide* mistake. I confess I hardly know what is meant by *bona fides* in such an argument. I inquired whether there was any evidence that the Directors had considered the meaning of the Articles or had taken any advice upon them. There is no suggestion that they ever did so. There is nothing obscure or difficult in the construction, and it seems to me incredible that any man of business could suppose that this course of proceeding was a division of realized profits."

(3) (1887) 35 Ch. D. 502; 56 L. J. Ch. 98; 55 L T. 598; 35 W. R. 116.

*Page of (1887) 35 Ch. D.—[*Ed.*]

That case was followed by Mr. Justice Stirling in the case of *Leeds Estate Building Co.* v. *Shepherd* (4). With regard to the liability of an Auditor he held : "that it was the duty of the Auditor in auditing the accounts of the Company not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the Articles of Association, and was properly drawn up so as to contain a true and correct representation of the state of Company's affairs."

With regard to the Directors who in that case were ignorant of the true state of the Company's affairs, but had neglected to enquire into or do anything by way of checking the conduct of the officials, Mr. Justice Stirling said this:

"The conclusion at which I have arrived, upon a consideration of the whole evidence, is, that the Directors never exercised any judgment at all with reference to these accounts, but accepted without inquiry or verification whatever Crabtree and Locking told them. In this respect they failed, as I think, to perform the duty cast upon them by the Articles of Association. That duty was to cause estimates of account to be prepared, and upon those estimates to recommend a dividend. In the performance of that duty they were no doubt entitled to avail themselves of the advice and assistance of their Secretary and Manager, and to obtain by that advice and assistance such materials as were proper for the purpose of enabling them to decide upon the questions they had to consider; and having so done, they were bound to exercise their judgment as merchantile men on the materials which they had obtained. This, in my opinion, they never did; but in truth they delegated to Crabtree the exercise of that judgment and discretion which it was their duty to take upon themselves. Upon the whole, although the Directors were, I believe, ignorant of the true state of the Company's affairs, and although I find no trace of their having acted with the view of obtaining any improper benefit for themselves, I feel compelled to hold that they have fallen short of that standard of care which, having regard to the *Oxford case* (3), they ought to have applied to the affairs of the Company in the following respects:—(1) They never

(4) (1887) 36 Ch. D. 787; 57 L. J. Ch. 46; 57 L. T. 684; 36 W. R. 322.

required the statement and balance-sheets to be made out in the manner prescribed by the Articles; (2) they failed properly to instruct the Auditor, or, at all events, to require him to report on the accounts and balance-sheets in the mode prescribed by the Articles: and (3) they were content throughout to act on the statements of Crabtree without inquiry or verification of any kind other than the imperfect audit of the accounts by Locking. Those accounts and balance-sheets did not truly represent the state of the Company's affairs; and that being so, I think that according to what is laid down in *In re County Marine Insurance Co., Rances case* (5), the onus is laid upon them to show that the dividends they paid were paid out of profits. This upon the evidence before me they fail to do."

Finally it seems to me that the principle laid down in *Masonic and General Life Assurance Co.* v. *Sharpe* (6) governs this case. We were, on behalf of the defendants, strongly pressed by the decisions in the cases of *Kingston Cotton Mill Co. (No. 2)* (7), and *Dovey* v. *Cory* (8). I do not propose to discuss the *Kingston Cotton Mill Co. (No. 2)* (7) at length. I think it may be said to represent the high water-mark of the immunity from legal liability of the ornamental and "do-nothing" Company Director. It seems to me that there is a broad distinction between the circumstances of that case and the circumstances of this case. It may well be that a Director or a body of Directors having apparently an honest Manager cannot be, under s. 281, called upon to keep a constant watch and check upon a fluctuating stock like yarn which is going in and out of the mill and which is being used daily in the handling of the Company's business. To impose such a duty upon Directors, as the Courts have said, would lead honest men to refuse to undertake such a resposibility. But that is a very different thing from a Bank Director taking no steps whatever to see that the Manager does not lend the funds and the depositors and share-holders' capital to worthless debtors and to persons who offer no security. It seems to me that the case of the *Kingston Cotton Mill Co. (No. 2)* (7) gives no assistance in deciding whether the Directors are liable in this case. The same I think must be said about the case of *Dovey* v. *Cory* (8), Mr. John Cory was in a very special position. Lord Davey said, and every body must recognize that the case was a difficult one. Mr. Cory certainly was guilty of doing very little but in that case in addition to the Manager, there was a Chairman of the Board who was actively interesting himself in the conduct of the Company's business, and was no doubt trusted by the Directors, and allowed so to speak to do their work in seeing that the Manager did his, and it so happened that this Chairman was not only dishonest, like the Manager, but was a brother of Mr. John Cory, and the Lord Chancellor emphasised the fact in his judgment that he desired to be understood as dealing only with the facts of that particuldr case. It does not seem to me that the conduct of Mr. John Cory, which was in that case excused, has any relation to the conduct of these Directors. Finally Mr. Peary Lal Banerji pressed upon us as being binding upon us with the force of a statute the dictum contained on pages 109* and 110* of the opinion of their Lordships of the Privy Council in the case of *Prefotaine* v. *Grenier* (9), where it is said by Sir Arthur Wilson apparently in general terms, that attempts had been repeatedly made to render Directors personally liable on the ground that they had trusted various officers of the Company and had failed to detect and had been misled by misrepresentation and concealment by such officers when there was no reason for doubting their fidelity, and that such attempts had not been successful, and it was further said in the course of that passage that it was sufficient to refer to the case of *Dovey* v. *Cory* (8). Paying all the respect which is due to any dictum in an opinion of their Lordships of the Privy Council, I can only say that if it is to be taken as a historical statement of fact, it cannot be accepted as accurate. In fact, in that particular case, no negligence was found against the Directors. An appeal was brought against the decision of the Court below, but so little headway did it make on the facts that the respondent's Counsel was not called upon, and

(5) (1870) 6 Ch. A. 104; 40 L. J. Ch. 277; 23 L. T. 828; 19 W. R. 291.

(6) (1892) 1 Ch. 154; 61 L. J. Ch. 193; 65 L. T. 806; 40 W. R. 241.

(7) (1896) 1 Ch. 331; 65 L. J. Ch. 290; 73 L. T. 745; 44 W. R. 363.

(8) (1901) A. C. 477; 70 L. J. Ch. 753; 50 W. R. 65; 85 L. T. 257; 17 T. L. R. 732; 8 Manson 346.

(9) (1907) A. C. 101; 76 L. J. P. C. 4; 95 L. T. 623; 23 T. L. R. 27; 13 Manson 401.

*Pages of (1907) A C.-- [*Ed.*]

the judgment does not profess to discuss the cases. I have already pointed out that the study of the case of *Dovey* v. *Cory* (8), does not quite bear out the statement made with regard to it in Sir A. Wilson's opinion, and I hold myself not to be bound by that dictum if it is to be taken as laying down the law that wherever a Director honestly trusts a fraudulent Manager, he is free from all liability.

Finally I prefer to base myself upon what was said by Lord Lindley in *In re National Bank of Wales, Cory's case* (10). It is the same as that case of *Dovey* v. *Cory* (8) and the judgment from which I quote, is the judgment of the Court of Appeal read by Lord Lindley, Master of the Rolls, overruling Mr. Justice Wright, who held John Cory to be liable. He says:

"The question arose, was it his duty to distrust the accuracy and confidence of what he was told by the General Managar and the Managing Director."

(It is to be observed that John Cory was relying on two persons each of whom was supposed to be independent of the other, one being in a position of authority).

"It is a question," says Lord Lindley "on which opinions may differ."

After further discussion Lord Lindley continues as follows:—

"Cases such as these are always cases of degree. In *Leeds Estate Building Co.* v. *Shepherd* (4) (to which I have already referred) the Directors trusted their Manager and were held liable. They did not take the trouble to see that what he did was even apparently what he ought to have done. They delegated their functions to him."

The case of *In re Denham* (11) is more like the present case, and there the Director was held not liable. It appears that the ruling of the House of Lords in the case of *Dovey* v. *Cory* (8) does not question the principles laid down in the judgment of Lord Lindley from which I have just made these extracts, and does not question the other authorities which were well known at the time, from which I have cited passages in this judgment. I find myself unable to come to the conclusion that that case altered the law in any respect or made any modification of the principles on which this section had been administered in England.

(10) (1899) 2 Ch. 629; 68 L. J. Ch. 634; 81 L. T. 363; 48 W. R. 99; 15 T. L. R. 517.

(11) (1885) 25 Ch. D. 752; 50 L. T. 523; 32 W. R. 487.

I come without hesitation to the conclusion following the principles laid down in England, and with due regard to the sections in the Indian Companies Act, that the Directors have failed to show that they had any reasonable belief, and that they are liable each of them for the payment which he approved either by resolution, or by signing the balance-sheet, and the report by which it was recommended for dividends paid out of capital from 1915 to 1923. This of course disposes of the case against Mr. De, so far as his liability as a Director is concerned, but it still leaves the question of his liability as Auditor to be disposed of. In my opinion Mr. De was guilty of signing a false statement of a balance-sheet as Auditor. Unless Auditors are to be held strictly to their legal liability, however honest they may be, the object of the Legislature in requiring a certificate from them is absolutely defeated. I acquit Mr. De of any conscious dishonesty. I am not satisfied that he deliberately left the Board in order to become an Auditor. I believe he is both in the ordinary way, and so far as the conduct of this business was concerned, a perfectly honest man. But, on the other hand, I hold that he was utterly reckless and indifferent in his conduct as an Auditor. He had been in the employment of the Government in the Accountant-General's Office and was a certificated Government Auditor. He was trusted to discharge his duty having regard to the experience which he had derived from his previous service, and, in my opinion, he allowed Kedar Nath to throw dust in his eyes and to deceive him in the most obvious manner. Mr. De says that if he had examined the books and asked for an explanation about the Tata Industrial Bank's liability, he would have discovered in two minutes that the affairs of the Bank were in a very critical state and that the depositors and creditors were being defrauded. He never asked a question and he signed a statement in the balance-sheet saying that he had received all the needed informations and explanations. These words are put in for the reason that an Auditor is not a mere arithmetical machine to check the figures in the book. He should have satisfied himself not only that the accounts were correct, but that the books represented the true state of affairs of the Bank. This Mr. De admits he did not do. He also admits that he

never took the slightest trouble to ascertain the facts. Here again I do not think it necessary to quote from the authorities. I think the statement which Mr. De himself signed, which I have just read, sets out the standard which the law confers upon him without reference to any authority. But, in conclusion, I will refer to what I believe to be the correct statement of the Auditor's duty, and one which has never been challenged contained in the judgment of Lord Lindley *In re London and General Bank (No. 2)* (12).

"An Auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a Company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the share-holders. His business is to ascertain and state the true financial position of the Company at the time of the audit, and his duty is confined to that. But then comes the question. How is he to ascertain that position? The answer is. By examining the books of the Company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the Company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, his audit would be worse than an idle farce. Assuming the books to be so kept as to show the true position of a Company, the Auditor has to frame a balance-sheet showing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the Company".

As Auditor, therefore, Mr. De must be declared to be liable for the last two years' dividends, namely, 1922 and 1923. In this respect Mr. De is jointly and severally liable in each year with the Directors whom we hold responsible for that year.

Mukerji, J.—After the very exhaustive judgment which has been just delivered by my learned brother, I would hardly consider it necessary for me to say anything by way of addition. But having regard to the importance of this case to the community, which has been hard hit by the failure of the Bank, I think I may as well state, very briefly, the reasons which have induced me to agree with the judgment of my brother.

The Liquidator has called upon the Auditor and the late Directors of the Union Bank to make good a large sum of Rs. 1,41,000 and odd on the ground that, between themselves, they have allowed so much money of the Company to be mis-spent. The application is one under s. 235 of the Indian Companies Act, 1913.

Two questions have been raised by way of defence on behalf of the Directors. It has been urged that the application was time-barred and, secondly, it has been urged that the Directors acted in good faith and honestly and, therefore, they are not liable.

The two defences raised are really the two main points to be considered in the case.

On the question of limitation I think Art. 120 of the Limitation Act is the only Article that can be applied to the case. The claim is by Liquidator who had no existence at the dates on which the amounts claimed are alleged to have been mis-spent. If the Liquidator is given permission by the law to claim these monies, certainly it would be unfair and unjust to say that the claim became time-barred before he came into existence. This is one of the reasons why I am unable to agree with the argument of the learned Counsel for the Directors that Art. 36 of the Limitation Act should be applied. Another reason which seems to be strongly against this contention is the fact that Art. 36 relates to cases of tort which are not provided for by the privious Articles relating to particular cases of suits of that character. Article 36 clearly mentions that it would apply in cases of misfeasance, etc., arising out of matters independent of contract. The liability of the Directors is certainly not a matter independent of contract. They are bound by the Articles of Association; and by Art. 50 of the Articles of Association relating to this Company, the business of the Company is to be managed by the Directors. It can hardly be said that the Directors were men in the street and it was a sheer act of trespass that they committed in ordering payment of the dividend. A

(12) (1895) 2 Ch. 166; 72 L. T. 611; 43 W. R. 481; 12 R. 263; 2 Manson 282.

case of the Lahore High Court was cited to us by the learned Counsel appearing for the Directors, *viz.*, *Bank of Multan* v. *Hukum Chand* (1). It appears that three learned Judges of the Punjab High Court were of opinion that Art. 36 did apply to an application by the Liquidator for recovery of money. One of the reasons given by the learned Chief Justice in favour of the application of the Article was that if that Article did not apply, old and stale claims might be recovered. But a clear answer to this objection is provided in s. 235 itself. It gives the Liquidator power to question the conduct not only of the Directors but of the *promoters* of the Company. It is clear that all transactions smelling of breach of confidence may be called into question by the Liquidator. The only check to be applied is that afforded by s. 281 of the Limitation Act. If an act has been done honestly and reasonably, nobody need be liable. Further, if Art. 36 applied, a fraudulent Director has only to keep the share-holders and others in ignorance of their mischievous acts for two years, and he would be immune. It is clear, therefore, that we cannot be guided by sheer considerations of policy in choosing what Article to apply.

It was argued by Mr. Banerji, the learned Counsel for the Directors, that if Art. 36 did not apply, Art. 115 would. He argued that if it was a matter of contract then Art. 115 ought to apply. But if Art. 115 applied, in this particular case Art. 116 would apply as the Articles of Association have been registered under the law. Registration with the Registrar of Companies is as much a registration within the Art. 116 as registration under Act XVI of 1908. This was held in *Ripon Press and Sugar Mill Co., Ld.* v. *Nama Venkatarama Chetty* (13). However, I agree with my learned brother that Art. 115 or Art. 116 has no application. They are meant to apply to particular and specific contracts that are broken. As indicated above, Art. 120 would seem to be the only Article applicable and the 'right to sue' would accrue only after the appointment of the Liquidator, if not after he discovers the misapplication of the money.

On the question of liability of the Directors in general, I have to examine the contention of the learned Counsel for the Directors, *viz.*, if the Directors act honestly they are immune. I should think that the Directors, for being exempted, must also show that they have acted 'reasonably.' It is not necessary for me to explain the reason of the rule but if one should seek it, it can be easily found. The Directors of a Company are really trustees and on behalf of a large body of share-holders and people who deal with the Company and the least that can be expected of them is that they should act honestly and reasonably. In so acting, they may become guilty of negligence. The law is prepared to excuse their negligence provided the acts are honest and reasonable. If they are dishonest, of course, there is no escape. But if they are not prepared to act reasonably, the men should not take upon themselves the onerous duty of discharging the functions of a Director.

The authorities on the point, apart from the law as enacted in ss. 235 and 281 of the Companies Act, have been considered by my learned brother and I do not propose to go over the same ground. I will content myself with the examination of facts and figures which go to establish that the Directors have not acted reasonably in the matter of their charge.

All the Directors were examined in open Court on a previous occasion and they have all admitted those statements to be correct and they were given further opportunity to add to their statements if they were so inclined. Those statements are evidence in this case. A mere reading of the statements will show that each and every one of the Directors has contented himself with stating that he acted blindfold, that he trusted the Manager Kedar Nath implicitly and did just what he asked him to do. This implies that the servant of the Directors became their master and the masters submitted their judgment to the servant. Under No. 73 of the Articles of Association, the Manager was to be, in all matters relating to the Company, subject to the superintendence, orders and control of the Directors. The Directors were even given power to dismiss the Manager. If after all this power and if after the clear provision that it was for the Directors to manage the business of the Company, the Directors submitted their judgment to the disposal of the Manager, it can hardly be said that these gentlemen acted reasonably,

(13) 48 Ind. Cas. 903; 42 M. 33; 35 M. L. J. 253; 8 L. W. 354; 24 M. L. T. 246.

The affairs of the Company as they stood at the date it went into liquidation have been examined by the Liquidator and his report has been admitted into evidence. It shows that in June 1924 the supposed assets of the Company stood at the figure of ... Rs. 2,24,000 and odd.

The details are:—

Overdraft unsecured	,,	1,13,000	,, ,,
Pro-notes without any security ...	,,	24,000	,, ,,
Bank's own shares purchased ...	,,	748	,, ,,

(This would mean probably that so much of the money was wasted).

Advanced on mortgage of a house ...	Rs.	2,000	and odd.
Security in the shape of ornaments obtained for loans ...	,,	24,000	,, ,,
Supposed to have been lent to Annapurna Co., Ld. against security of grain ...	,,	48,000	,, ,,
Owing by Tata Industrial Bank to the Company ...	,,	9,000	,, ,,

It will be noticed that except the security offered by the house and the ornaments, there was really no security for any portion of the huge balance. The grain supposed to have been pledged with the Company was not forthcoming and even the ornaments could not be found on the premises of the Bank. Thus the whole sum of Rs. 2,24,000 had been squandered away.

Under the Articles of Association of the Company the Manager had no authority to grant a loan exceeding the sum of Rs. 100 and in some cases exceeding the sum of Rs. 150. Yet the Liquidator's report, which has gone unchallenged, shows that unsecured loans and overdrafts to the extent of Rs. 1,13,000 were issued by the Manager and Manager alone. Nobody seems to accept the responsibility of the advance of money to Annapurna Co., Ld. It is true that a worthless mortgage was obtained from the Annapurna Co. in 1923 but nothing came out of it because there was no grain to be had. The loan to Tata Company was a fictitious transaction. Possibly it represents that some money was spent in purchase of shares. But no one saw these shares. The Tata Company reported that these shares were sold and the proceeds were paid to the agent of Kedar Nath.

Coming to the details, we find that from 1914 onwards, the Company never had, except in one year, to be shortly mentioned, any income enough to cover its working expenses and the interest which it had to pay on deposits. The claim of the Liquidator starts with and includes the year 1915. But it would be useful to examine the state of affairs as they stood in 1914 as well.

In 1914	Rs.	a.	p.
Actual amount of interest realized was ...	12,197	0	0
Working expenses and bad debts including the interest payable for deposits ...	9,228	7	6

Thus the only balance that was available for either being distributed as dividend or being carried to reserve fund was a sum of Rs. 3,540. Yet the Directors declared a dividend of Rs. 4,799-2-0 and thus a sum of Rs. 1,258 was lost to the Company and was distributed out of the capital.

With this state of affairs in 1914 let us examine those of 1915.

In 1915	Rs.	a.	p.
Amount of interest shown in the balance-sheet as actually earned was ...	13,757	0	0
But, as a matter, of fact the interest received by the Company in their coffers amounted to ...	11,886	0	0
Interest payable on deposits, working expenses and bad debts, according to the balance-sheet itself were	8,645	0	0
The actual profit, therefore, was of a sum of ...	3,241	0	0
The dividend declared was that of a sum of ...	4,991	0	0
Here again there was a loss of Rs. 1,750 out of the capital.			
Coming to the year 1916, we find that interest declared in the balance-sheet as having been earned was	13,638	0	0
Interest actually received in the coffers of the Company	7,580	0	0
Working expenses, bad debts and interest payable on deposits ...	8,783	0	0
Dividend declared ...	4,247	0	0
Here again there was a total loss of ...	5,450	15	0

Coming to the year 1917, we find that a false and inflated amount of Rs. 12,796 was shown in the balance-sheet as the interest earned by the Company. It may be that that was the amount of interest found on calculation as due to the Company for the year 1917. But the very fact that only a sum of Rs. 4,685 had been actually realized goes to show that much of the interest shown as earned was irrecoverable. The actual working expenses, bad debts and interest on deposits came to Rs. 8,577. The dividend that was declared was a sum of Rs. 4,310. Thus a total sum of Rs. 8,090 was paid out of the capital to the share-holders.

The year 1918 appears to have been somehow or other a more prosperous year for the Company. Although the interest shown in the balance-sheet as earned was Rs. 13,052, the amount actually realized was Rs. 12,967. The working expenses, bad debts and interest on deposits came to Rs. 8,552. The amount of dividend declared was Rs. 4,379-6. Thus the income and expenses just balanced themselves in this year. But having regard to the fact that during the last four years there was nothing but loss, the amount of profits realized for the first time after several years ought not to have been distributed as dividend, but ought to have been used in replenishing lost capital.

In 1919 the amount of interest shown in the balance-sheet as earned was Rs. 11,862. The amount that was actually realized by way of interest and commission came to Rs. 5,080. The working expenses and interest payable on deposits, etc., came to the sum of Rs. 6,677. The dividend that was declared was Rs. 4,707. Thus a sum of Rs. 6,304 was paid out of the capital.

In 1920 the interest earned was shown as Rs. 13,034 in the balance-sheet, although the interest that was actually received in the coffers of the Company came to only Rs. 4,052.

The working expenses, bad debts and the interest payable to the depositors came up to Rs. 7,689. The dividend that was declared was Rs. 4,824. Thus there was a total loss of Rs. 8,462.

Coming to the year 1921, the interest declared as earned in the balance-sheet was the sum of Rs 13,638. The amount actually realized was, however, Rs. 5,269. The working expenses, the interest payable to depositors and the debts admitted to have been bad came to Rs 8,148-15. Thus, although there was a loss of Rs. 2,878, the Directors found themselves justified in declaring a dividend to the sum of Rs. 5,002. The total loss of the Company in this year was to the extent of Rs. 7,881.

In 1922 the total amount of interest declared in the balance-sheet as having been earned by the Company was Rs. 14,463. The interest actually realized was, however, Rs 10,055. The working expenses, the interest payable on deposits and bad debts came to Rs. 8,893. A sum of Rs. 5,121 was paid out in the shape of dividend. Thus a sum of Rs. 3,959 was spent out of the capital in this year.

In the year 1923, preceding year of the cash, the sum of Rs. 19,115 was shown as interest earned by the Company. According to its books, the amount of interest actually realized was the sum of Rs. 11,388, but, as a matter of fact, this was an inflated figure as Mr. Govia, the Liquidator's agent, has proved by his evidence. The actual amount that was realized was the sum of Rs. 4,414. According to the correct figures in the books, the working expenses and interest payable on deposits and bad debts went up to the sum of Rs. 12,698 and there was a loss of Rs. 8,284. In spite of this loss, a sum of Rs. 5,223 was declared and distributed as dividend to the share-holders. Thus the Company lost in all Rs. 13,508 out of the capital in this particular year.

The facts noted above will clearly show that none of the gentlemen who figure as the Directors took any genuine interest whatsoever in the affairs of the Company. They may have acted under the direction of Kedar Nath and with blind faith in him but it can never be said that they exercised any discretion whatsoever, much less to say that they acted reasonably.

I agree, therefore, in holding that the several Directors are responsible for having paid out, out of the capital, dividend during the several years in suit.

Coming to the case of Mr. De the Auditor, I agree with my learned brother that although no dishonesty can be imputed to him in the sense that he misappropriated any money of the Company, he really shut his eyes and passed any accounts, as correct and good, that were brought forward before him by the Manager Kedar Nath. I will give a few illustrations to show

how that gentleman acted. His own evidence is nothing but a string of confessions. At almost every step he admitted that many things that he did he ought not to have done and many things that he did observe ought to have done and many things that he did observe ought to have aroused suspicion and he should have called upon the Manager for genuine explanation. In the cash book dated the 16th of December, 1922, the loan account of Mahendra Nath Mitter, a brother of the Manager Kedar Nath, is shown. According to this account, Mahendra paid Rs. 3,900 principal amount and Rs. 4,290 as interest. In the account of the same date, and really on the right hand side of the same page, the whole amount is shown as having been lent out to Mahendra Nath Mitter. This was clearly a manipulation of figures and nothing else. Mahendra Nath Mitter had long delayed payment and never paid anything, yet it was shown in his account that he had paid up his old debts and if anything was due to him it was on account of a fresh loan advanced to him. No explanation, however, clever can really explain away this state of affairs. Yet Mr. De says that he examined the account-books and found them in order.

I have already mentioned that year after year a very large sum of money was shown as interest earned by the Company. Mr De as the Director of the Company from 1915 to 1921 might have known and subsequently as the Auditor must have been aware that the sum shown as earned had not really been realized by the Company and that the balance-sheet was so designed as to show that the Company had an income large enough to justify the distribution of dividend.

Coming to the reserve fund, Mr. De had to admit that there was really no reserve fund. He said that the money supposed to have been set apart as the reserve fund was as much invested in granting loans as any other portion of the capital. The statement, therefore, in the balance-sheet, that there was a reserve fund was absolutely false. Yet Mr. De had no hesitation in putting his signature and his certificate down to that statement and declaring that the statement was correct.

Mr. De admits that he never examined the security supposed to have been in the custody of the Bank although he had no hesitation in certifying that loans exceeding Rs. 2,00,000 were fully secured. Before he certified to the fact, he ought to have satisfied himself that there was something on which he could base his certificate although it may not have been his duty to count the security and to assess the market value of several articles. If a Bank possesses mortgage-deeds as security, I suppose, it would be the duty of the Auditor to examine the deed. Similarly it would be the duty of the Auditor to satisfy himself that there really was in the possession of the Bank the security, so as to justify him in saying that the loans advanced were fully secured.

We find that by resolution dated the 4th of June 1916 Mr. De, as one of the Directors, authorized the Manager to raise a loan of Rs. 15,000 by pledging the ornaments in the custody of the Bank. To be accurate, he ought to have examined whether the security which was in the possession of the Bank was still in its possession or had been pawned away in order to raise money. This was an important fact which the share-holders and the public had a right to know and this fact was concealed. As a matter of fact, as already stated, the Liquidator found no ornaments or only just a few and of no value, in the possession of the Bank when it failed.

In my opinion, Mr. De has not acted in accordance with his duty as an Auditor and must share the responsibility of the acts with the Director.

The liability of each Director and of Mr. De has been described in detail in my brother's judgment, and I fully agree with his views. The dividends paid out of capital must be made good by the Directors who induced the payment on false balance-sheets and the responsibility must be shared by the Auditor in years 1922 and 1923.

The Manager, Kedar Nath, not having been served with notice of these proceedings could not be proceeded against and for the time being at least, he escapes a just liability.

Thus the claim of the Liquidator in respect of the dividends paid out of the capital is fully established.

The Liquidator claimed a sum of Rs. 56,000 on account of the value of grain said to have been lost to the Company owing to the negligence of the Directors. This charge fails for the simple reason that there is

no evidence to show what was the actual weight or value of the grain which, it was supposed, Annapurna Co. possessed and offered to give as security. This branch of the case has been dealt with at length in the judgment of my learned brother and I do not feel called upon to discuss it. Suffice it to say that I am in full agreement with it.

The third and the last claim related to certain 'floating account.' This part of the claim has been withdrawn and very properly. It was brought under a certain misapprehension of facts.

The result is that I fully agree in the order proposed by my learned brother.

By the Court.—The order of the Court is that Mr. Ganendra Nath Ghose and Mr. B. L. De are jointly and severally liable and must pay to the Liquidator the sum of Rs 4,991 in respect of the year 1915, the sum of Rs. 4,247 in respect of the year 1916 the sum of Rs. 4,310 in respect of the year 1917, the sum of Rs. 4,379 in respect of the year 1918. Mr. B. L. De, Mr. J. N. Ghose and Mr. M. M. Banerji are hereby declared to be liable and must pay to the Liquidator the sum of Rs. 4,707 for the year 1919. Mr. B. L. De, Mr. J. N. Ghose, Mr. M. M. Banerji, Mr. Ashutosh Banerji and Mr. Ashutosh Mukerji are jointly and severally liable and must pay to the Liquidator the sum of Rs. 4,824 for the year 1920, the sum of Rs. 5,002 for the year 1921, the sum of Rs. 5,121 for the year 1922, and the sum of Rs. 5,323 for the year 1923, which will also include Mr. Shanker Prasad.

The Liquidator must have his costs of these proceedings from all the defendants, except Shanker Prasad jointly and severally, the amount to be certified by us.

The total amount we certify is Rs. 2,500 which is as follows:—To the learned Counsel from Calcutta Rs. 250 for reading the case, and Rs. 1,200 at the rate of Rs. 150 a day for 8 days, making a total of Rs. 1,450, Rs. 150 to Mr. Sanyal, Rs. 600 to Mr. Desanges for 6 days, and Rs. 300 special allowance to the Liquidator for preparing the case. The defendants must pay their own costs.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 144 OF 1924.
February 23, 1925.
Present:—Mr. Hallifax, A. J. C.
YADO RAO—PLAINTIFF—APPELLANT
versus
AMRIT RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1, 5, O. XLI, r. 33—Mortgage suit—Prior mortgagee, whether necessary party—Sale in execution of mortgage-decree—Auction-purchaser, position of—Appeal—Decree, whether can be modified in favour of person not party to appeal.

At a sale in execution of a mortgage-decree, the purchaser acquires the rights of both mortgagor and mortgagee. As purchaser of the equity of redemption he is entitled, if he wishes, to redeem a later mortgage or as purchaser of the rights of the mortgagee, he can claim priority over the later mortgage by electing to stand in the shoes of the prior mortgagee. [p. 804, col. 1.]

A prior mortgagee or a purchaser of his rights under the mortgage is not a necessary party to a suit on the subsequent mortgage, as he is under no obligation to redeem to keep his rights alive. [*ibid.*]

Under O. XLI, r. 33 of the C. P. C. a decree cannot be modified in appeal in favour of any person unless he is a party to the appeal. [*ibid.*]

Second appeal against a decree of the District Judge, Wardha, dated the 22nd December 1923, in Civil Appeal No. 96 of 1923.

Mr. *M. B. Niyogi*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—The appellant Yado Rao claimed Rs. 1,000 or foreclosure on a mortgage executed on the 19th of April 1906 in his favour by the first defendant Sadashiv Deshpande of a *malik makbuza*, field of 8.84 acres and a quarter share in seven mango trees. Gopal Rao Buti, who is not a party to the suit, held a prior mortgage of the 16th of May 1904 on the same property and a house. In a suit on that mortgage, in which he did not join the present plaintiff, he obtained a preliminary decree for sale on the 18th of July 1911 and a final decree on the 7th of April 1915 and brought the property to sale on the 17th of September 1917. Amrit Rao the second defendant here, bought the field for Rs. 250, Sadashiv Kasar and Krishna Kasar, the third and fourth defendants, bought the share in the mango trees for Rs. 25 and somebody else bought the house for Rs. 20. That did not satisfy the decree on which a sum of nearly Rs. 300 was still due when the present suit was instituted on the 18th of April 1923.

The second, third and fourth defendants

who are the respondents here, pleaded that the plaintiff was bound to redeem them, not they the plaintiff, as they had purchased the rights of Gopal Rao Buti, and also that Gopal Rao Buti was a necessary party to the suit. It was held in the First Court that Gopal Rao Buti need not be joined in the suit, and the second point, of the liability of the auction-purchasers to redeem, was left out of sight, and a decree for foreclosure was passed against all the defendants. It seems fairly obvious that the two matters are really one. If the prior mortgagee was not a necessary party to the suit, it was because he was under no obligation to redeem to keep his own rights alive, and if the decision is correct, as it is, then the purchasers of his rights are not necessary parties and under no obligation to redeem.

Amrit Rao alone appealed to the Court of the District Judge making only the plaintiff Yado Rao a respondent. The learned Judge modified the decree by the addition to it of a direction that it was "subject to the rights of defendants Nos. 2, 3 and 4, as auction-purchasers under a prior mortgage." It may be pointed out that the third and fourth defendants were not parties to the appeal at all, and modification of the decree in their favour is not authorized by r. 33 of O. XLI of the C. P. C. The plaintiff has, however, made them respondents in this Court without mentioning the matter in his petition of appeal, and on its being mentioned in the course of the argument it was stated that he did not wish to raise it, as it affected only the quarter share in the seven mango trees.

At a sale in execution of a mortgage-decree the purchaser acquires the rights of both mortgagor and mortgagee. As purchaser of the equity of redemption he is entitled if he wishes, to redeem a later mortgagee, or as purchaser of the rights of the mortgagee he can claim priority over the later mortgagee. These auction-purchasers have refused to redeem and have elected to stand in the shoes of the prior mortgagee, which they are undoubtedly entitled to do. Something was said in argument about the present plaintiff not having been joined in the previous suit. The first suggestion of any plea of this sort, and it is a very vague suggestion, is in the petition of appeal to this Court. Anyhow the plaintiff can only claim to be put in as good a position as he would have occupied if he had been made a party to that suit, that is that he should be given the right to redeem now. That has been offered to him all through and he has steadily refused it, repeating that refusal even in this Court.

The refusal was not well advised. The result of it, which was inevitable from the beginning, is that he loses his Rs. 1,000, and the probable result of redemption by him would practically be the acquisition for that sum and an additional Rs. 250 of property which is now worth a good deal more than Rs. 1,250 He preferred, however, the very faint chance of getting it for Rs. 1,000, with the correspondingly great chance of getting nothing at all, to the practical certainty of getting it for Rs. 1,250. The appeal will be dismissed and the appellant must pay all the costs of the respondents.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 63 of 1923.

May 2, 1925.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Simpson, A. J. C.

LAL BISHUNPAT SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

LAL KEDAR NATH SINGH—PLAINTIFF—RESPONDENT.

Minor—Compromise entered into by guardian, whether binding on minor—Sanction of Court—Concealment of material facts—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7.

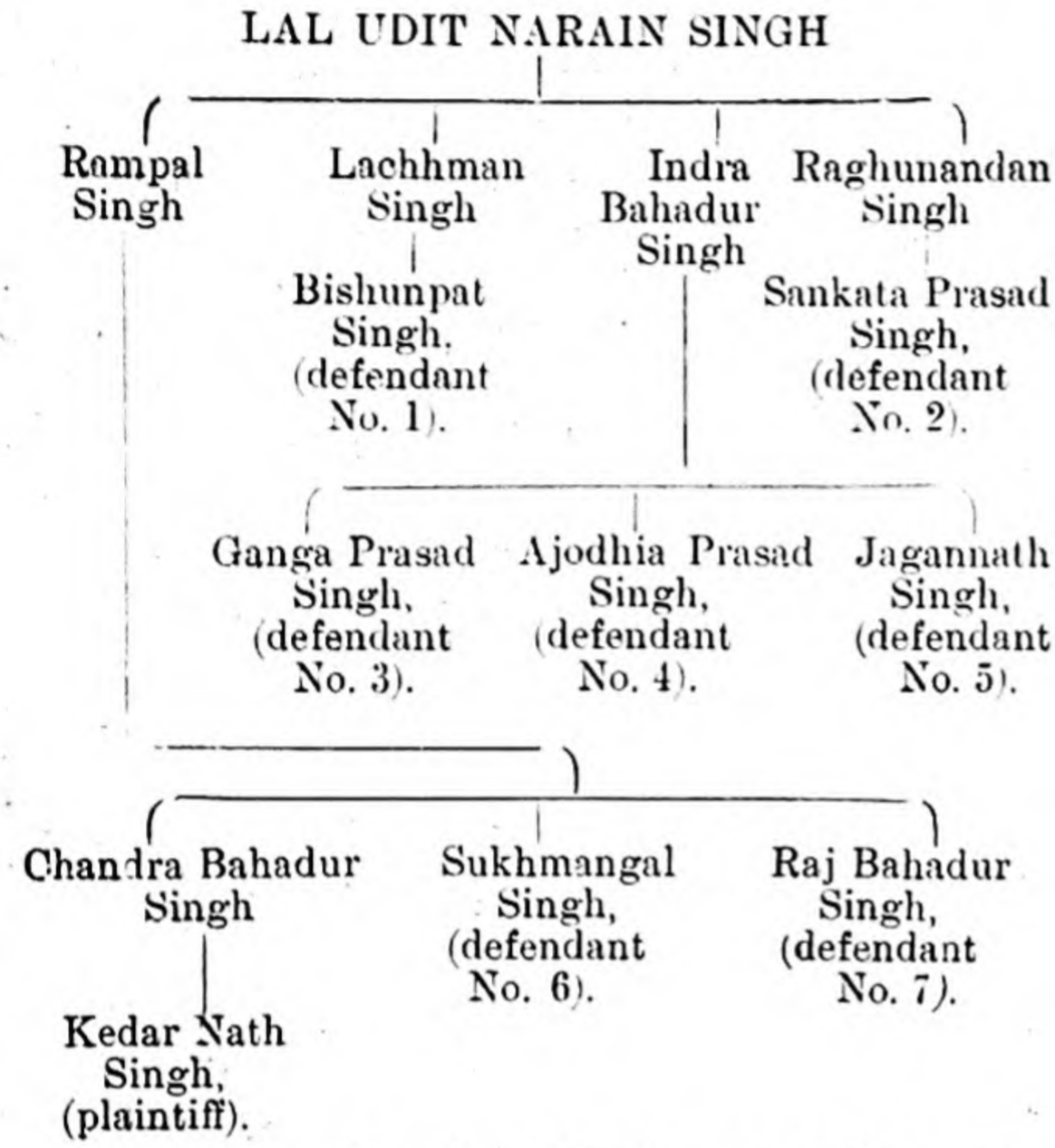
A minor will be bound by a compromise decree which is entered into on his behalf by his guardian, and which has received the sanction of the Court. But, if it is found that the facts were not properly placed before the Court by the guardian at the time when the Court sanctioned the compromise on behalf of the minor, with the result that while the minor received no benefit, but on the contrary lost heavily, his guardian did receive some benefit for himself, the compromise decree is vitiated and does not bind the minor. For, it is the duty of a minor's guardian to place the Court in possession of all essential facts, and any concealment of material facts will amount to fraud on the Court, because the Court must be put in a position to form an opinion whether a compromise ought or ought not to be sanctioned. [p. 806, col. 1; p. 807, col. 1.]

First appeal from a decree of the Subordinate Judge, Partabgarh, dated the 30th July 1923.

Messrs. *Niamat Ullah* and *Hakim Uddin*, for the Appellants.

Mr. *Ali Muhammad*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants. Lal Kedar Nath Singh, was the plaintiff. The suit was one for possession of certain property on the ground that the plaintiff was legatee of his great-grandfather Lal Udit Narain Singh. This is the pedigree showing the descendants of Lal Udit Narain Singh.



Lal Udit Narain Singh was sole owner of the superior proprietary tenure of *Mauza* Nasirpur. He also possessed certain mortgagee rights in the under-proprietary tenure of certain plots in the same village. Whether the property was ancestral or self-acquired is no longer of importance. In the year 1902 he made a partition of *Mauza* Nasirpur, dividing it into five and a half shares. One and a half shares went to the eldest son Rampal Singh, leaving four shares, of which Udit Narain Singh himself retained one share. His other two surviving sons Indra Bahadur Singh and Raghunandan Singh got one share each. The fourth son Lachhman Singh was dead but his son Bishunpat Singh got the remaining share. On 18th March 1906 Udit Narain Singh made a Will, in which he recited the partition he had made, and bequeathed his own share amounting to 2-annas and 10-10/11 pies to Kedar Nath Singh, the present plaintiff. The mortgagee rights are claimed by the plaintiff under a clause of the Will which says: "on my demise this property or whatever property I may leave shall be owned by Lal Kedar Nath Singh."

Having made this Will Udit Narain Singh died on 12th April 1906. The plaintiff immediately applied for mutation, Bishunpat Singh, now appellant No. 1, objected to the mutation. He was referred to the Civil Court and plaintiff got mutation. Bishunpat Singh then proceeded to bring his suit. The plaint is dated 19th September 1907. That case ended in a compromise which was embodied in a decree dated 18th December 1907. By that compromise Rampal Singh, the eldest son of Udit Narain Singh and grandfather of the present plaintiff, received one and a half shares, and Bishunpat Singh, Indra Bahadur Singh and Raghunandan Singh got one share each. What is called the *ikrarnama* or agreement of 1902, by which Udit Narain Singh had divided his property among himself and his sons, was cancelled and so was Udit Narain's Will. If this compromise holds good plaintiff's case fails and the present appeal succeeds.

The learned Subordinate Judge held that the compromise decree could not stand because "The only benefit alleged to the plaintiff minor by the compromise was that Rampal Singh, grandfather of plaintiff, was to be given one and a half shares instead of one share and that this was the consideration which led the Court to allow plaintiff's father and guardian *ad litem* to compromise on behalf of the minor (plaintiff)." He went on to say that the evidence in the case satisfied him of the existence of a custom by which the eldest son was entitled to one and a half shares. From this he concluded that there was no benefit to the minor in the additional share obtained by his branch of the family, which he would have been entitled to under the custom apart from the compromise. He found, therefore, a misrepresentation on the part of Chandra Bahadur Singh, the father and guardian of the plaintiff who was then a minor, and he further found that the Court would not have sanctioned this compromise had it not been for this misrepresentation. We take a somewhat different view from that. The question was not whether there was or was not such a custom in the family. The question was rather, whether there had been a partition of the family property in 1902. If there was such a partition, then Udit Narain Singh became

full owner of the share he reserved for himself and he was competent to bequeath it to the present plaintiff. The question is whether the facts were properly placed before the Court at the time when the Court sanctioned the compromise on behalf of the minor. This is a question of considerable difficulty. The law on the subject is not doubtful. On the one hand a minor will be bound by a compromise decree which is entered into on his behalf by his guardian, and which has received the sanction of the Court. On the other hand, it is the duty of a minor's guardian to place the Court in possession of all essential facts. Any concealment of material facts will amount to fraud on the Court, because the Court must be put in a position to form an opinion, whether a compromise ought or ought not to be sanctioned. We find that in the present case there was such concealment. The Court had before it the plaint filed by Bishunpat Singh. That plaint sets forth the pedigree correctly. It then states that the parties are members of a joint Hindu family. The statement was not correct unless the partition of 1902 is treated as a nullity. The partition is referred to in paras. 5 and 6 of the plaint. It is stated that Bishunpat Singh's signature was obtained by Udit Narain Singh and Rampal Singh by the exercise of undue influence, and that consequently the deed was invalid. Paragraphs 7, 8 and 9 deal with the Will. It is said that Udit Narain Singh was not of sound mind at the time he wrote the Will. It cannot be said that this plaint furnished the Court with a correct account of the state of things. No written statement was filed and the only other document which was before the Court was the application for compromise which was filed by Chandra Bahadur Singh as guardian of the present plaintiff. It runs as follows:—

"In the above-noted suit, mutual disputes arose between the parties, who are members of a joint Hindu family, because Lal Udit Narain Singh, the ancestor, executed the agreement dated 8th July 1902 and the Will dated 18th March 1906, in favour of Kedar Nath Singh, defendant No. 7, in respect of his share. Both these documents are invalid owing to the existence of a joint Hindu family. In lieu of the Will, Rampal Singh, the father of the undersigned defendant and grandfather of the minor defendant No. 7 has been given one and a half shares instead of one share which is to the advantage of the minor. If a case is fought, it is apprehended that the property in suit, on which rest the good name and position of the family, shall be destroyed; while a compromise will be beneficial to the minor. This application is, therefore, filed and it is prayed that permission to enter into a compromise be granted to the undersigned defendant, who is the father and guardian of the defendant No 7, and the compromise, annexed hereto be sanctioned."

We find that these documents, namely, the plaint and the application for leave to compromise, which were all that the Court had before it, concealed the true facts. It was the duty of Chandra Bahadur Singh to have said not less than the following. That Udit Narain Singh had made a partition between his sons and himself, which had been followed by mutation. That if that partition held good then Udit Narain Singh was legally entitled to bequeath his share to Kedar Nath Singh. He might then have added that both the partition and the Will were attacked by Bishunpat Singh, and that he thought it better to compromise rather than risk the expenses of litigation. It is just possible that the Court might have sanctioned the compromise in order to save the minor from becoming embroiled in an expensive litigation, but we hardly think so, for there seems to have been no substantial ground for attacking either the partition or the Will. The minor was giving up the entire share of Udit Narain Singh to which he was entitled under the Will, and he was obtaining in exchange merely some fractional amount of that same share which would fall to his branch of the family. The one and a half shares which Rampal Singh was to get as the eldest son could not be reckoned as a benefit to the minor. This is not because of the existence of a family custom, which would have been a matter for enquiry, but because Rampal Singh had already received a share and a half under the partition. There is a further objection to the compromise, and it is this. The benefit, such as it was, was a benefit to every member of Rampal Singh's family, including Chandra Bahadur Singh the guardian *ad litem* of Kedar Nath Singh the

present plaintiff, so that while the minor received no benefit, but on the contrary lost heavily, his guardian did receive some benefit for himself. It was his duty to have pointed this out to the Court. His not doing so amounted to fraudulent concealment of facts, and is sufficient to vitiate the compromise decree. On this point, therefore, the appeal fails.

The next question is whether the suit was in time. This turns upon the age of the plaintiff. The suit was filed on 25th May 1922. The plaintiff had three years after attaining the age of eighteen, so the earliest date for his birth which will bring him within time is 25th May 1901. The date he sets up is 6th December 1902. He offered in evidence the Civil Surgeon, a horoscope and some oral evidence. The Court of Trial accepted part of the oral evidence and came to the conclusion that the plaintiff was within time. We have been taken through the evidence on both sides but we do not propose to discuss it. We are not prepared to differ on the point from the Court of Trial.

The next point is defendant's allegation that Udit Narain Singh's Will was obtained by undue influence. This allegation was somewhat half-hearted and there appears to be no evidence of any weight against the Will which is a registered one.

The sixth and seventh grounds of appeal were not argued before us and they appear to carry no weight.

In the result the appeal fails and is dismissed with costs.

There remains the cross-objection. It relates to certain mortgagee rights held by Lal Udit Narain Singh, the testator, over the under-proprietary right in certain plots in the same village of Nasirpur, in which he held the whole of the superior proprietary right. These rights were claimed by the plaintiff. The Will explicitly left a share of 2-annas 10 10/11 pies of the superior proprietary tenure. It made no express mention of these mortgagee rights but it contained the words "this property or whatever property I may leave." These words are sufficient to cover the mortgagee rights. The learned Subordinate Judge has given the plaintiff a decree for the same fraction of the mortgagee rights as Udit Narain Singh reserved for himself in the superior proprietary right. In the cross-objection the plaintiff claims the whole of the mortgagee rights on the ground, apparently, that they were the exclusive property of Udit Narain Singh, but in the absence of any proof that these rights stood on a different footing from the family property which was partitioned in 1902, we hold that the mortgagee rights were acquired out of family funds, belonged to the whole family, and were also partitioned in title, though not by metes and bounds, when the partition took place in 1922. The decree is, therefore, right on this point. The cross-objection is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 94 OF 1924.

November 12, 1924.

Present:—Justice Sir Jawala Prasad, KT., and Mr. Justice Kulwant Sahay.

SHEO SAHAY—JUDGMENT-DEBTOR—APPELLANT

versus

JAMUNA PRASAD SINGH—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Objection by judgment-debtor—Oral application by decree-holder to examine a witness, whether step-in-aid of execution.

A decree-holder is entitled to regard any step taken by him to remove an obstacle thrown by the judgment-debtor in his way to the realization of his decree as a step-in-aid of execution, and an application to the Court, whether verbal or written, to take such a step falls within the purview of Art. 182 (5) of Sch. I to the Limitation Act and operates to extend limitation for execution of the decree.

An oral application by the decree-holder to the Court to examine a witness in order to enable the decree-holder to resist an objection filed by the judgment-debtor to the execution of the decree, is an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act.

Kedar Nath Dey Roy v. *Lakhi Kanta Dey*, 40 Ind. Cas. 1005; 21 C. W. N. 868; 26 C. L. J. 115, *Brojendra Kishore Roy Choudhury* v. *Dil Mahmud Sarkar*, 44 Ind. Cas. 604; 22 C. W. N. 1027 and *Surajmal* v. *Sarjoog Prasad Singh*, 38 Ind. Cas. 540; 2 P. L. J. 5; 3 P. L. W. 208; (1917) Pat. 54, referred to.

Appeal from an order of the Additional District Judge, Patna, dated the 30th April 1924, confirming that of the Munsif, Barh, dated the 4th December 1923.

Messrs. *Noresh Chandra Sinha* and *Nitai Chandra Ghosh*, for the Appellant.

Mr. *Shivanandan Rai*, for the Respondent,

JUDGMENT.—The only point raised in this appeal relates to limitation. It is said that the application of the decree-holders made on the 12th of May, 1923 is barred by limitation, the last execution being of 9th August 1919. On behalf of the decree-holders it is urged that their application for execution is not barred, inasmuch as they had taken proper steps to further the execution of their decree on the 15th May, 1920. The Court below has accepted the contention of the decree-holders and has allowed the execution to proceed. The view taken by the Court below seems to be correct. On the 15th May, 1920 the decree-holders examined a certain witness in order to resist an objection filed by the judgment-debtor to the execution of the decree. That action on behalf of the decree-holders is certainly a step-in-aid of execution as contemplated by Art. 182, Sch. I of the Limitation Act. This view is supported by various authorities: [*vide Kedar Nath Dey Roy* v. *Lakhi Kanta Dey* (1), *Brojendra Kishore Roy Choudhury* v. *Dil Mahmud Sarkar* (2), *Surajmal* v. *Sarjoog Prasad Singh* (3) and the unreported decision of this Court in *Rai Bahadur Kashi Nath Singh* v. *Syed Kabiruddin* (4).] The latter case was cited by Mr. Noresh Chandra Sinha on behalf of the judgment-debtor-appellant. The learned Chief Justice, however, held that an application need not be in writing and that a verbal application is sufficient to extend the period for execution of the decree provided it is a definite application in order to oppose an application of the judgment-debtor to set aside the execution proceedings. There can hardly be any doubt that the decree-holders are entitled to regard any step taken by them to remove the obstacle thrown by the judgment-debtor in their way to the realization of their decree as a step-in-aid of execution.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 40 Ind. Cas. 1005; 21 C. W. N. 868; 26 C. L. J. 115.
(2) 44 Ind. Cas. 604; 22 C. W. N. 1027.
(3) 38 Ind. Cas. 540; 2 P. L. J. 5; 3 P. L. W. 108; (1917) Pat. 54.
(4) Miscellaneous Appeal No. 281 of 1923.

CALCUTTA HIGH COURT.

APPLICATION IN CONNECTION WITH ORIGINAL CIVIL SUIT No. 2060 OF 1922.

March 25, 1925.

Present:—Mr. Justice C. C. Ghose.

HAZARIMULL HIRALAL—PETITIONER

versus

SADASUKH PARRUCK & Co.—OPPOSITE PARTY.

*Landlord and tenant—Lease for period of years—Clause providing for forfeiture in case of insolvency of lessee—Assignment of lease—Insolvency of lessee after assignment, effect of—Practice—*Pro interesse suo *summons—Procedure.*

One of the conditions of a lease for a period of years was that if the lessee or any of his heirs, executors, administratives or assigns became insolvent or bankrupt it would be lawful for the lessors to re-enter the demised premises at any time and to re-possess and enjoy the same. The lessee mortgaged his leasehold interest in the demised premises to the plaintiff who brought a suit on his mortgage and obtained a decree. In execution of the decree the property was purchased by the plaintiff mortgagee himself. Thereafter the lessee became insolvent and the lessors made an application for an order *pro interesse suo* to come into the suit on the allegation that on the insolvency of the original lessee the lease had been forfeited and that the applicants had become entitled to re-enter on the demised premises. They also prayed for an order that the Official Receiver who was in possession of the premises should make over the possession thereof to them:

Held, (1) that there being nothing in the lease to prevent the lessee from mortgaging the leasehold premises by way of sub-demise without obtaining the permission of the lessors, the mortgage was valid as between the lessors and the mortgagee, and the mortgagee having succeeded to the rights of the lessee and having stepped into his shoes, he must be regarded as the lessee and in possession of the leasehold interest; [p. 809, col. 2.]

(2) that as there had been no insolvency of the person who must now be regarded as the lessee, the clause in the lease providing for a forfeiture could not be invoked in favour of the applicants; [*ibid.*]

(3) that a declaration such as was sought for by the applicants could not be made in a summary manner on a summons in Chambers and that consequently for both these reasons the application must fail. [p. 810, col. 1.]

Application for an order that the Official Receiver of the High Court, who was in possession of the leasehold premises, should make over possession to the lessor.

Mr. *S. C. Bose*, for the Petitioner.

Sir *B. C. Mitter* (with him Mr. *H. C. Mazumdar*), for the Opposite Party.

JUDGMENT.—The facts giving rise to the present application on behalf of the lessors of premises Nos. 123, 124, 125, 126, 126/1, Canning Street, and 4, 5, Jackson Lane in the town of Calcutta under an indenture of lease dated the February 16th 1920, for an order that the Official Receiver of this Court, who is the Receiver in this suit of the said leasehold properties, should

make over possession to the said lessors, are as follows:—

It appears that by the indenture of lease dated the 16th February 1920, one Sumer mull Parruck was granted a lease of the said premises for a period of 41 years from the 1st January 1918, and that one of the conditions in the said indenture was that if the said lessee or any of his heirs, executors, administrators or assigns becomes insolvent or bankrupt, it should be lawful for the lessors to re-enter the demised premises at any time thereafter and to repossess and enjoy the same. By an indenture of mortgage dated the 3rd October 1921, the lessee mortgaged the leasehold interest in the said properties to the plaintiffs Hazarimull Hiralal. The plaintiffs thereupon brought a suit on the 23rd June, 1922, to enforce their mortgage. The preliminary decree in the mortgage suit was made on the 16th August, 1922, and the Official Receiver was appointed Receiver of the mortgaged premises on the same date.

The lessee Sumermull Parruck died intestate on or about the 27th November 1922 leaving the present defendants his sole legal heirs and representatives and leaving, among others, a business carried on under the name and style of Sumermull Parruck and Panna Lal Parruck, and the said leasehold premises as his properties. The final decree for sale in the mortgage suit was made on the 5th May 1924, and the properties comprised in the said mortgage were subsequently purchased by the mortgagees, namely, the plaintiffs. On the 24th February 1925, the Firm of Sumermull Parruck and Panna Lal Parruck were adjudicated as insolvents.

It is contended now on behalf of the lessors that the effect of the adjudication order was to vest in the Official Assignee the properties of the said Sumermull Parruck and that owing to such insolvency there has been a forfeiture of the lease, in which the said Sumermull Parruck and after his death the defendants as heirs of the said Sumermull Parruck were interested. The lessors now want an order that the Official Receiver who is in possession of the premises should make over possession thereof to them. The application is urged because it is said that the lessors have a paramount title and that, therefore, they can come into this suit and ask for an order *pro interesee suo* [see in this connexion my judgment in *Sreedhar Choudhury* v. *Nilmoni Choudhury* (1)].

The application is opposed by the plaintiffs and on their behalf Sir Benode Mitter in the course of a vigorous address has contended in the first place, that all the interest that the lessee had in the said premises had passed to the plaintiffs by virtue of the mortgage herein before referred to and that inasmuch as there has been no insolvency of the mortgagees, who were the assignees of the original lessee, the clause in the indenture of lease which it is suggested, ought to be brought into play on this summons, can have no application at all and, in the second place, that having regard to the fact that the certificate of sale in favour of the plaintiffs in execution of the said mortgage-decree had been filed so far back as the 14th February 1925, the certificate itself being dated the 6th February 1925, the report of the Registrar must be taken to have stood confirmed by effluxion of time and, in the third place, that the insolvency of the firm herein before referred to can give no rise to any cause of action for an order such as is claimed in the present summons, and lastly that a declaration such as is now prayed for on behalf of the present applicants cannot be made and is never made on summons in Chambers.

My attention has been drawn to the terms of the indenture of lease dated the 16th February 1920, and I find that among the lessee's covenant there is nothing to prevent him from mortgaging the leasehold premises by way of sub-demise without obtaining the permission of the lessors. The mortgage, therefore, was valid as between the lessors and the mortgagees, *i. e.*, it could not be questioned by the lessors. The mortgagees, therefore, succeeded to the rights of the lessee, but having regard to the events which have happened the lessee's right to redeem is gone and the mortgagees have definitely and finally stepped into the shoes of the lessee, free from all trammels and restrictions except those contained in the indenture of lease. Therefore it follows that there has been no insolvency of the person who is the lessee now and is possessed of the leasehold term. In this view of the matter I do not think that the present applicants can invoke the clause letting in the right

(1) 86 Ind. Cas. 677; 41 C. L. J. 197; (1925) A. I. R. (C.) 681.

to a forfeiture and on this ground alone this application must fail.

In the second place, I do not think that a declaration such as is now sought for can really be made in a summary manner on summons in Chambers. It is not the practice of this Court to make declarations in matters like this on summons in Chambers and, therefore, on this second ground the application fails. It is unnecessary for me to deal with the remaining two grounds upon which Sir Binode Mitter based his opposition. The two grounds upon which I have proceeded are fatal to the present application and it will suffice for the day to dismiss the present application on those two grounds. The application fails and must be dismissed with costs.

Z. K. *Application rejected.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 11 OF 1924.

May 14, 1925.

Present:—Mr. Dalal, J. C., and Pandit Gokaran Nath Misra, A. J. C.

BIBI BATUL—DEFENDANT—APPELLANT

versus

KEDAR NATH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Practice—Record, printing of—Registration endorsements, whether must be printed—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage suit—Decree for sale—Liberty to apply for personal decree, effect of—Construction of document—Power-of-attorney—Agent authorized to borrow money—Money borrowed to pay off debt due by husband of principal—Principal, whether liable—Money paid to agent—Proof that money reached principal, whether necessary.

It is always desirable to get registration endorsements translated and printed where they are necessary by way of evidence. [p. 811, col. 1.]

Where a debt is contracted on behalf of a *pardanashin* lady by her general agent authorized to do so, the creditor is not required to prove that the consideration reached the lady, unless there is a reservation to that effect in the power-of-attorney executed by the lady in favour of the general agent. [p. 812, cols. 1 & 2.]

Where a *pardanashin* lady authorizes her agent by means of a general power-of-attorney to borrow money on mortgages, the agent has no authority to mortgage the property of his principal to pay off debts due by her husband. [p. 812, col. 1]

Where in a decree for sale of a mortgaged property liberty is given to the plaintiff to apply for a personal decree for the amount of the balance due to him after the sale of that property, this does not imply that on application a personal decree must be granted. The question of limitation remains open and has to be decided at the proper time. [p. 812, col. 2.]

Appeal from a decree of the Additional Subordinate Judge, Sultanpur, dated the 12th November 1923.

Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant *Musammat* Bibi Batul from a decree for sale passed against her on foot of a mortgage-deed. The mortgage-deed was executed by Zakir Husain the lady's son as general agent. He acted under the authority given to him under a power executed by the lady in his favour on 18th November 1908. It was a simple mortgage and executed on 15th January 1910 for a sum of Rs. 6,250. The consideration was made up as follows:—

	Rs.
Left with the mortgagee for payment to Kedar Nath Sahu for money due on a mortgage-deed dated 29th April 1905 executed by Ghulam Husain Khan husband of *Musammat* Bibi Balul ...	5,050
Received previously to defray cost of stamp, etc., connected with this deed ...	50
Deducted by the mortgagee for money due on a registered bond executed by Zakir Husain as agent of Bibi Batul ...	100
Received in cash in the presence of the Sub-Registrar at the time of registration ..	1,050

In the body of the deed it was recited that the bond on which Rs. 100 was due was executed by the declarant on behalf of his mother. The registration endorsement shows that cash was paid to Zakir Husain (Rs. 1,000) in the presence of the Sub-Registrar. We have only got a copy of the document and possibly Rs. 1,000 is a mistake for Rs. 1,050.

The property mortgaged was 1/6th share out of six villages situated in Pargana Miranpur out of the *taluqa* Manyarpur. The lady had five sisters and the *taluqa* was inherited by her and her sisters from their father. She had, therefore, 1/6th share in the *taluqa*.

Subsequent to the mortgage there was a partition between the six sisters and instead of 1/6th share in the *taluqa* *Musammat* Bibi Batul was allotted 14 entire villages. Out of the share of the six villages mortgaged only Khokhipur came to the share of the defendant lady while the other five villages

of which the shares were mortgaged fell in the lots of the other co-sharers.

The learned Judge of the lower Court gave a decree for the full amount with interest by sale of all the 14 villages which were allotted to the defendant lady at partition. The bond rate of interest, Rs. 1-8 per cent. per mensem simple, was allowed.

In appeal to this Court the following grounds were urged:—

1. That it was not proved that the lady who was *pardanashin* executed the power-of-attorney in favour of her son after fully understanding the contents of the document and the effect thereof.

2. That according to the terms of the power-of-attorney Zakir Husain had not the authority to execute the mortgage-deed in suit.

3. That Zakir Husain had not the power to transfer property for payment of a debt not due from the lady.

4. That the decree for sale of all the 14 villages was inequitable and that only a village or two ought to have been ordered to be sold proportionate to the 1/6th share in the five villages mortgaged to the plaintiffs.

5. That the suit for a money-decree was time-barred.

There is ample evidence to prove that the lady executed the power-of-attorney after fully understanding its contents and the effect thereof. The marginal witnesses were Lal Bahadur and Tafazzul Husain and the scribe was Albeli Prasad. All these three persons are dead. The lady was identified at the time of the registration by another son of hers Ghulam Abbas and her brother Asghar Ali. Asghar Ali is dead but Ghulam Abbas is alive and was not produced as a witness on behalf of the lady. One Sadiq Husain was produced as a witness on behalf of the plaintiffs. Possibly his testimony is not reliable as the occasion for his presence at the time of registration is not well-established. There however, remains the unrebutted testimony of the Sub-Registrar, Ali Ahmad who was examined on commission. The registration endorsement which this witness verifies makes note of the procedure adopted by the Sub-Registrar in great detail. More than once this Bench has called the attention of Counsel to the desirability of getting registration endorsements translated and printed where they are necessary by way of evidence as in the present case. We again draw their attention to the necessity of getting an important endorsement as the one in this case printed. The office will make a note that if the file is to be sent to the Privy Council this endorsement shall be translated and printed. It is specifically stated there that the purport of the document was explained to the executant that the Registration Officer himself went to the executant who sat behind a *parda* and satisfied himself that the document was executed by *Musammat* Bibi Batul of her own desire and understanding. When the Registering Officer read this endorsement the situation was revived in his memory and he deposed to the care taken by him in satisfying himself that the lady fully understood the purport of the document and realized what she was doing. The lady did not come into the witness-box and an excuse was made that she was ill. This excuse was made in September 1923 and the lady, we are told, is still alive. On behalf of the defendant an attempt was made after the proper time for the summoning of Zakir Husain as a witness knowing well that the Court would refuse such a request. No attempt was made to examine Ghulam Abbas another son of the lady as a witness. The Sub-Registrar's evidence, therefore, stands unrebutted and we are fully assured of the proper understanding of the contents of the power-of-attorney by the lady. We hold that the lady is bound by its terms.

It was next pleaded that the document did not give authority to Zakir Husain to mortgage the lady's property. There are clear words to the effect that Zakir Husain "may realize money by executing in respect of my moveable and immoveable property mortgage-deeds, etc.....and verify and admit them and have them registered" Zakir Husain had clear authority, therefore, to mortgage property and borrow money on behalf of the lady.

It is true, however, that under the authority Zakir Husain can borrow money for the benefit of the lady only and not for the benefit of himself or a third person. As would be seen by a narration given above of the items making up the consideration amount Rs. 5,050 was left with the mortgagee for payment of a debt due not from the lady but from her husband. There is not an atom of evidence to prove that the lady was liable to pay this debt of her husband. Reference was made to another suit against

the lady which came up to this Court in which the consideration consisted of the payment of a debt due from the lady's husband. A copy of this judgment is filed and is Ex. 4 on the record. There the lady herself had executed the document and she was at liberty to accept as her own the debt of a third person. The present case is different. Here Zakir Husain acted under well-defined authority and if that authority were exceeded the lady would not be bound. It may be mentioned that this plea of this particular sum not being recoverable from the lady was raised in para. 16 of the written statement and there was no replication filed on behalf of the plaintiffs. On behalf of the plaintiffs one Badri Prasad the general agent was examined. Through his evidence it was sought to be proved on behalf of the plaintiffs that the lady had admitted her liability to pay her husband's debt. The husband had died. What the witness stated is :—"I demanded the money due under the deed from Bibi Batul. She said that Lala Kedar Nath was her own *mahajan*, that she required more money for the expense of a partition suit, that she had executed a *mukhtarnama* in favour of Zakir Husain her son authorizing him to mortgage her property and that he would go to Kedar Nath and borrow more money by executing fresh mortgage-deeds, in which old deeds would be credited against its consideration." We find it difficult to believe this uncorroborated statement, but even taking these words at their face value they do not amount to an acknowledgment by the lady of any liability to pay her husband's debt or her willingness to do so even though she may not be liable. We hold that Zakir Husain had no authority to mortgage property for the payment of a debt due from his father and not from his mother.

As a part of this argument it was urged that the plaintiffs had failed to prove that the balance of the consideration had reached the lady. No such proof was necessary. The ruling quoted of this Court, reported as *Muhamdi Begam* v. *Durga Prasad* (1), has no bearing on the present case. The wording of the document of authority was different in that case where authority extended only to borrowing for necessity. In such a case, of course, the mortgagee would have to prove necessity for the loan. No such reservation is made in the document executed by the lady in favour of her son. We hold that the rest of the consideration is binding on the lady.

It is true that a large amount of property is ordered to be sold in payment of the money due on the mortgage There, however, does not appear to be any other method of realizing the debt possible. The learned Counsel for the defendant-respondent admitted that there was no possibility of discovering exactly what property was received by the lady at partition in lieu of her 1/6th share in the six villages specifically mortgaged in the deed in suit. The plaintiffs-respondents' learned Counsel, however, has promised that at the time of execution one village at a time shall be put up to auction until the money is realized and that not more than one village shall be sold at the same time. We consider this undertaking to be sufficient to guard the equitable rights of the defendant-appellant. A note of this undertaking shall be made in the decree of this Court.

No money-decree has been passed so far, so the question as to its limitation is premature. The liberty given in the decree of the lower Court to the plaintiffs to apply for a personal decree for the amount of the balance due to them after sale of the lady's property does not imply that on application a personal decree must be granted. The question of limitation remains open and will be decided at the proper time.

In the result we amend the decree of the lower Court and grant a decree for Rs. 1,200 with interest at the bond rate up to six months from to-day's date. Future interest shall run at 6 per cent. per annum. If the money is not deposited in the Trial Court within the time specified the property entered in the lower Court's decree shall be sold, one village at a time, until the decretal amount is fully realized. Parties shall bear their own costs of both the Courts.

Z. K. *Appeal partly allowed.*

(1) 40 Ind. Cas. 452; 4 O. L. J. 299.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 415 OF 1922.

January 20, 1925.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

RAM GHULAM SINGH—PLAINTIFF—APPELLANT

versus

NAND KISHORE PRASAD—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Pious obligation of sons to pay father's debts, whether can be enforced during father's lifetime—Partition, effect of—Property of sons, whether liable for father's debts.

A pious obligation of a Hindu son to pay off his father's debts is enforceable even during the father's lifetime.

Where, however, a partition has taken place between the father and the sons the property of the sons cannot be proceeded against in satisfaction of a simple money-debt of the father. After partition takes place there are no assets of the father in the hands of the sons and there is nothing for the creditor to proceed against so far as the sons are concerned.

Appeal from a decision of the Additional District Judge, Patna, dated the 11th January 1922, modifying that of the Subordinate Judge, Patna, dated the 6th January 1921.

Mr. *K. P. Jayaswal* (with him Mr. *Bimola Charan Sinha*), for the Appellant.

Mr. *Siveshwar Dayal*, for the Respondent.

JUDGMENT.

Ross, J.—The first contention raised by the learned Counsel for the appellant is that the learned District Judge was in error in holding: "that the sons cannot be made liable on the ground that it is their pious duty to pay off their father's debt inasmuch as the father (defendant No. 1) is alive." It is conceded by the learned Vakil for the respondents that this is an error and that, so far as the pious obligation is concerned, it attaches during the lifetime of the father.

The second contention was that the enquiry was sufficient. The learned Counsel referred to the passage of the judgment of the Additional District Judge dealing with this point and observed that two cousins of the defendants had given information to the plaintiffs. He contends that this evidence ought to have been acted upon by the Additional District Judge. In my opinion, it is not open to this Court in second appeal to question the finding on this part of the case which is a finding of fact.

On behalf of the respondents while it is admitted that the pious duty attaches to the son even during the lifetime of the father, it is contended that as partition had taken place and had taken place before the suit was brought the property of the sons cannot be proceeded against in satisfaction of this simple money debt. This contention was supported by a reference to the decision in *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (1) and especially to the judgment of Kumarswami Sastriar, J., at page 147*. It is clear that in any case only the assets of the father in the hands of the sons could be followed. But, after partition has taken place, there are no assets of the father in the hands of the sons and there is nothing to follow. This is not a case of mortgage where the security attaches to the property and clings to it even after partition. In the case of a simple money debt where there are no assets of the father in the hands of the sons there is nothing for the creditor to proceed against so far as the sons are concerned.

Finally, it was argued by the learned Counsel for the appellants that in equity defendants Nos. 2 to 4 are bound by this debt because they have obtained benefit from it. It is said that the money was borrowed in connection with the partition suit and that these defendants have obtained the benefit of this loan by the partition being effected. Now this argument also is met by the findings of fact. The learned Additional District Judge has held: "that it has not been shown how much if anything the defendant No. 1 had to pay as Commissioner's fee;.....and it has been stated above that no money was necessary to be borrowed to meet the family expenses. Necessity to borrow the money has not at all been proved."

It follows that if there was no necessity to borrow the money these defendants cannot be bound to make good the loan. The decision of the learned Additional District Judge is right and the appeal must, therefore be dismissed with costs.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 515; 6 L. W. 617; (1917) M. W. N. 785.

*Page of 41 M.—[*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1129 OF 1923.

April 29, 1925.

Present:—Mr. Justice Sulaiman.

Sheikh JORHAWAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE MUNICIPAL BOARD, GORAKHPUR—DEFENDANT—RESPONDENT.

U. P. Municipalities Act (II of 1916), ss. 178, 180, 318, 319, 321—Sanction to erect building, refusal to grant—Sanction granted subject to conditions—Order, legality of, whether can be questioned—Appeal—Procedure—Jurisdiction of Civil Courts.

The scheme of the U. P. Municipalities Act is that even if an order refusing sanction to build or imposing conditions subject to which sanction is granted, passed by a Municipal Board under s. 180 (1) of the Act, is illegal the only remedy of the person aggrieved is to move the District Magistrate under s. 318 of the Act. If the District Magistrate refers the matter to the High Court under s. 319 of the Act, he would abide by its decision. But if no such reference is made and an order is made by the District Magistrate confirming the order of the Municipal Board that order is final and cannot be questioned in any other manner or by any other authority by virtue of the provisions contained in s. 321 of the Act. A Civil Court has, therefore, no jurisdiction to question the legality of an order passed by a Municipal Board under s. 180 (1) of the U. P. Municipalities Act which has been confirmed by the District Magistrate under s. 318 of the Act. [p. 815, col. 1.]

Second appeal against a decree of the District Judge, Gorakhpur, dated the 5th of April 1923.

Mr. *A. Sanyal*, for the Appellants.

Mr. *Mushtaq Ahmed*, for the Respondent.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for a declaration that the plaintiffs have a right to set up door-leaves or a gate in the eastern wall of an enclosure newly constructed and to build a house on the open space inside the enclosure. The suit is in substance to challenge the refusal of the Municipal Board of Gorakhpur to grant permission to build the constructions or to put door-leaves in an archway.

The suit has been dismissed by both the Courts below on the preliminary ground that it is barred under the provisions of s. 321 of Act II of 1916.

It appears that the plaintiffs applied to the Municipal Board for permission to build an enclosure round their land and to make certain constructions. They also wanted to have door-leaves set up in the entrance on the west side. A report was called for by the Building Sub-Committee which recommended the granting of the application partially. The Board however by its resolution refused to grant any sanction to build on the open space inside the enclosure and also granted permission to build the western wall provided an open entrance is left on that side. The plaintiffs appealed to the District Magistrate who confirmed that order. Another futile attempt was made to move the Commissioner but he declined to interfere. After their failure the plaintiffs have instituted the present suit.

I propose to consider separately (1) the refusal of the Municipal Board to grant sanction to make constructions on the land and (2) their granting sanction to build the western wall subject to there being an open archway.

As regards the Board's refusal to grant sanction to build I am of opinion that the suit is not at all maintainable. Under s. 180, sub cl (1) the Board has subject to the provisions of any bye-law power either to refuse to *sanction any work of which notice has been given under s. 178* or may sanction it absolutely or subject to certain directions. It cannot be denied that in this case a notice under s. 178 had been given by the plaintiffs to the Municipal Board. Acting on the supposition that the land sought to be built upon was a part of a grave yard the Board refused to grant sanction. It is immaterial whether the reasons for the refusal were sound or not. The Board had power to refuse the sanction. Its refusal was by no means *ultra vires*. The remedy of the appellants, of which they availed, was to move the Magistrate under s. 318. The Magistrate confirmed the order of the Board so far as the refusal to build the house was concerned. That order is final and cannot be questioned in any other manner or by any other authority at all. It is noteworthy that under s 87 of Act I of 1900, which was the section corresponding to the present s. 180 there was a proviso that the Board shall not refuse to sanction the erection or re-erection of such buildings except on certain grounds. No such proviso is to be found in s. 180. This obviously means that the Board now has a wider power to refuse sanction. Whether the refusal was proper or improper, it cannot be questioned in a Civil Court.

As to the question whether the Board could grant sanction conditionally, the main trouble has arisen owing to the fact that the Municipal Board of Gorakhpur has not taken the trouble to pass any bye-laws under the new Act (II of 1916). Under

s. 87 of the old Act I of 1900 Boards are empowered to issue written directions which they may deem fit to issue in respect of all or any of the six matters mentioned therein. The written directions had to be confined to those matters and a Board would be acting *ultra vires* if it was issuing written directions beyond the scope of that section . Under that Act certain directions were issued purporting to be in respect of the matters enumerated in sub-cls. 1 to 5 of old s. 87. In direction No. 18 it was provided that the Board "shall also have power to give sanctions on special terms for any erection or re-erection without regard to the aforesaid rules." This obviously was beyond the scope of the authority given to Boards under s 87 and I would have considerable doubt in holding that this direction was not *ultra vires*. A Board cannot exercise its extra powers by issuing directions which are not authorised by any provisions of the law

Under the new Act, it is perefectly open to Municipal Boards under s. 298, List I. sub-cl. (*h*) (*i*) to make bye-laws prescribing, with reference to the erection or re-erection or alteration of buildings or any class of buildings, the materials and method of construction to be used for external walls. Furthermore they have power to make a bye-law under cl. (*i*) regulating in any manner any buildings provided for in this Act, the erection of any enclosure wall etcetra or other structure of whatsoever kind and nature on any land within the limits of the Municipality. They could also issue directions in respect of all or any of the matters mentioned in sub-head (*h*) of heading (A) of s 298. Thus if a Municipal Board were to pass the requisite bye-laws it would have very wide powers to control the constructions of buildings within the Municipal area. The unfortunate circumstance in this case is that the Municipal Board of Gorakhpur is not up to date and has not taken the trouble to pass any bye-laws under the new Act. I postponed this case for a month in order to enable the learned Vakil for the Municipal Board to obtain the bye-law under which the Municipal Board had professed to act. All that has been supplied to him is a copy of the general directions issued under s. 87 of Act I of 1900. I have already said that direction No. 18 went beyond the scope of the provisions of s. 87 of the old Act. Under the directions then issued the Municipal Board did not expressly lay down any direction regulating the construction of external walls. I am, therefore, unable to find any bye-law or direction which would entitle the Board to impose conditions on the building of the external wall.

At the same time I must hold that the present suit is not maintainable. If the order passed by the Board was illegal then the only remedy of the appellants was to move the District Magistrate under s. 318. Section 319 provides that if any question as to the legality of the prohibition, direction, notice or order arises the Magistrate may refer the point to the High Court for decision. Section 321 then goes on to provide that no order or direction referred to under s. 318 shall be questioned in any other manner or by any other authority than is provided therein and that the order of the appellate authority confirming, setting aside or modifying any such order or direction shall be final. It is obvious that the scheme of the Act is that even if the order passed by the Municipal Board is illegal the only remedy of the person aggrieved is to move the Appellate Court. If the Appellate Court refers the matter to the High Court it would abide by its decision. But if so such reference is made and an order is passed by the Appellate Court that order is final and cannot be questioned in any other manner or by any other authority. It seems to me that the order passed on appeal by the District Magistrate was, therefore, a final order which a Civil Court has no jurisdiction now to question.

It has been contended on behalf of the appellants that this case raised a question of title inasmuch as the refusal of the Municipal Board was based on the supposition that the land was a grave-yard. In my opinion no question of title at all arises. Even if the land belongs to the plaintiffs the Municipal Board had jurisdiction under s. 180 of the Act to refuse to grant sanction for building a house on it. That sanction cannot now be questioned in this suit. As regards leaving an open archway in the western wall no question of title, of course, arises. That condition was imposed for the convenience of the public in order that they may have an access to the tombs inside. The result is that this appeal fails and is dismissed with

costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1632 OF 1920.
December 16, 1924.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Jai Lal.

HUSSAIN SHAH—DEFENDANT—APPELLANT
versus
GUL MUHAMMAD—PLAINTIFF—RESPONDENT.

Custom versus *Muhammadan Law—Alienation—Mughals Barlas of Qadian, District Gurdaspur, whether follow custom—Muhammadan Law—*Wakf—Takia, *whether valid object of* wakf.

The fact that in matters of succession a party follows custom does not necessarily show that it follows the same rule as regards alienations as well. [p. 818, col. 2.]

In matters of alienation the Mughals Barlas of Qadian in the Gurdaspur District are governed by Muhammadan Law and not by custom. [*ibid.*]

The literal meaning of the word *takia* "is resting place." In common parlance a *takia* means the resting place of a *fakir*. The word "*fakir*" does not mean a "beggar" as is commonly understood, but it means a "holy person" who has relinquished the world and devotes his time to imparting religious instructions to his disciples and others. The *takia* is the place where he usually resides and imparts such instructions. [p. 819, col. 1.]

A *takia* is an institution recognised by law and a grant of endowment to a *takia* is as valid a *wakf* as one made to a *khankah*, a *dargah* or a mosque. [*ibid.*]

Takia Kamaldinwala in Qadian in the Gurdaspur District is a religious or *quasi*-religious institution and is a valid object of *wakf* according to Muhammadan Law. [p. 819, col. 2.]

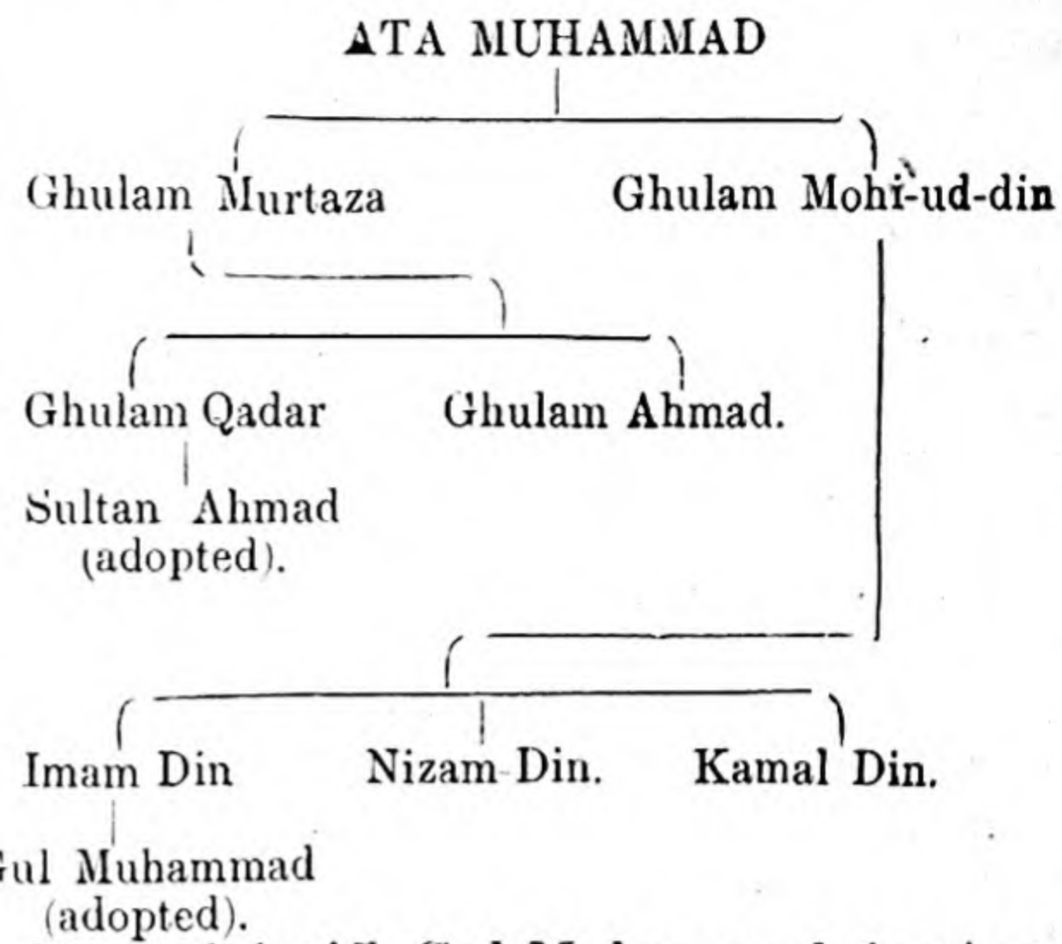
First appeal from a decree of the Subordinate Judge, First Class, Gurdaspur, dated the 30th March 1920.

Messrs. *Ghulam Mohi-ud-Din* and *Jagan Nath Bhandari*, for the Appellant.

Mr. *Zafarulla Khan* and Mr. *Abdul Rashid*, for the Respondent.

JUDGMENT.—A preliminary objection taken on behalf of the respondent that the memorandum of appeal was insufficiently stamped was disposed of by us at the commencement of the hearing. We were of opinion that the insufficiency was very small and was due to an error in calculation and, therefore, holding that the mistake was a *bona fide* one we permitted the appellant under s. 149, C. P. C., to make good the difference in the Court fees and proceeded to hear the appeal on the merits.

In order to understand the case the following pedigree will be useful :—



The plaintiff Gul Muhammad instituted this suit in the Court of the Subordinate Judge, Gurdaspur, on 5th October 1918, praying for a decree for possession of 82 *kanals* and 1 *marla* of land. The Subordinate Judge dismissed the suit in respect of 23 *kanals* and 3 *marlas* and granted a decree for possession of 55 *kanals* and 8 *marlas*.

The defendant appeals and the plaintiff has filed cross-objections in respect of the 23 *kanals* and 3 *marlas*.

The entire land in dispute was recorded in the Record of Rights prepared at the Settlement of 1890-91 as owned by Imam Din, Nizam Din and Kamal Din in equal shares but under the actual cultivation of Kamal Din.

In the Record of Rights prepared at the Settlement of 1910-11 it was entered as owned by *takia* Kamal Din under the management of Kamal Din. In the *jamabandi* papers for 1915-16 the entry was as follows:—

"Gul Muhammad, adopted son of Imam Din and son of Nizam Din, 19 *kanals* and 19 *marlas*, *takia* Kamal Din under the management of Hussain Shah, disciple of Kamal Din, 62 *kanals* and 2 *marlas*".

By virtue of a mutation sanctioned on 28th August 1894 Imam Din relinquished his share in the whole land in dispute in favour of Kamal Din in exchange for other land given to him by Kamal Din. Thus Nizam Din remained the owner of a $\frac{1}{3}$rd share and Kamal Din became owner of $\frac{2}{3}$rds share in the land in dispute.

By means of a mutation sanctioned on the 6th January 1894 Nizam Din and Kamal

Din made a gift of 23 *kanals* and 3 *marlas* out of the land in suit to *takia* Kamal Din under the management of Kamal Din. Pir Shah, disciple of Kamal Din is entered as cultivator of this land in the mutation entry.

By a mutation sanctioned on 15th February 1901 Nizam Din confirmed an exchange of his ⅓rd share in the remaining land made by him six years before with Kamal Din. Thus Kamal Din became the sole owner of the 58 *kanals* and 8 *marlas*

On 31st December 1907 Kamal Din transferred ⅔rds of 58 *kanals*, 8 *marlas* to *takia* known as Kamal Diuwala and on 30 January 1910 he transferred the remaining ⅓rd to the same *takia*.

Imam Din died on 3rd July 1903, Nizam Din died on 18th June 1910 and Kamal Din died in January 1916. The last named died sonless. Nizam Din had only one son Gul Muhammad, the plaintiff, who was adopted by Imam Din.

Hussain Bakhsh or Hussain Shah, defendant, a disciple of Kamal Din, became the *Sajjadanashin* of *takia* Kamal Din after his death. The allegation of the plaintiff is that he is the heir to the property left by the three brothers named above, and that the land in suit did not belong to the *takia* as there was no such *takia* and also because the *takia* was not a proper subject of *wakf* under the Muhammadan Law. It was further asserted that Kamal Din was not competent to make a valid gift of ancestral land as his powers of alienation were limited under the Customary Law. On the death of Kamal Din 19 *kanals* and 9 *marlas* of the land were entered in the name of the plaintiff but the entire area remained in the possession of the defendant.

The ancestral nature of the land is not denied before us, but it is asserted that Kamal Din was not governed by the Customary Law in the matter of alienation of land and it was further alleged that the *takia* Kamal Din was a proper subject of *wakf* under the Muhammadan Law. These were the only two points that were argued before us at length by the learned Counsel for the parties.

The most important question for decision undoubtedly is whether the family of Kamal Din is governed by the Customary Law or by the Muhammadan Law in the matter of alienation of ancestral land.

After examining the parties, the Subordinate Judge placed on the plaintiff the burden of proving that the family was governed by custom and came to the conclusion that the burden had been discharged.

The home of the family is in Qadian in Batala Tahsil of the Gurdaspur District. It appears that at one time the head of the family exercised ruling powers and that the village was founded by the ancestors of the plaintiff, *i. e.*, the Mughal Barlas. The land in suit is situated in Qadian. None of the members of the family have been known to actually cultivate land. Imam Din was a Risaldar in the army and after his retirement became the *Pir* or religious head of sweepers. Nizam Din was a Sub-Inspector of Police and retired after more than 20 years' service. Kamal Din was a *Hakim* before he became the *Pir* or head of the *Naushahi* sect. Mirza Ghulam Ahmad was in Government service and then became the head of the well-known *Ahmadia* sect and Sultan Ahmad was an Extra Assistant Commissioner in the Punjab.

Mirza Ghulam Ahmad admittedly followed the Muhammadan Law and his estate on his death in 1908 was divided among his heirs according to that law. It was sometime about 1885 that Mirza Ghulam Ahmad and Kamal Din both adopted 'holy orders' and ceased to have any connection with secular affairs.

Before 1885 a greater portion of land in Qadian had passed out of the family of the Mughal Barlas into the hands of the Mughal Chogattas by sale Since 1885 a number of alienations including gifts, sales, mortgages and exchanges have taken place in the village but none are proved to have been challanged in the Courts or otherwise. Thus the village is now owned by different castes, *e. g.*, Mughal Barlas, Mughal Chogattas, Arains, Pathans, Jats, Sayyads, Biloch, Kazi, Khatris, etc., and there is no compact village community or a compact section of village community.

P. W. No. 3, Rafique Beg, a maternal uncle of the plaintiff and P. W. No. 4, Imam Din, clearly stated in cross-examination that the Mirzas had been making alienations of land and none had so far been contested.

We are of opinion that the above facts clearly establish that in the matter of alienation of land the Mirzas, *i. e.*, the descendants of Ata Muhammad follow the

Muhammadan Law and not the Customary Law.

The learned Subordinate Judge has referred to some evidence in his judgment in support of his conclusion on this point and this evidence we now proceed to examine.

The first piece of evidence referred to by the learned Judge is the record of the questions and answers attached to the Settlement Record of 1910-11. But on reference to this document we find that it relates to the Gurdaspur Tahsil and not to the Batalla Tahsil with which we are here concerned. The *Qanungo* on the other hand definitely states in his report that there is no entry in the *Riwaj-i-am* prepared in 1910-11 relating to Batala Tahsil as to custom followed by the Mughal tribe in matters of alienation and succession by daughters. Reliance is then placed on three documents, Exs. P-3, P-6 and P-8. The first two are described as relating to gifts made by some members of this family but which were declared invalid on being contested. We have examined both the documents and find that in both cases attempt was made by certain persons to get the land left by deceased members of the family mutated in their favour on the allegation that the deceased had made gifts in their favour before death, and that in both cases the heirs of the deceased proprietor had objected to the mutations on the ground that no gifts had been made. No question as to the validity of the gifts on the ground of incompetency of the alleged donors was raised. The Revenue Officials holding that there was no evidence in support of the alleged gifts declined to sanction the mutations. We fail to see how these mutations can be held to support the contention of the respondent. On the other hand we consider that they might with advantage be relied upon by the appellant to show that the right of the alleged donors to make the gifts was not questioned.

Exhibit P-8 relates to the claim made on behalf of a minor daughter, aged three years, to succeed to his father's estate. A number of owners supported her claim but the reversioners claimed that the minor was living with her maternal grandfather who it was alleged would misappropriate the property of the minor, but ultimately some land was transferred to the daughter as a result of a compromise made between the parties. This instance is quoted to show that among the Mughals daughters are excluded. We do not think that the facts stated above establish anything of the sort.

Another document is referred to by the learned Judge in his judgment, *e. g.*, a printed copy of the *Riwaj-i-am* of 1865. No such document is on the record and none was produced before us and we are unable to express any opinion on it.

The learned Counsel for the respondent relied on another circumstance which perhaps is the strongest piece of evidence in his favour. He pointed out that there were five recent instances in this family where widows, sisters and daughters had been excluded from inheritance though under the Muhammadan Law they would be entitled to succeed. He has further shown that there have been two adoptions in the family which is an institution foreign to the Muhammadan Law but recognised by the Customary Law.

We have given full consideration to this argument, but do not consider that the facts relied upon can materially affect our decision in this case. In the first instance the two adoptions were evidently made with a view to keep out female heirs and, therefore, we are really left with the five instances of exclusion of such heirs. Then we find that in the Record of Rights prepared at the Settlements of 1852 and 1865 female heirs are entered as co-sharers in the land in suit. The idea to exclude such heirs, therefore, appears to be of comparatively modern growth. No exclusion, after contest, of the females has been proved and it is quite possible that there were some other good reasons for their not claiming the inheritance: and lastly, the fact that in the matter of succession the parties follow custom does not necessarily show that they follow the same rule as regards alienations as well. If enquiry is instituted it will be found that in a number of families admittedly governed by the Muhammadan Law, females do not claim and do not take a share in the estate.

We hold, therefore, that there is a great preponderance of evidence in favour of the view that in this family of the Mughal Barlas right of alienation is governed by the Muhammadan Law and not by custom and in coming to this conclusion we have also been influenced by the conduct of the two brothers of Kamal Din in exchanging lands with him and in joining with him in the gifts made to the *takia*.

A number of authorities were quoted at the Bar by the learned Counsel for the parties but we do not propose to notice them in detail here as in our opinion the decision of each case depends upon a multitude of circumstances proved therein and the general principles which guide the Courts in deciding such matters are too well-recognised to need repetition.

Keeping those principles in view we had to apply our mind to the facts and circumstances proved in this case and then to determine the issue involved. We have done so and arrived at the conclusion already indicated.

The next contention of the learned Counsel for the respondent was that the *takia* Kamal Dinwala was not an institution which could be the object of a valid *wakf* under the Muhammadan Law. He also, rather feebly, contended that the appellant was not in fact a disciple of the late Kamal Din or the *Sajjadanashin* of the *takia*. There is ample evidence on the record to show that the appellant is a disciple of Kamal Din and also the *Sajjadanashin* of the *takia* in question. The main argument, however of the learned Counsel was that a *takia* was not a religious or a *quasi*-religious institution and was not recognised as such by the Muhammadan Law. The literal meaning of the word *takia* is "resting place". In common parlance a *takia* means the resting place of a *fakir*. The word "*fakir*" does not mean a "beggar" as is commonly understood, but it means a "holy person" who has relinquished the world and devotes his time to imparting religious instructions to his disciples and others. The *takia* is the place where he usually resides and imparts such instructions. A full description and nature of a *takia* is to be found at pages 415, 428 and 433 of Ganpathi Iyer's Law relating to Hindu and Muhammadan Endowments. It is there stated that the place of abode of a *fakir* is called a *takia* before he attains sufficient public importance, and that when a *fakir* attains sufficient public importance and a large number of disciples begin to get round him and lodgment is provided for such disciples, then the place is called a *khankah* and then if the *fakir* on his demise is buried in the *khankah* it becomes a *dargah*, and further that the *takia* is itself an institution recognised by law and a grant of endowment to the same will be as valid a *wakf* as to a *khankah*, a *dargah* or a mosque. We entirely agree with the opinion of the learned author. It is quite clear from the evidence on the record that Kamal Din had become a *fakir* sometime between 1885 and 1890, and that he had a number of disciples who received religious instructions from him. He was in fact the head of the *Naushahi* sect of the *fakirs*. On his death he was buried in the grounds attached to the *takia* and so were his two brothers Nizam Din and Imam Din. The fact that the *takia* was intended to be a religious institution, and became a religious institution, is further supported by the statements that were made by the donors of the lands to the *takia* on two occasions.

On the 5th of January 1895 Nizam Din and Kamal Din are recorded to have stated as follows:—"Land measuring 23 *kanals* 3 *marlas* has been attached to the *takia*. The manager of the *takia* will enjoy the produce. He shall have no right to effect a sale or a mortgage. The manager shall pay the Government revenue. The managing *gadinashin* of the *Naushahi* sect shall be the manager of the *takia*."

Then on the 30th January 1910, Kamal Din is recorded to have made the following statement:—"That the entire land might be entered in the name of the *takia* known as Kamal Dinwala. The gift has been made by way of *religious endowment*. Hence the mutation entry should be sanctioned." The words used in the vernacular are "*ghairat-i-mazhab*."

This leaves not the least doubt that it was the intention of Kamal Din and his brothers that the *takia* should be a religious institution and that full effect was given to this intention by the continued use of the *takia* for purposes for which it was established. We hold, therefore, that the *takia* Kamal Dinwala was a religious or *quasi*-religious institution, and as such was the object of a valid *wakf* according to Muhammadan Law, and that the land in dispute is *wakf* property attached to the *takia*, and as such does not descend to the personal heirs of Kamal Din, Nizam Din or Imam Din, but to the *sajjadanashin* of the *takia* who is the appellant in this case.

As a result of the above findings we accept the appeal and dismiss the plaintiff's suit with costs throughout. The cross-objections are dismissed with costs.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 604 OF 1922.

April 6, 1925.

Present:—Mr Justice Kulwant Sahay.

GANESH LALL—DEFENDANT—APPELLANT

versus

BISESAR PANDEY—PLAINTIFF—RESPONDENT.

Appeal, second—Finding of fact—Mis-reading of documentary evidence—Document of title, construction of—Question of law.

The construction of a document which is a document of title and forms the basis of the plaintiff's claim is a point of law which can be gone into in second appeal. [p. 820, col. 2]

Where a finding of fact arrived at by a Court of first appeal is based on a piece of a documentary evidence which has been completely mis-read by the Court, the finding is not binding in second appeal. [p. 821, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna, dated the 5th June 1922, reversing that of the Additional Munsif, Patna, dated the 6th March 1922.

Messrs *P. C. Manuk* and *Anand Prasad*, for the Appellant.

Mr. *N. N. Sen*. for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendant and arises out of a suit brought by the plaintiffs respondents for a declaration that the defendant has no right to open doors on the south of his house marked F in the sketch map filed with the plaint on a lane marked E in the map, on an allegation that the said lane was the private property of the plaintiffs and of the owners of the houses marked B and C in the sketch map.

The defendant denied the title of the plaintiffs to the lane and asserted that it was a public lane to which the plaintiffs had no exclusive title and that the defendant had as much right to the lane as the plaintiffs had, and that he had the right to open the doors at the points marked G and H in the sketch map towards south of his opening on the lane

The learned Munsif found that the plaintiffs had got no right to the soil of the lane and that they had only a right of way over it. He was of opinion that the lane was not a public lane as alleged by the defendant but that it was a blind lane terminating at the southern extremity of the house marked A in the map. He held that the lane was not a private lane of the plaintiffs only but that the defendant had also the right to use it. He accordingly refused to give a decree to the plaintiffs restraining the defendant from opening his doors at the points G and H and dismissed the suit.

On appeal the learned Subordinate Judge has decreed the suit and has made a declaration that the defendant has no right to open the doors at the points G and H or to open any other door into the lane marked E in the map which he declared to be the private lane of the owners of the houses A B and C in the sketch map filed with the plaint.

Against this decree the defendant has come up in second appeal to this Court. It is contended on his behalf that the learned Subordinate Judge has made a mistake of record in considering the documentary evidence in the case and has also put a wrong construction upon Ex. 5 which is the title-deed of the plaintiffs.

On referring to the sketch map filed with the plaint, it appears that the plaintiffs' house marked A lies to the east of the defendant's house marked F. South of the plaintiffs' house is the house of Mahadeo Pande marked B and to the south of Mahadeo Pande's house is the house of Basant Misser marked C. Between the house of Mahadeo Pande and the defendant's house there is a lane which is said to be a continuation of the disputed lane marked E lying to the south of the defendant's house marked F.

The learned Subordinate Judge agrees with the Munsif that the oral evidence with regard to the ownership of the lane is not satisfactory; but he was of opinion that the documentary evidence adduced by the plaintiffs was distinctly in favour of the plaintiffs and established their title to the lane. The first document that the learned Subordinate Judge considers is Ex. 5 a *kabala* dated the 30th August, 1872. This is a title deed of the plaintiffs and the construction of this document is a point of law which can be taken in second appeal. By this *kabala* (Ex. 5) Mahadeo Pande, the owner of the house marked B, sold a portion of his house to the ancestor of the plaintiffs. That portion has now been amalgamated with the plaintiffs' old house, and the house marked A in the sketch is the old house of the plaintiffs amalgamated with a portion of the house B purchased under Ex. 5. The learned Subordinate Judge refers to the eastern boundary of the portion sold by Ex. 5 which was stated to be the house of one Doman

and from this he inferred that there was no lane to the east of the plaintiffs' house as alleged by the defendant. He then refers to a description in the *kabala*, Ex. 5, to the effect that the main entrance of the portion of the house sold lay to the south and he says that this is the entrance as shown in the sketch map as being the entrance of the house A. This, however, does not show the title of the plaintiffs to the lane in dispute and there is no question of mis-construction of this document and the argument of the learned Counsel for the appellant that the Subordinate Judge has misconstrued the title-deed (Ex. 5) must fail.

The next document referred to by the learned Subordinate Judge is a *khasra* marked Ex. 15 and a map marked Ex. 14. This *khasra* and the map were prepared in the course of a partition suit and it is not a *khasra* made at a public survey as stated by the learned Subordinate Judge. Item No. 211 in this *khasra* is the house marked C in the sketch map. This *khasra* shows that the house marked C then belonged to one *Musammat* Pano Kuer, widow of Dwarka Pande. There are two entries in *Khasra* No. 211. The first entry is that of the house now marked C as the house of *Musammat* Pano Kuer of which the length, breadth and area are given in the columns provided therefor. The next entry runs thus: "Goshagali for egress and ingress westward up to the road"; and the length, breadth and area of this Goshagali are also given separately from those of the house. The learned Subordidate Judge on a reference to the map finds that this Goshagali is the lane marked E in the sketch map which is the subject of dispute in the present case. The learned Subordinate Judge says that these two documents (Exs. 14 and 15) show that the title to the lane was with the widow of Dwarka Pande who was an agnate of the plaintiffs. The learned Subordinate Judge says that this plot No. 211 is entered in the *khasra* under the column headed "*Jagir* Bishanprit, etc." In this he is clearly wrong It is not shown in the *khasra* under the column headed "*Jagir* Bishanprit, etc." In fact this particular column is left blank against the *Khasra* No. 211. It is contended by Mr. Manuk that this is a mistake of record and that the finding of the Subordinate Judge to the effect that the lane in dispute is proved to be the *Jagir* Bishanprit of Dwarka Pande is based on the erroneous impression that it is entered in the column of "*Jagir* Bishanprit, etc.," in the *khasra* and that when there is no such entry in the *khasra*, the whole decision of the Subordinate Judge is vitiated as the finding is based on a fact which is non-existent. Furtheron in the judgment the learned Subordinate Judge observed that although the Goshagali was measured as a part of plot No. 211 it will appear that it was the *nikas* of Mahadeo Pande and others and *Musammat* Pano Kuer could not obviously sell it away. Mr. Manuk contends that here there is an inconsistency in the finding of the learned Subordinate Judge. His first finding being that Pano Kuer had a title to the lane, the subsequent finding that she could not sell it away is inconsistent with that finding. The plaintiffs' case was that the lane in dispute was the *barhmottar* land belonging to their ancestors and to themselves and the learned Subordinate Judge has found that this allegation is correct under the mis-conception that it is described in the *khasra* under the column of "*Jagir* Bishanprit, etc." There being no such entry in the *khasra* the finding of the learned Subordinate Judge cannot be sustained inasmuch as it is based on a mis-reading of the *khasra*. This *khasra* (Ex. 15) was a very important piece of evidence in the case and the learned Subordinate Judge relies upon it very strongly; and one does not know what would have been his decision if he had read the *khasra* correctly.

The documents marked Exs. 13 and 7 which are next considered by the learned Subordinate Judge do not prove the plaintiffs' title to the lane; they only show that the lane was the *nikas* or passage of egress and ingress of the houses of Mahadeo Pande and others. The learned Subordinate Judge himself observes that the documents Exs. 7, 17, 8, 11 and 12 referred to him do not prove the ownership of the lane to belong to the plaintiffs. As regards the sale deed (Ex. 19) the learned Subordinate Judge refers to the eastern boundary thereof which is shown as Galimai *nala* Bisessar Pande. This is the deed by which the defendant purchased the house marked F. Bisesar is one of the plaintiffs in this case and from the description of the eastern boundary of the house marked F the learned Subordinate Judge comes to the conclusion tnat the lane in dispute belongs to

Bisesar Pande. It is, however, pointed out by Mr. Manuk that the lane there referred to is the lane to the east of the house marked F which is not in dispute in the present case. The dispute relates to the lane lying to the south of the house marked F and the description of the southern boundary in this deed (Ex. 19) is merely *gali amad raft*, *i. e.*, a lane which is a passage for ingress and egress. This does not show that the lane in dispute belongs to Bisesar Pande and the different descriptions of the eastern and the southern boundaries in the same document are remarkable.

There is thus a serious error in the judgment of the Subordinate Judge as regards Ex. 15 and as I have said it is impossible to say what the decision of the Subordinate Judge would have been if he had correctly read Ex. 15. Further he has considered only one of the boundaries given in Ex. 19 and has not considered the southern boundary thereof which was very important. I am, therefore, of opinion that the dicision of the learned Subordinate Judge cannot be maintained. The decree appealed against must, therefore, be set aside and the appeal remanded to the Subordinate Judge for disposal after reconsidering the evidence in the case. Costs will abide the result.

Z. K. *Decree set aside; Case remanded*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 142 OF 1922.
June 1, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SHIAM LAL—DEFENDANT—APPELLANT

versus

RADHA BALLABH AND OTHERS—PLAINTIFFS AND BALMAKUND AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition—Improvements made by co-sharer—Contribution, right of—Consent of co-sharers, whether necessary—Civil Procedure Code (Act V of 1908), s. 11—Point left undecided, whether can be raised in a subsequent suit—Res judicata.

Where a point is expressly left undecided by the Court in a suit, it is open to the parties to agitate it in a subsequent suit. [p. 823, col. 2.]

To entitle a tenant-in-common to an allowance on a partition in equity for the improvements made by him on the premises it is not necessary for him to show the assent of his co-tenants to such improvements or a promise on their part to contribute their share of the expense; nor is it necessary for him to show a previous request to them to join in the improvements and their refusal. The only good faith required in such a case is that the improvements should have been made honestly for the purpose of improving the property and not for the purpose of embarrassing the co-tenants or encumbering their estate or hindering partition. [p. 824, cols. 1 & 2.]

Where, however, one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenants to obtain their shares of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor notwithstanding that he may have added greatly to the value of the land, inasmuch as it would be the improver's own folly to extend his own improvements over the whole estate. It would be unjust to permit a co-tenant at his pleasure to charge another tenant with the cost of improvements he may not have desired. In such a case the improver stands as a mere volunteer and cannot, without the consent of his co-tenants, lay the foundation for charging him with improvements. [p. 824, col. 2.]

Where a co-tenant is charged with the cost of improvements made by another co-tenant, the charge will not be for the price of the improvements but only with his proportion of the amount which at the time of the partition the improvements add to the value of the premises. From this amount he will also be entitled to deduct any sum in respect of which he may have a just claim for use and occupation of his share of the property enjoyed by the co-tenant making the improvements. [p. 825, col. 2.]

First appeal from a decree of the Subordinate Judge, Muttra, dated the 30th January 1922.

Mr. *Asthana*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—The subject-matter of the dispute in this case is a three-storeyed house situated in the town of Muttra. On the 20th May 1911, the site of this house and certain materials were sold by two separate deeds of sale. The site of the house was sold to one Ram Chand or Ram Chander who is the own brother of the present appellant Shiam Lal. The materials were sold to a man named Jamna Das and were afterwards sold by him to Ram Chander the man whose name has just been mentioned. The site was sold for Rs. 400 and the materials for Rs. 250.

Both these sale deeds are printed at pages 21 *et seq.*, of our record. The vendors were Gopal Das and his son Piare Lal. The latter was acting for himself and for his two minor sons.

It appears that after these sales took place Ram Chander re-built the house. Then in the year 1914 a suit was filed by Mitthu

Lal and others who were members of the family of Gopal Das. This suit was brought in the Court of the Additional Subordinate Judge of Muttra, on the allegation that the sales made by Gopal Das, his sons and grandsons were not binding inasmuch as the property which had been sold was joint family property. The plaintiffs alleged themselves to be members of a joint family with Gopal Das, and they, therefore, asked that the deeds of sale might be cancelled and that Ram Chander might be ejected from the premises.

Ram Chander defended this suit and raised a variety of pleas. He denied that the family of the plaintiffs and Gopal Das, his vendor, was a joint family. He denied that the property was joint family property and pleaded that he had acquired the whole of these premises from Gopal Das. He set up a defence under s. 41 of the Transfer of Property Act and pleaded moreover that in no case could he be ejected without payment by these plaintiffs of the sum of Rs. 5,000, the amount which he had spent on the re-erection of the house.

This suit was decreed in the Court of the Subordinate Judge of Muttra to this extent, namely, that the plaintiffs were given a decree for joint possession of the premises. That decree was upheld in appeal in this Court by the judgment in First Appeal No. 199 of 1916 which was delivered on the 2nd of January 1919.

Mitthu Lal and his co-plaintiffs having thus got a decree for joint possession the suit out of which this appeal has arisen was instituted in November 1920 by Radha Ballabh and others, some of the successors-in-interest of the plaintiffs in the earlier suit. The suit is a suit for partition. The learned Subordinate Judge has ordered the sale of the premises and has directed distribution of the sale-proceeds according to the shares of the parties. We gather from the judgment of the Court below that Shiam Lal, the defendant-appellant now owns 45/72 of the house. Shiam Lal, it may be mentioned, alleged that in a partition arrived at between himself and his brother Ram Chandar this house had fallen to his share. It further appears that since the date of the earlier suit Shiam Lal or his brother Ram Chander had been buying in some of the shares of the other co-tenants.

One of the claims made by the defendant-appellant Shiam Lal in this suit for partition was that he was entitled to claim from the plaintiffs a sum of Rs. 5,500, on account of improvements which he had made on the property. The Subordinate Judge came to the conclusion that it might be inferred that he had spent a sum of Rs. 5,000 on re-building these premises. Compensation, however, was refused to Shiam Lal on the ground that he and his predecessor Ram Chander were only trespassers and that he laid out the money at his own risk.

It is this finding which is contested here and it is argued on behalf of Shiam Lal that the judgment of the Court below is erroneous. It is said that in these partition proceedings he is entitled in equity to compensation for the money he laid out in restoring these premises.

On the other side it has been argued that this question of compensation is no longer open in view of the findings which were come to in the earlier suit of 1914 to which we have referred.

A copy of the judgment of the Additional Subordinate Judge in that earlier suit is to be found at page 27 of our record. In that case the learned Subordinate Judge was asked to hold that the plaintiffs could not recover possession of the premises without paying to Ram Chander the money which he had laid out in re-building the house. The learned Subordinate Judge refused to decide this question. He stated that at that stage it was not necessary to decide this issue but that subsequently in a partition suit, if the rules of equity would allow, Ram Chander would be entitled to receive compensation for repairs and improvements effected by him.

When the case came up to the High Court the same plea was again raised on behalf of Ram Chander, and this Court agreeing with the judgment of the Court below was of opinion that Ram Chander could not demand that the plaintiffs in that suit should pay him money for compensation as a condition precedent to their getting a decree for possession.

We have considered carefully the judgments in this earlier suit and we are of opinion that there is no solid foundation for the argument that the question of this claim to compensation as now raised is *res judicata* between the parties. All that was held in the earlier case was that Ram Chander, who was then in possession of the house, could not insist that the plaintiffs should pay him compensation before they were entitled to get joint possession. It

seems to us that the question of any compensation which might be allotted at the time of partition was left open in these earlier proceedings.

We have now to consider what the law is regarding a claim of this kind. We have been referred in the course of argument to a treatise by a learned American Author, "Freeman on Co-tenancy and Partition." According to this learned author the law is as follows:—We quote from para. 509 at page 678 of the book:—

"The fact that a co-tenant has located upon a particular portion of the lands of the co-tenancy and has enhanced its value by making improvements or by reducing it from a wild state to one fit for profitable cultivation, is a circumstance always deemed worthy of the attention of a Court charged with the duty of making a partition..... The law declines to compel one co-tenant to pay for improvements without his authorization but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises the fruits of his expenditure and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. It is the duty of equity to cause these improvements to be assigned to their respective owners (whose labour and money have been thus inseparably fixed on the land) so far as can be done consistently with an equitable partition."

Continuing in para. 510 the learned author quotes the opinion of the Supreme Court of the States of New York in the following language:—

"Where one tenant-is-common lays out money in improvements on the estate, although the money so paid does not in strictness, constitute a lien on the estate, yet a Court of Equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant-in-common to an allowance on a partition in equity for the improvements made on the premises it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part, to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements and their refusal. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property and not for embarrassing his co-tenants or encumbering their estate or hindering partition. But if one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made the tenant making the improvements would not be entitled to compensation therefor notwithstanding they may have added greatly to the value of the land because it would be the improver's own folly to extend his own improvements over the whole estate and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case the improver stands as a mere volunteer and cannot without the consent of his co tenant lay the foundation for charging him with improvements."

From the above statement of the principles which govern the award of compensation on partition it is apparent that the real difficulty arises in those cases where, as here, the property is not susceptible of physical division. In the present instance we find that the house in dispute, although of three storeys, is not a large house, and as the co-sharers are many it would be quite impossible to make any physical division of the premises and so the learned Judge has been obliged to resort to the provisions of the Partition Act of 1893 and to direct a sale with the further direction that the sale-proceeds are to be divided between the interested parties.

It is laid down in the above statement of the law that it is essential that the person claiming compensation should have acted in good faith. In the present case we think it may fairly be said on behalf of Shiam Lal or his predecessor that he acted in good faith in the sense contemplated, that is to say, he made the "improvements" honestly for the purpose of improving the property and not in order to embarrass the other co-tenants or to encumber their estate or to hinder partition. He had no such object in view for apparently he was under the impression that by the purchase made in the year 1911 he had become the owner of the whole of the estate. The law as stated in the quotation made above relates to

claims for compensation on account of "improvements." In this present case it is we think possible to say that the matter stands on a somewhat different footing for if carefully examined it seems to us that what have been called improvements in the course of the trial were really repairs. It is clear on all hands that when the appellant's predecessor bought these premises the property was in ruins. There is evidence to show that a long time before the purchase was made the house had been a three storeyed house. When Ram Chander bought in the year 1911 the two upper storeys had disappeared, there was only the lowest storey and that was in ruins, and it is quite clear that as matters then stood the property was quite useless and unprofitable. It may be mentioned here that Gopal Das and the other members of the very large family to which he belonged did not reside in Muttra; some of them we are told resided in the Aligarh District and others of them at Calcutta, and it seems reasonable to suppose and there is evidence to that effect, that these people, being absentees had neglected these premises and allowed them to fall into decay. We find then that Ram Chander buys these premises in a state of ruin and thereby becomes a co-tenant. He spent a sum of money in re-instating the premises and making them fit for occupation. Having regard to all these circumstances we think that he may fairly be held entitled to some compensation for re-instatement. He has, by the money he has laid out converted this building into something which is of use and which can bring in profit. In the state it stood when he purchased it was worth little or nothing at all.

We have decided, therefore, that in the circumstances to which we have referred, the defendant-appellant is entitled to some compensation, and we now proceed to determine what the amount of that compensation should be.

There is no very definite evidence on this point on the record but in his own statement which is to be found at page 11 of the record Shiam Lal stated that he had spent Rs. 5,000 or Rs. 6,000 in restoring these premises. This restoration he said, had taken place some ten years before the date on which he was giving his evidence. That would fix the date of the restoration in or about the year 1912. Obviously Shiam Lal was not able to produce any detailed account of his expenditure on these particular premises. It seems from his deposition that at that time he built three other houses as well and that he had spent some Rs. 25,000 in erecting all four. He called two witnesses Parbhu Lal and Munshi Abdullah, one of whom is a contractor and the other a sub overseer, and these men were examined with reference to an estimate which is printed at page 38 of our record and marked Ex. A. It may be mentioned here that both these men were called as witnesses in the earlier suit of 1914 and that this very estimate was produced in that case. Both these men who have some pretensions to be experts and who drew up this estimate jointly, fixed the costs of re-building these premises at Rs. 5,480. Of course, when all is said and done this is an estimate only. They themselves have no direct knowledge of the money that was actually spent in re-building the house. It was on these materials that the Court below came to the conclusion that in all probability Shiam Lal's predecessor Ram Chander had spent about Rs. 5,000 in re-instating the property now in dispute, and all things considered, we are of opinion that the conclusion of the Subordinate Judge is substantially correct. We should, therefore, be prepared to allow Shiam Lal a sum of Rs. 5,000 by way of compensation, but there is another fact which is to be taken into account and that is that Shiam Lal and his predecessor, so far as we can see have had the exclusive use of these premises for a considerable period. We do not know on the present state of the record whether the plaintiffs who are now seeking partition have received from Shiam Lal any profits accruing since the time when they were admitted to joint possession under the decree of this Court. We may refer in this connection again to para. 510 of Freeman's book where, dealing with the question of compensation for improvements, the author says:—

The co-tenant against whom the improvements are charged will, therefore, be charged not with the price of the improvements but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum of which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements."

We feel, therefore, that we must allow these plaintiffs some set-off on account of the use and occupation of these premises by the appellant and his predecessor. No definite material is to be found on the record but we think, having regard to the value which is put upon the premises and to the probable rent which a building of this description would bring in, we shall not be doing the defendant any injustice if we hold that during the period of his occupation he has recouped himself to the extent of Rs. 1,000. Deducting this sum of Rs. 1,000 from the Rs. 5,000 just mentioned we come to the conclusion that the appellant is entitled to compensation to the extent of Rs. 4,000 from the sale-proceeds. The decree of the Court below, therefore, is modified and it is now declared that on sale of these premises the defendant-appellant will be entitled to deduct Rs. 4,000 out of the sale-proceeds. The balance can then be distributed amongst the various co-owners in proportionate shares. As regards costs we leave the parties to pay their own costs in both the Courts.

Z. K. *Decree modified.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 885 OF 1924.

November 25, 1924.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

KAILASH CHANDRA DATTA—DEFENDANT—PETITIONER

versus

SADAR MUNSIF, SILCHAR—PLAINTIFF—OPPOSITE PARTY.

Company, meeting of, what amounts to—Articles of Association—Share-holders' meeting and passing of resolutions, whether meeting of Company—Receiver of assets of Company, when can be appointed.

The only proper ways in which a meeting of a Company can be called are either by the Directors in accordance with the provisions of the Articles of Association or by the share-holders on requisition also in accordance with the provisions of the Articles of Association. A meeting of a Company may also be called by a direction of the Court to the Liquidator in winding up proceedings. The mere fact that certain persons who happen to be the share-holders of a Company met together at a private house and purported to pass resolutions appointing Directors, etc., does not make that a meeting of the Company. For a meeting to be a meeting of the Company it must be a meeting convened in one of the ways mentioned above and convened strictly in accordance with the Articles of Association. [p. 827, col. 2.]

A Court has no jurisdiction to appoint a Liquidator to conduct the business of a Company except in a debenture-holders' action when the business and assets of the Company have been charged with the payment of the claims of the debenture-holders. [p. 828, col. 1.]

Rule against an order of the Munsif, Silchar, dated the 27th June 1924.

Mr. *S. R. Das*, Advocate-General, (with him Babus *Govinda Chandra Dey Roy*, *Narendra Kumar Bose*, *Hemendra Kumar Das* and *Hiran Kumar Roy*), for the Petitioner.

Dr. *S. C. Basak* (with him Babu *Priya Nath Dutt*), for the Plaintiff.

Babu *Surendra Nath Guha*, Senior Government Pleader, for the Deputy Commissioner of Cachar.

JUDGMENT.

Greaves, J.—This is a Rule seeking to set aside certain proceedings to which I shall presently refer. The facts are as follows. There is a certain Insurance Company called Arya Insurance Co., Ltd., which has its registered office at Silchar. Apparently disputes had arisen with regard to the management of the Company and some time in the year 1922 one Jogesh Chandra Mazumdar, a share-holder in the Company instituted a suit in the Court of the Subordinate Judge for a declaration that certain persons were no longer Directors of the Company. In the Course of the suit an application was made for the appointment of a Receiver to carry on the business of the Company and an order was made appointing a Receiver who thereupon took charge of the business of the Company. Then ultimately the suit was decreed and a declaration was made to the effect that the defendants had ceased to be Directors of the Company. On the 16th April 1924, the Subordinate Judge directed the Receiver to hold a meeting of the share-holders to pass accounts and deal with other matters. On the 28th April in the same year the Receiver issued a notice calling a meeting of the Company on Sunday the 18th May at 8-30 in the morning at the registered office. On the 16th May the same gentleman who had sued in the Court of the Subordinate Judge instituted a suit in the Court of the Sadar Munsif at Silchar for a declaration that the petitioner before us and certain other persons were not competent to act as share-holders of the Company and that their shares were invalid. No injunc-

tion was asked for in the plaint, but a petition was presented to the Munsif with the plaint asking for a temporary injunction restraining the petitioner and the other defendants from acting as share-holders of the Company. No notice was given to the petitioner. But one of the share-holders sought to be restrained happened to be a Pleader in the Court of the Sadar Munsif of Silchar: and then and there he was asked verbally to show cause on the following day. On the following day, that is the 17th May this Pleader share-holder apparently showed cause before the Munsif and the Munsif passed an injunction in a somewhat curious form not restraining the share-holders in question from voting at the meeting which would have been the natural order to make but restraining the Company who was defendant No. 22, from holding a meeting until further order. The Receiver appointed in the Court of the Subordinate Judge was not a party to the suit in the Munsif's Court, but notice was given to him for his guidance. The other defendants who did not appear on that day and who had not been served were directed to show cause on the 9th June. The order for injunction was not served upon the petitioner before us. The order apparently was hung up on the door of the registered office of the Company on Sunday morning. At 8-30 A. M., the hour fixed for the meeting, the door of the registered office of the Company was found closed by those share-holders who came there to attend the meeting. On the same day, the 18th of May, the petitioner and some other share-holders who came to attend the meeting called for the morning of the 18th, proceeded to a private house near by and held a meeting whereby they purported to appoint Directors and sent a copy of the resolution which they purported to pass to the Receiver and to the Subordinate Judge. On the 19th May the Receiver reported the matter to the Munsif. On the 21st May the Munsif issued orders on the persons present at the meeting held at the private house on the 18th May to show cause why they should not be prosecuted under ss. 188 and 143, Indian Penal Code, cause to be shown on the 26th of May. On the 13th June the Munsif purported to grant sanction to prosecute under ss. 188 and 143, Indian Penal Code. On the 23rd of June the petitioner got a certified copy of the order of the 13th June to which I have just referred with a view to prefer an appeal against that order. On the 27th June the Munsif came to the conclusion that no order could be made under s. 188 of the Indian Penal Code and he accordingly cancelled his order of the 13th June and directed the parties to adduce any witnesses they wanted to call on the 12th July. By the 12th July the Munsif seems to have awakened to the fact that this order was also wrong and that he could not on his own motion direct the parties to show cause on the 12th July and accordingly on that date a petition was presented by the plaintiff for leave to proceed against the present petitioner in contempt proceedings. Apparently leave was given on that petition. The order which is now sought to be set aside is the order of the 27th June 1924 to which I have just referred.

These are the facts and one has only got to state them to see that there has been error at every stage in these proceedings. It seems to me sufficient to say that the order of the 27th June 1924 cannot stand on the ground that the meeting that was held on the 18th of May was not a meeting of the Company and there was not, therefore, a breach of the injunction of the 17th May even assuming that that order was properly passed and even assuming that it was not necessary to serve it on or to give notice to the petitioner before proceedings against him in contempt could be taken. That I think is really sufficient to dispose of the matter.

There are proper ways in which a meeting of a Company can be called either by the Directors in accordance with the provisions of the Articles of Association or by the share-holders on requisition also in accordance with the provisions of the Articles of Association. There is only one other way of which I know, apart from any special Article of Association, that a meeting of a Company can be called and that is by a direction of a Court to the Liquidator in winding up proceedings. The mere fact that certain persons who happened to be share-holders of the Company met together at a private house and purported to pass resolutions appointing Direcrors and so on does not make that a meeting of the Company. For a meeting to be a meeting of the Company it must be a meeting convened in one of the ways to which I have referred and convened strictly in accordance with the Articles of Association.

The result is that the order of the 27th

June 1924 was wrong *in toto* and there was no breach of that order as no meeting of the Company was held on the 18th of May 1924 as the Munsif seems to have thought.

It is not necessary for the purposes of this Rule to go into the various irregularities that are disclosed on the facts that I have stated. But I must say that it is the first time that I have heard of a Court assuming jurisdiction to appoint a Receiver to conduct the business of a Company unless the Receiver is appointed in a debenture-holders' action when the busines and assets of the Company have been charged with payment of the claims of the debenture-holders. Apart from that, in my opinion, there is no jurisdiction in a Court to appoint a Receiver of a Company. If it is necessary to protect the assets of a Company other means must be sought which are provided by the provisions of the Companies Acts.

In the result we make the Rule absolute. The plaintiff-opposite party must pay the costs of this Rule.

Chakravarti, J.—I agree.

Z. K. *Rule made absolute.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 627 OF 1922.

November 20, 1924.

Present:—Mr. Justice Spencer.

CHANGANATH KUTTAPPA NAIR—PETITIONER

versus

POOPPIL *alias* VALAMARUDM VANIYATHER LAKSHMI VARASIAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 151, 152—Practice—Variation between judgment and decree—Amendment of decree—Appellate Court, powers of—Omission to file memo. of objections, effect of.

Where there has been an appeal against a decree any order to amend the decree so as to make it agree with the judgment should be passed by the Appellate Court. [p. 828, col. 2.]

Where a decree of the Court of first instance which is not in accordance with the judgment is confirmed in appeal, the Appellate Court has power even after disposal of the appeal to amend the decree so as to bring it in accordance with the judgment. [p. 829, col. 1.]

The only executable decree is that of the Appellate Court which incorporates the decree of the lower Court when it confirms it. Although the mistake might have been corrected by means of a memo. of objections at the time when the Appellate Court had cognizance of the case, the omission to do so will not have the effect of taking away the plaintiff's inherent right to have a decree in accordance with the judgment passed in his favour. [*ibid.*]

Muhammad Sulaiman Khan v. *Muhammad Yar Khan*, 11 A. 267 at p. 274; A. W. N. (1899) 55; 13 Ind. Jur. 427; 6 Ind. Dec. (N. S.) 598 and *Sahdeo Gir* v. *Deo Dutt Misir*, 29 Ind. Cas. 50; 37 A. 323; 13 A. L. J. 449, relied on.

Petition, under s 115 of Act V of 1908, praying the High Court to revise an order, dated the 3rd February 1922, in M. P. No. 468 of 1921, on the file of the Court of the Subordinate Judge, South Malabar, Calicutt, in A. S. No. 25 of 1919, in the said Court (O. S. No. 428 of 1917, on the file of the Court of the Additional District Munsif of Tirur.)

Mr. *P. Govinda Menon*, for the Appellant.

Mr. *D. A. Krishna Variar*, for the Respondents.

JUDGMENT.—The preliminary decree is not in accordance with the preliminary judgment as in the plaint the mortgagee asked for the mortgaged property to be sold and for payment of the amount found to be due to him out of the sale-proceeds and the judgment of the Court was "the suit is decreed as played for"; but the preliminary decree, as drawn up, did not provide for any payment being made to the plaintiff but provided for payment of the amount found to be due to a subsequent mortgagee and the balance to the mortgagors.

There was an appeal which was dismissed with a slight modification as to the personal remedy.

Now the Subordinate Judge, after disposing of the appeal, has declined to bring the First Court's decree in accordance with the judgment.

I think he was wrong in thinking that he had no power to amend the decree and in declining jurisdiction. It was held in *Shivlal Kalidas* v. *Jumaklal Nathiji Desai* (1) and numerous other cases that where there has been an appeal any order to amend the decree so as to make it agree with the judgment should be passed by the Appellate Court. As observed by Sir J. Edge, C. J., in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (2), if the original Court were allowed to amend its decree the result might be that it would become essentially a different decree from that

(1) 18 B. 512; 9 Ind. Dec (N. S.) 870.

(2) 11 A. 267 at p. 274; A. W. N. (1899) 55; 13 Ind. Jur. 427; 6 Ind. Dec. (N. S.) 598.

which the Appellate Court intended to confirm. The only executable decree is that of the Appellate Court which incorporates the decree of the lower Court when it confirms it. No doubt the mistake might have been corrected by means of a memo. of objections at the time when the Appellate Court had cognizance of the case. But this omission will not have the effect of taking away the plaintiff's inherent right to have a decree in accordance with the judgment passed in his favour [*vide Sahdeo Gir* v. *Leo Dutt Misir* (3).] I observe that the final decree does provide for payment of what is declared due to plaintiff out of the sale-proceeds, but as the objection that, this being so, it will be unnecessary to amend the preliminary decree was not the ground of the Subordinate Judge's order declining jurisdiction, it may be left for consideration when the petition for amendment is finally disposed of. I set aside the order of the Subordinate Judge and direct him to take the petition on file and dispose of it according to law. The respondent to pay the petitioner's costs of this civil revision petition.

V. N. V. *Order set aside.*

Z. K.

(3) 29 Ind. Cas. 50; 37 A. 323; 13 A. L. J. 449.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 379 OF 1924.

May 29, 1925.

Present:—Mr. Justice Sulaiman.

HET RAM *alias* UDIT NARAIN—JUDGMENT-DEBTOR—APPELLANT

versus

RAJA DAT PRASAD SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5, 10—Mortgage suit—Decree for sale—Final decree—Costs incurred in execution, whether can be added to mortgage-money—Mortgagee, personal liability of.

There is no provision in r. 5 of O. XXXIV of the C. P. C. that costs incurred subsequent to the passing of a final decree for sale on a mortgage should also be added to the mortgage-money. The scheme of the rules is that the mortgaged property is liable for the costs properly incurred even subsequent to the preliminary decree, but it does not follow that all kinds of costs which are incurred after the final decree are to be added to the mortgage-money. Rule 10 of the Order contemplates that when the time for final adjustment arrives the Court has to add to the mortgage-money such costs as have been properly incurred since the decree and till the time of actual payment, but the costs mentioned in the rule are costs which are properly incurred in the suit in carrying out the directions contained in the decree and do not include costs incurred in subsequent objections to execution proceedings or in appeals from orders passed in execution. These costs are incurred in proceedings separately numbered and treated as quite distinct and independent from the suit itself. Costs awarded in subsequent proceedings or in appeal from such proceedings must be separately taxed and realized by separate execution against the mortgagor personally. [p. 830, cols 1 & 2.]

Execution first appeal from a decree of the Subordinate Judge, Muttra, dated the 30th August 1924.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *S. N. Gupta*, for the Respondent.

JUDGMENT.—This execution appeal arises under the following circumstances. A preliminary decree for sale was passed on the 4th of March 1910. This decree was made final on the 30th of April 1915. In 1917 the decree-holder put in an application for execution. After his decree had been partially satisfied the execution case was struck off by an order dated the 14th of December 1920. The decree-holder appealed to the High Court and his appeal was allowed on the 27th of February 1923 and the case sent back to the Court below with directions to re-admit the application for execution. The High Court awarded the decree-holder Rs. 166-8-0 as costs of the appeal.

The decree-holder has put his decree for costs in execution against the judgment-debtor personally. The judgment-debtor filed objections to this execution pleading that this amount ought to be added to the mortgage-money and realized exclusively by sale of the mortgaged property and that the decree for costs should not be executed against him personally. This objection has been disallowed by the Court below, hence this execution appeal.

The learned Advocate for the appellant contends that under O. XXXIV, r. 10, C. P. C., it was imperative on the Court below to add to the mortgage-money the costs incurred since the decree and before the actual payment, and that, therefore, the Court had no power to execute this decree against the judgment-debtor personally.

I am unable to accept this contention. If we look to r. 4 of O. XXXIV, it will be apparent that the preliminary decree which is to be framed is to direct that the amount realized should be applied in payment of what is declared due to the plaintiff together

with subsequent interest and subsequent costs. Then r. 5 says, that if on or before the date fixed the amount declared due as aforesaid together with such subsequent costs as are mentioned in r. 10 is not paid then under r. 5 (2) the Court shall pass a decree that the mortgaged property or a subsequent part thereof be sold. There is no provision in r. 5 that if the final decree for sale has been passed costs incurred subsequent thereto should also be added to the mortgage-money. Reading all these rules together the scheme of the Code seems to be that the mortgaged property is liable for the costs properly incurred even subsequent to the preliminary decree, but they do not necessarily show that all kinds of costs which are incurred after the final decree are to be added thereto. Rule 10 contemplates that when the time for final adjustment arrives the Court is to add to the mortgage-money such costs which have been properly incurred since the decree and till the time of actual payment, but, in my opinion, the costs mentioned in r. 10 are costs which are properly incurred in the suit in carrying out the directions contained in the decree, for instance a mortgagee may be ordered to deliver title-deed of the property or to furnish accounts. Such costs as are incurred in carrying out the directions of the decree would be costs incurred in the suit which would be liable to be added to the mortgage money.

On the other hand costs incurred in subsequent objections to execution proceedings or in appeals from orders passed in execution are costs which are incurred in a proceeding separately numbered and treated as quite distinct and independent from the suit itself. It would be difficult to hold that r. 10 would cover costs awarded in such subsequent proceedings also. According to the practice that prevails to my knowledge the costs awarded in such subsequent proceedings or in appeal from such proceedings are separately taxed and are realized by separate execution. The final decree has been prepared once and for all; it cannot be tampered with by making additions to or subtractions therefrom. Of course at the time of the final adjustment when the Court has to see whether the decree has or has not been satisfied due credit has to be given under r. 10 for costs that the mortgagee may have incurred in the suit itself.

If this interpretation of the rules were not correct the result may be extremely disadvantageous to the mortgagee for whose benefit the r. 10 was obviously intended. In many suits or mortgages the personal remedy may be barred. Costs incurred by the mortgagee in meeting objections in the execution Department or resisting appeals to higher Tribunals if they are only to be added to the mortgage-money and cannot be realized against the judgment-debtors personally, would merely create a further charge on the mortgaged property which may not be sufficient to meet even the original liability. Furthermore, the mortgagors would be immune from all personal liability to pay costs of futile and frivolous objections which they may choose to raise. This, in my opinion, could not have been contemplated. I must accordingly hold that the costs allowed by the High Court in appeal from the order striking off the execution are costs which the decree-holder can realize separately by execution against the judgment-debtor personally and which he is not bound to add to the mortgage-money.

While in the course of delivering this judgment, I noticed with surprise that at an earlier stage in the suit I had appeared as Counsel for one of the parties but as the learned Counsel for the parties have stated that they have no objection to my deciding this case. I have completed the judgment.

The appeal is dismissed with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 301 OF 1922.

March 5, 1925.

Present:—Mr. Justice Foster.

RAMJAS PANDEY—DEFENDANT—APPELLANT

versus

AWADH MAHTON AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 148-A—Decree for arrears of rent obtained against some tenants only—Decree, nature of—Execution of decree—Sale—Auction-purchaser, rights of.

A decree obtained by a landlord for arrears of rent in respect of a holding which is not transferable without the permission of the landlord, against some only of the tenants of the holding, without impleading the legal representatives of a deceased tenant as parties to the suit, is not a rent-decree

within the meaning of s. 148-A of the Bengal Tenancy Act and in execution of such a decree only the right, title and interest of the judgment-debtors can be sold. The auction-purchaser at a sale in execution of such a decree does not become a purchaser of the entire holding.

Appeal from a decision of the Additional Subordinate Judge, Saran, dated the 29th November 1921, reversing that of the Additional Munsif, Saran, dated the 14th September 1920.

Messrs. *N. N. Sinha* and *B. B. Saran*, for the Appellant.

Mr. *S. K. Mitter*, for the Respondents.

JUDGMENT.—The plaintiffs have a two-thirds *raiyati* interest in *Khatas* Nos. 81 and 82, which were put to sale in execution on the 6th September 1918 and purchased by Ramjas Pande the appellant (defendant No. 10). The suit is for declaration that the sale has not passed the plaintiffs' interest.

The facts are as follows: The defendants Nos. 1 to 6 own shares in the villages Mohendra Buzrud, within which lies *Khata* No. 81 and Amwari Bahalia, which includes *Khatas* Nos. 82 and 83. These three parcels of land (81 to 83) from one holding with one consolidated rent. Plaintiffs have acquired the *raiyati* interest in two-thirds of each of these *khatas* in the following manner—by purchase from Gopal Lohar defendant No. 9 and one Daulat Malik, so far as Nos. 81 and 82 are concerned; and by a family arrangement so far as No. 83 is concerned. In this *Khata* No. 83 one Kheta plaintiffs' great uncle, had a two-thirds interest. He died issueless leaving brothers and nephews but by a family arrangement the interest in *Khata* No. 83 was made over to plaintiffs' father. Defendants Nos. 7 and 8 own the remaining one-third interest in the three *khatas*. The holding is not transferable without permission of the landlords by village custom.

In 1917 (after these acquisitions by the plaintiffs and their father) the landlords defendants Nos. 1 to 6 sued and obtained an *ex parte* decree for arrears of rent. The suit was apparently in the form indicated in s. 148-A of the Tenancy Act and the decree is on the face of it a rent decree. Whether it was in fact a rent decree is an important question. The decree was put into execution and *Khatas* Nos. 81 and 82 sold and purchased in September 1918 by Ramjas Pande defendant No. 10. If it was a rent-decree, it seems to me that the plaintiffs, transferees of a two-thirds interest in each of the *khatas*, would have no right to oppose the entry of the auction-purchaser, the rent being a first charge. On the other hand if the decree was not a rent decree, the purchaser did not necessarily buy the entire *Khatas* Nos. 81 and 82 but only the right, title and interest of the judgment-debtors.

Now the defendants in that rent suit were defendants Nos. 7, 8 and 9 and Daulat Malik. Ketha Mahto's interest was not represented, his heirs not being impleaded. But for this defect the decree would possibly have fulfilled the requirements of a rent decree in spite of the transfers made by Gopal and Ketha's heirs of parts of the holding to the plaintiffs. But the tenants were a group of *lohars* and a *kumri*, and not a joint family, and the *lohars* could in no way represent the interest of Kethas heirs. So I find that the decree was not a rent decree. I refer to *Jagattara Dassya* v. *Daulti Bewa* (1).

Two points remain to be considered. It is urged that the plaintiffs as transferees of part of the holding have no right to bring this suit. There appears to be some confusion in this argument between the right to sue and the right to succeed in the suit. The plaintiffs' interest in the entire holding was threatened by the execution sale of two of the *khatas*, I think that fact constituted a valid cause of action.

It is next urged that they should have sued for possession, but the delivery of possession to Ramjas Pande did not take place till after the institution of the suit.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 2 Ind. Cas. 695; 37 C. 75; 13 C. W. N. 1110.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 29-B OF 1924.

July 16, 1924.

Present :—Mr. Kotval, A. J. C.

Musammat RUKHMABAI—JUDGMENT-DEBTOR—APPELLANT

versus

RAMCHANDRA—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66 (2)—Execution of decree—Decree passed against

legal representative—Notice to settle terms of sale proclamation—Sale—Objection by judgment-debtor that property is not liable to attachment and sale in execution of decree, whether can be entertained.

In execution of a money-decree passed against the legal representative of a deceased debtor certain property was attached and notice was issued to the judgment-debtor under O. XXI, r. 66 (2) of the C. P. C., for settling the terms of the sale proclamation. The judgment-debtor did not appear and the sale took place but was not confirmed as the purchaser failed to pay the balance of the price within the proper time. A fresh proclamation was subsequently ordered to issue and the judgment-debtor made an application alleging that the property attached belonged to her and was not liable to attachment and sale in execution of the decree passed against her in her representative character:

Held, that the judgment-debtor having failed to take the objection at the time when the sale proclamation was settled it was not open to her to raise it later in the execution proceedings.

Ram Kirpal v. *Rup Kuari*, 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.), followed.

Durga Charan Mandal v. *Kali Prasanna Sarkar*, 26 C. 727; 3 C. W. N. 586; 13 Ind. Dec. (N. S.) 1064, referred to.

Appeal against the judgment of the District Judge, East Berar, Amraoti, dated the 30th of November 1923, confirming that of the Subordinate Judge, Daryapur, dated the 4th of August 1923.

Mr. *K. V. Deoskar*, for the Appellant.

Mr. *A. V. Khare*, for the Respondent.

JUDGMENT.—For the purposes of this appeal the facts may be stated briefly as follows. On a bond executed by one Surebhan deceased a simple money-decree was passed against his widow, the appellant Rukhma Bai, making her liable to the extent of the assets of Surebhan in her possession. The decree was passed on the 16th November 1921. In execution of the decree field survey No. 26 was attached as being the property of Surebhan on the 7th July 1922. Notice under O. XXI, r. 66 (2), C. P. C., of the day for settling the sale proclamation issued to Rukhma Bai could not be served for several hearings, and finally substituted service was effected on the 24th January 1923 and held good on the 17th February 1923. A proclamation of sale was ordered to issue on the 10th March 1923 and the sale was fixed for the 18th June 1923. The field was sold but the sale was not confirmed as the purchaser failed to pay the balance of the price within the proper time, and on the 21st July 1923 a fresh proclamation of sale was ordered to issue. On the 16th July 1923, Rukhma Bai made an application alleging that the field was her property having been given to her by Surebhan for her maintenance and was not liable to attachment and sale in execution of the decree and praying for its release. The application was rejected, both the lower Courts holding that the objection that the field was not liable to be sold could not be entertained at that stage, not having been preferred when the order for sale was passed on the 10th March 1923. Rukhma Bai appeals.

Rukhma Bai had applied to have the *ex parte* order set aside but failed and an appeal from the order refusing to set aside the *ex parte* order was dismissed. The order for sale thus became final. It was as effective as if it had been passed in Rukhma Bai's presence without the present objection being taken by her, or as if the objection had been taken and had failed. Its binding force does not depend on s. 11, C. P. C., regarding *res judicata* which does not apply to execution proceedings but upon general principles of law: *Ram Kirpal* v. *Rup Kuari* (1). Rukhma Bai might and ought to have urged her objection to the sale at the stage when the proclamation for sale was settled and having failed to do so it was not open to her to raise it later. *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (2) which is cited on behalf of Rukma Bai is directly against her on the point now under consideration. In that case an occupancy holding was sold in execution of a decree and the judgment-debtors who contended that it was not saleable as they had no disposing power in respect of it objected to the application made by the auction-purchaser after the confirmation of the sale for delivery of possession. It was held that the confirmation of the sale was no bar to the judgment-debtor's application to have it declared that the holding could not be sold in execution of the decree, the question being one relating to the execution, discharge and satisfaction of the decree. It was, however, held that if the judgment debtors were parties to the order for sale or were aware of it and did not appeal against it they were precluded from questioning the propriety of that order and consequently of the sale that had taken place under that order.

The decision of the lower Courts is correct. The appeal is dismissed with costs. Pleader's fee Rs. 25.

Z. K. *Appeal dismissed.*

(1) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec (N. S.) 718 (P. C.).

(2) 26 C. 727; 3 C. W. N. 586; 13 Ind. Dec. (N. S.) 1064.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 186, 242, 253 AND 257 OF 1925.

May 5, 1925.

Present:—Mr. Dalal, J. C.

F. S. HAY AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 443, Ch. XXXIII—Trial under Ch. XXXIII, when can be claimed—European British subject—Procedure—Claim not made before Committing Magistrate, whether can be made at trial—Penal Code (Act XLV of 1860), ss. 24, 120-B, 409—Criminal breach of trust by public servant—Ingredients of offence—Conspiracy—"Dishonestly," meaning of.

A claim by the accused under s. 443 and a finding by the Magistrate are necessary ingredients for the application of the provisions of Ch. XXXIII of the Cr. P. C. If no such claim is made prior to commitment and there is no finding by the Magistrate the question cannot be raised in the Court of Session. If such a claim is made and a finding favourable to the accused is recorded by the Magistrate, the Sessions Judge is bound to act under the provisions of Ch. XXXIII and cannot refuse to do so on the ground that those provisions do not apply. In the case of acceptance of the claim of the accused person the finding of the Magistrate is final. When the finding of the Magistrate is adverse to the claim it is final, unless the claimant appeals and in the case of an appeal the decision of the Sessions Judge is final. [p. 838, col. 2.]

By the provisions of the second paragraph of s. 443 of the Cr. P. C. the Legislature desired the matter of the benefit of the provisions of Ch. XXXIII to be decided finally by the Sessions Court so as to make it impossible that it could be raised in the High Court after a prolonged trial in the Sessions Court. [*ibid.*]

The Sessions Judge has, however, no power to determine the matter except on appeal under cl. (2) of s. 443 of the Cr. P. C. [p. 838, col. 2; p. 839, col. 1.]

When once an opportunity to make a claim under s. 443 of the Cr. P. C. is missed by the accused and the case is committed under s. 213 of the Code the provisions of Ch. XXXIII do not give him another opportunity of claiming the benefit of the special provisions. [p. 838, col. 2.]

The mere fact of a person being a European British subject does not entitle him to the benefit of Ch. XXXIII, which is devised for the benefit both of a Europen British subject and an Indian British subject. An Indian British subject has certain privileges just as a European British subject has under that Chapter. The distinctive rights of a European British subject are detailed in Ch. XLIV A, which also deals with the distinctive rights of an Indian British subject. The determination of this question of the class of British subjects is necessary for the application of the provisions of s. 275 of the Cr. P. C., in the case of Jury and the provisions of s. 284-A in the case of Assessors. [p. 837, col. 2.]

Without the slightest evidence of any money having been received by a public servant he can be convicted of criminal breach of trust by a public servant under s. 409 and of conspiracy under s. 120-B of the Penal Code when property under his control disappears and his connection with the conspiracy is brought home to him. [p. 839, col. 1.]

The word "dishonestly" as defined in s. 24 of the Penal Code does not necessarily imply wrongful gain to the accused himself. [p. 839, col. 2.]

Appeal against a judgment of the Special Sessions Judge, Lucknow, dated the 3rd March 1925.

Messrs. *Ross Alston*, *R. F. Bahadurji* and *G. H. Thomas*, for the Appellant.

The Government Pleader with him Mr. *Madan Mohan Lal*, Prosecuting Inspector, for the Respondent.

JUDGMENT.—Five men have separately appealed from their conviction by the Special Sessions Judge of Lucknow of offences under s. 409 and under s. 120-B for conspiracy to commit that offence. They were all convicted at the same trial. Embezzlement was committed of Railway stores known as brass boring. When brass is worked in shops, pieces drop out which are of no use in the works and must be sold as metal. This waste brass was collected at a workshop known as shop No. 10 and sent to the stores for storage and subsequent sale. Hay was Assistant Controller of Stores, Maharaj Kishan was Depôt Store Keeper, Raj Narain was a Ward Keeper in charge of the Metal Godown and Debi Dayal was Traffic Clerk whose duty was to send consignments from the Railway stores to their destination. These are four of the appellants. The fifth appellant Chhedi Ram is one of the merchants who is stated to have given bribes. The other merchant in whose favour embezzlement was committed by the servants of the Company was the approver Maiku Lal. When the method of storage and despatch is explained it will be seen how the four servants of the Company were implicated in the offence of embezzlement with the storage and despatch of brass boring.

When any quantity of brass boring was collected at the Loco Shop No. 10 and was to be despatched to the stores, an advice note was prepared at the shop by Sheo Dayal. All these advice notes are bound in a book and though the book is not paged it will be difficult to take them out of the book. With each advice note three counterparts on loose paper were prepared giving the same details. The duplicates were sent to the Works Manager where they were stamped with a date stamp and signed by the Works Manager. When these counter-parts came back to the clerk they were sent with a gate pass and that

particular consignment of stores to the Stores Department. The method which I describe is one that ought ordinarily to be followed. When the consignment reached the stores with the counter-parts, a receipt was given by a clerk in the Stores Department in a book of receipts. When this quantity of brass boring was locked away the amount was entered on a card kept in the Stores Department. If properly kept up this card showed the quantity of brass boring in hand on any one particular date. The gate pass was kept by tha gate sergeant who passed the brass boring on the strength of this pass. Out of three counterparts received by the stores one went to the stores audit, another to the workshop audit and the third was kept at the stores.

On arrival at the stores the brass boring was again weighed and compared with the counterparts. This was done before entry was made in the stock card. The method appears perfect on paper but to begin with there was the first flaw that no record was kept of the consignments in the office of the Works Manager. I was assured by the learned Government Pleader that the officer holding that post is not an author or an actor or any other celebrity whose signature would have any market value. If so, it is difficult to understand what profit he obtained by making his signatures or initials on the duplicate forms. If a register had been kept in the office of the Works Manager to note down details of the date, nature and weight of the stores sent from shop No. 10 to the stores it would not have been possible for the clerks subsequently to make alterations in the advice note and in the duplicates as has been done in the present case. The method of conveying excess stores from the shop No. 10 to the stores may be easily thought out. A correct gate pass, advice note and duplicates were first prepared. The duplicates were sent to the Works Manager and on return the brass boring was sent out with the three duplicates and the gate pass. Subsequently after it safely arrived at the stores, the advice note and the duplicates were altered in accordance with the conspiracy between the officials of the loco shop and of the stores. The learned Judge has made attempts at guessing as to how cheating was done. It is, in my opinion, impossible to discover what methods were employed as one of the clerks in the conspiracy has not turned an approver. Strangely enough the learned Judge has acquitted Sheo Dayal clerk of the loco shop No. 10 who also was prosecuted. In my opinion the acquittal was certainly wrong. Large excess stores could not have passed from the loco shop to the stores without the active connivance of Sheo Dayal. Transparently the advice notes have all been altered and the dates thereon do not tally with the dates of the gate passes. Sheo Dayal's explanation was that he entirely depended on the weights sent to him from the Stores Department and corrected his own advice and the counterparts accordingly. If he was so trustful of weights obtained at the stores, there was no object in his going through the process of noting down his weights on the advice note and the counter foils. He might as well have waited for filling up columns until he received intimation from the stores. The receipt book has been missing.

Entries on the stock cards were considerably delayed. Outwardly this would not help to accumulate excess store because by keeping back entries of receipts of stores the actual accumulation would be then greater than it would be if the stock cards were kept up to date. Much stress was laid on this point on behalf of the defence. At the same time, this delay proved manipulation by the officials at the stores. It is impossible to discover how the stores had been passed out in excess of what ought to have gone and how holding in hand stock without showing it on the stock card helped the conspiracy. It is certain from the alterations made in the advice note in the counterfoils from the want of agreement of dates and weights between the passes and the advice notes and from the delay in posting up advice notes on the stock card that there was a conspiracy by which larger stocks were received from loco shop No. 10 at the stores than were entered on the stock cards. This will be further proved when I come to consider the issue of stock. The fraud, however, is so transparent that not one learned Counsel has had the courage to argue before this Court that everything was straight. Every appellant and his Counsel attempted to prove that that particular appellant had nothing whatever to do with the fraud and in the ordinary course of his duties would not be likely to

become aware of the fraud. If the defence is considered in the lump it amounts to this that fraud did exist but it was committed by coolies and cooly *jamadars* while the clerks and superior officers were too busy to attend to their duties. One had heard of Babu *Raj*, where the clerk is supposed to run the office while the superior officers undergo the painful and exhausting task of signing their names. This is the first time, however, that this Court has had a defence of cooly *Raj* put up before it.

I shall now come to issues of stock.

An auction is held about twice a year to sell off the stock, in the present case, of brass boring. The merchants who purchase at auction are given by the auctioneer orders to take the amount of store purchased by them from the stores. When the order is perused, the stock, in this case, brass boring is taken out of the room by the stores officials and put in bags. These bags are weighed at what is called the beamscale just outside this store godown which is known as section H and loaded in a wagon. Then the wagon is run on to the weigh bridge and weighed. As is well-known every wagon has written on the face of it its own weight, known as tare, and by deducting it from the weight of the wagon and the store at the weigh bridge the weight of the store is found a second time. A forwarding note is then prepared by an official of the stores and the traffic clerk. A receipt is given to the merchant who sends the consignment and a shunting order prepared to shunt the wagon out of the stores yard.

Here also by connivance between the officials of the Stores Department and the traffic clerk, a smaller weight may be entered in the forwarding note and the Railway receipt. Fortunately for the prosecution, the method adopted here has been disclosed by the approver Maiku Lal and is most convincingly proved. As in the case of receipt of brass boring, so in the case of issue, every learned Counsel solemnly disclaimed any intention of arguing that much larger quantities of stores than were entered in the forwarding notes and receipts did not leave the Stores Department. The method adopted was both simple and ingenious. At first a forwarding note was correctly prepared. It may be mentioned that forwarding notes are kept separately and are not bound in a book. This practically is the offer of the consignor to the Railway Company to accept his consignment for transit. Naturally such forms could not be bound in a book. A Railway receipt, however, was not prepared as it ought to be. It should be remembered that the distance for the wagon to travel was short because the merchants took the stores to Cawnpore. Suppose the merchant had purchased 5 tons. In the first consignment 5 tons are put in and a proper forwarding note for that quantity is prepared. If anything went wrong on the way till arrival at Cawnpore, the store officials and the traffic clerk can point to the correct forwarding note and say that 5 tons had left. It must be remembered, as I have already said, while examining the methods of issues that the stock cards were never written up punctually. There would therefore, be no entry in the stock card to detect that the store officials wanted to make out that only 1 ton had been despatched. As soon as the wagon reached one of the several receiving stations at Cawnpore the merchant hurried back to the Stores Department and reported that all was safe. The correct forwarding note was then destroyed and an incorrect one of 1 ton was prepared and also a receipt for 1 ton. The merchant took the receipt to Cawnpore and obtained delivery of 5 tons, of course through clerks on the other side who were squared in the usual routine of business. The next consignment could carry only 4 tons under cover of 1 ton because if anything were detected on the way they were secured for the transit of 4 tons only and no more as 1 ton was declared to have been carried previously. The same process was gone through. It will be seen that under cover of 2 tons 9 tons could be passed out according to the methods adopted by the conspirators.

This part of the case stands on very solid foundation and I will be wasting time to go through minute details so clearly and accurately given in the lower Court's judgment.

One point, however, is worth noticing to show how clearly the prosecution has succeeded in proving the preparation of a correct forwarding note first and subsequently of an incorrect one on a later date. Admittedly on 22nd December 1923 a wagon was loaded at the stores with 5 tons brass boring and 4½ tons of lead. The forwarding note which now appears contains only 4½ tons of lead and the date

is 24th December. Maiku Lal being inside the conspiracy has given details as to how this happened. The wagon was sent off from the stores and a shunting order prepared. Somehow some defect was discovered at the local goods shed about two or three furlongs away from the stores siding. This naturally put the stores officials and the traffic clerk of the stores siding on the alert. Maiku Lal was also sent for and they all got transferred the material from that wagon to another wagon though the traffic clerk of the stores siding had nothing whatever to do with the goods shed. After this new wagon reached Cawnpore a forwarding note of 4½ tons of lead was prepared and a corresponding receipt. On behalf of Debi Dayal traffic clerk and Maharaj Kishen, depôt storekeeper, strange explanations are given which explain nothing. It was said that the wagon was found to be damaged at the stores siding itself but the damage ceased to exist as soon as 5 tons of brass boring was removed by Maiku Lal on a receipt given by him for local delivery. The wagon was then sent on and even with lightened weight it was found defective at the goods shed. Debi Dayal out of kindness of heart rushed off to the goods shed to oblige a consignor of his own siding and had the lead removed from one wagon to another. All this is mere childish talk which could take in nobody and does not deserve any examination. Why Maiku Lal or Debi Dayal should worry over 4½ tons of lead is not explained. There is no evidence whatsoever that such a large quantity as 5 tons of brass boring was taken delivery of locally by Maiku Lal. No *thelewala* or other carrier is produced to depose to this false story. A witness called by Debi Dayal himself Mohammad Hasan, D. W. No. 2, deposed that the Railway receipt ought to be prepared as soon as the forwarding note is prepared. When it is admitted that a forwarding note was prepared it must be presumed that a corresponding receipt ought to have been prepared at the same time and admittedly it was not. This by itself is sufficient to prove underhand dealings by the stores officials and the traffic clerk.

In the judgment of the lower Court will be found in great detail evidence by which different consignments have been traced to a certain shop in Cawnpore. There were auction sales on three different dates—20th November 1922, 23rd February 1923 and 23rd October 1923. The appellant Cheddi Ram purchased six tons of brass boring at the 20th November sale. What was sold by him was nearly 24 tons to Sita Ram. Similarly excess quantity was received both by Chhedi Ram and Maiku Lal on account of the February sale. As no argument was addressed to me on this part of the case I will not dwell upon it in great detail.

It was argued by one of the learned Counsel that it is not sufficient to prove that the excess material was received by merchants but that the prosecution should also have proved that there was excess material in stock at the stores to make over to the merchants. As none of the clerks of the stores turned an approver, that has been impossible for the prosecution to do. From the various irregularities and alterations all that the prosecution can show is dishonesty. As already pointed out no correct weight was kept anywhere. The difficulty would have been solved if any register of the correct weight sent out from the loco shop No. 10 to the stores had been kept in the Works Manager's Office. This was not done and as the loco shop No. 10 officials and the stores officials were all in the conspiracy and manipulated the papers to suit their ends, it cannot now be determined what quantities did really pass from loco shop No. 10 to the Stores Department. As I have already pointed out, the learned Judge has made an attempt by adding up the weights entered in the passes produced before him referring to the period under charge and the amounts entered in the altered advice notes, to show that a larger quantity appeared in the passes. At the same time no exact account can be given. The learned Judge has himself pointed out that there is no guarantee of every pass of that period having been produced before him. The way I argue this matter is this: It is conclusively proved that two merchants, Cheddi Ram and Maiku Lal, received brass boring in excess of the quantity purchased by them. This excess was obtained from the stores and the stores must have had that excess to part with. When excess of issue is conclusively proved it is not necessary, in my opinion, for the prosecution to go further and prove the exact excess of receipts. Of course if the papers had been kept perfectly, a correct record had been

kept in the office of the Works Manager and the stock card had been written up from day to day, one might have been confronted with a difficulty in discovering how there was excess at the stores when all the excellant accounts disproved its existence.

The prosecution essayed to indicate various devices by which excess store could be accumulated at section H. In one case 6 tons of issue is posted up in the stock card months after the issue. The issue was made on 20th November 1922 and it was posted on 20th February 1923, three months afterwards. The curious fact is that on 17th February 1923 without the issue of this stock being taken into account, the stock verifier Mr. Braden P. W. No. 2 found the stock to be short by only 3 cwt. The prosecution pointed out that if this posting had been made at the right time the excess would have been over 5½ tons. The answer as one would have expected is that some of the advice notes of receipts of brass boring were not posted up at the time and if these were taken into consideration the difference would be very slight. Practically, no firm conclusion can be drawn when all the papers have been manipulated. There was some method, not discovered for want of an approver, by which advice notes and issues were kept back to make the entry in the stock card tally with the stock more or less approximately. I am convinced that excess material did pass from loco shop No. 10 to the stores and it is convincingly proved that much excess of stores passed out of the stores to merchants who purchased certain quantities at the auction sale. Embezzlement, therefore, and conspiracy for that purpose are proved.

The question for decision is, which of the appellants was a party to the conspiracy and the fraud. On behalf of one of the appellants who is a European British subject it was argued by Mr. Bahadurji that the trial by the Sessions Judge with the help of Assessors was vitiated by the fact that proceedings were not taken under Ch. XXXIII of the Cr. P. C. The question here does not arise whether Hay was entitled or not to be tried under the special provisions of that Chapter. The procedure is laid down in s. 443 of the Cr. P. C. It must be adopted by a person who desires the benefit of the special provisions. Where in the course of a trial outside the Presidency Towns of any offence punishable with imprisonment the accused person, at any time before he is committed for trial under s. 213, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied about certain matters, record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or if he is not so satisfied record a finding that it is not such a case. If the application is rejected the person aggrieved may appeal to the Sessions Judge under cl. (2) of the same section and the decision of the Sessions Judge in the matter cannot be questioned in any Court in appeal or even in revision. The foundation must be laid by a claim that the case ought to be tried under the provisions of Ch. XXXIII. That foundation was never laid in this case. The application of F. S Hay and J. A. Ireland (who was acquitted by the lower Court) ran as follows:—

(1) That the applicants are being tried under the above noted sections (409, 109 and 120-B, Indian Penal Code) by the Hon'ble Court.

(2) That the applicants understand that the Hon'ble Court is going to commit the case to Court of Session.

(3) That the applicants are European British subjects and claim to be tried as such according to the provisions of the Cr. P. C.

It will be noticed that no mention is made of the provisions of Ch. XXXIII. The mere fact of a person being a European British subject does not entitle him to the benefit of Ch. XXXIII, which is devised for the benefit both of a European British subject and an Indian British subject. An Indian British subject has certain privileges just as a European British object has under that Chapter. The distinctive rights of a European British subject are detailed in Ch. XLIV-A, which also deals with the distinctive rights of an Indian British subject. The determination of this question of the class of British subjects is necessary for the application of the provisions of s. 275 of the Cr. P. C. in the case of Jury and the provisions of s. 284-A in the case of Assessors. When a person has been found by a Magistrate under the provisions of this Code (*i. e.*, Ch. XLIV-A) that he is a Euro-

pean British subject, he is entitled to have a majority of the Jury European British subjects and all the Assessors, when the trial by the help of Assessors, to be European British subjects. That is the necessity for the determination of the question whether an accused person is a European British subject or not. On the face of it, the application of Hay and Ireland of 21st October 1924, related to these matters of trial and did not amount to a claim to be tried under the special provisions of Ch. XXXIII.

The Magistrate's order also makes the matter clear. It is:—

"The applicants are Hay and Ireland and I am satisfied that both of them are European British subjects as defined under s. 4 (*i*) of the Cr. P. C. The certificate filed by Ireland is signed by Mr. Ibbotson, I. C. S., and is *bona fide*."

There is no finding here by the Magistrate that the case is a case which ought to be tried under the provisions of Ch. XXXIII. The Magistrate never brought his mind to bear on the inquiry regarding the conditions (*a*) and (*b*) under s. 443 entitling a person to claim the benefit of these special provisions. By reason of Hay and Ireland being European British subjects, all the Assessors chosen by the Sessions Court were European British subjects as required by s. 284-A.

Before the learned Sessions Judge it appears that Mr. Bahadurji argued on behalf of his client that he should be tried by a Jury under s. 446 of the Cr. P. C., which comes within Ch. XXXIII. What the learned Counsel desired was that the special provisions of that Chapter should be applied to Hay's case. The learned Sessions Judge wrote a long order dealing with the question whether Hay was entitled to the benefit of those provisions or not.

In my opinion this was entirely unnecessary. All that the learned Sessions Judge need have said was that there was no claim by Hay before the Magistrate that the case ought to be tried under the provisions of Ch. XXXIII and that consequently there was no finding by the Magistrate conducting the inquiry prior to commitment to the effect that he is satisfied that the case ought to be tried under the provisions of that Chapter. The learned Judge understood is position partly as is apparent by his noting in the order that the Magistrate does not appear to have either accepted or rejected the claim. The mistake he made was to presume that a claim was made under s. 443 (1). It is certain on the record that no such claim was made because the only point raised by Hay and Ireland in their application of 21st October was the determination of the question whether they were European British subjects or not. As explained by me already, this question does not necessarily involve the benefit of the special provisions of Ch. XXXIII, which depends on various other circumstances besides the fact of the accused persons being European British subjects. When there was no claim by the accused and no finding by the Magistrate the matter cannot be raised for the first time in the Sessions Court and the benefit of the special provisions of Ch. XXXIII cannot be claimed there.

It is obvious from the provisions of the second paragraph of s. 443 that the Legislature desired this matter of the benefit of the provision of Ch. XXXIII, to be decided finally by the Sessions Court so as to make it impossible that it could be raised in the High Court after a prolonged trial in the Sessions Court.

To sum up, a claim by the accused and a finding by the Magistrate are necessary ingredients for the application of the provisions of Ch. XXXIII. If no such claim is made prior to commitment and there is no finding by the Magistrate the question cannot be raised in the Court of Session. If such a claim were made and a finding favourable to the accused were recorded by the Magistrate, the Sessions Judge would be bound to act under the provisions of Ch. XXXIII, and could not refuse to do so on the ground that those provisions did not apply. In the case of acceptance of the claim of the accused person the finding of the Magistrate would be final. When the finding of the Magistrate is adverse to the claim it is final, unless the claimant appeals and in the case of an appeal the decision of the Sessions Judge shall be final.

If I had held that Hay made a claim to the benefit of the special provisions of Ch. XXXIII, and the Magistrate recorded a finding in his favour, I would have held the trial by the Sessions Judge contrary to the provisions of Ch. XXXIII to be illegal and would have set aside the conviction. The Sessions Judge has

no power to determine the matter except on appeal under cl. 2, of s. 443.

I uphold the legality of the lower Court's order because I hold that no claim was made by Hay under s. 443, and that, therefore, there was no finding under the section of the Magistrate that the provisions of Ch. XXXIII of the Cr. P. C. applied to his case. Once this opportunity was missed by Hay and the case was committed under s. 213 the provisions of Ch. XXXIII did not give him an other opportunity of claiming the benefit of the special provisions.

I am in complete agreement with the reasoning of the learned Judge of the lower Court that there was no scope in this case for the application of the provisions of Ch. XXXIII, but even so, if the claim had been made at the proper time and the Magistrate had recorded a favourable finding, the Sessions Judge and this Court would have been bound to follow the directions given in Ch. XXXIII.

Before I take up the individual cases I must comment on one wrong view taken by the learned Judge of this case. It is strange that such an acute intellect as is displayed in a large part of the judgment under appeal should slip into the blunder that the accused persons were being tried for receiving bribe. This blunder has laid the judgment open to an easy attack on behalf of Hay. Maiku Lal approver stated that the bribes were paid through Hay and on this ground the learned Judge has repeated his conviction in several portions of his judgment that if Hay could not be convicted none of the other appellants could. Such a view has opened out an argument on behalf of Hay that the lower Court has looked upon his case with a certain amount of prejudice. The charges framed against the accused persons were under s. 409 for criminal breach of trust by public servants and for conspiracy under s. 120-B to commit this offence. Without the slightest evidence of any money having been received by these public servants they could be convicted of criminal breach of trust when property under their control has disappeared as it has in this case and their connection with the conspiracy is brought home to them. Whoever in any manner entrusted with property in his capacity of a public servant commits breach of trust in respect of that property is liable to punishment (s. 409, Indian Penal Code). Criminal breach of trust is defined in s. 405, Indian Penal Code. "Whoever, being in any manner entrusted with property...dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any... legal contract,.....which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust." Even if there be no proof of the accused public servants having received a single rupee, they will liable to conviction if it is proved that they permitted large stores belonging to the Railway to pass into the ownership of Chhedi Ram and Maiku Lal without payment. "Dishonestly" does not necessarily imply wrongful gain to the accused himself. The word is defined in s. 24, Indian Penal Code: "Whoever does anything with the intention of causing wrongful gain to one person, and wrongful loss to another person, is said to do that thing dishonestly." In this case there would be wrongful gain to Chhedi Ram and Maiku Lal. Necessarily under such circumstances benefit to the accused persons would be presumed on proof of the facts such as are mentioned above because it cannot be thought that they permitted such wrongful gain and wrongful loss to other persons out of pure kindness of heart or out of charity for poor starving Kalwars at the expense of a rich Railway Company. Having regard to the manner in which the charges were framed the question of illegal gratification is of importance only so far as it supports the main case of embezzlement. Maiku Lal says that the money by way of bribe was actually paid to Hay for distribution among the accused. A belief however in this statement is by no means necessary for the conviction of the accused persons.

A very few words will be sufficient to prove the complicity of four of the appellants with the fraud and I shall finally come to the case of Hay.

Maharaj Kishan, Depôt Storekeeper, entered the weight of the consignment in the forwarding note. There is no imaginable reason to believe that he had nothing whatever to do with the weighment. As I have shown when discussing the case generally of fraud and conspiracy that the entry of the short wrong weight in the forwarding note and the receipt

was one of the methods of the conspiracy to pass out excess amount of brass boring. The usual defence was made that somebody somewhere took the weight and informed Maharaj Kishen who put it down mechanically in the forwarding note. No evidence was produced for the defence to indicate who this somebody somewhere was. Much show is made of every official neglecting his duty until we come down to the coolies who we are expected to believe ran the entire department. Maharaj Kishan had ample opportunity to prepare his defence because prior to the bringing to light of this fraud in the embezzlement of brass some other inquiry had been started as regards embezzlement of iron. In forwarding notes relating to certain consignments of October Maharaj Kishan has written certain figures (Ex. P. 84A, P. 85A, P. 86A and P. 87A). His learned Counsel argued that to establish Maharaj Kishan's connection with the other forwarding notes where he had entered weight of consignment with his own hand, the prosecution must produce entry of figures in his hand. The learned Counsel with equal justice may have asked that the prosecution must fail as Maharaj Kishen was not caught red handed putting bribe money into his pocket, nor actually detected in putting down wrong weight in forwarding note. These accounts were worked out by Maharaj Kishan himself without any official directions to do so. It is obvious that this was done by him with respect to honest consignments in order to escape his liability with regard to dishonest consignments. Maharaj Kishen entered the weight in the case of wagons Nos. 8504 and 3775 consigned to Chhedi Ram out of the November 1922 auctions. Similarly the weight of the wagon No. 10169 consigned to Maiku Lal out of the February auctions was entered with his hand. His statement in the lower Court was very shifty. First of all he stated that he always inserted the correct weight in these forwarding notes. Possibly his desire was to brave it out and urge that there was no fraud. Then he changed his mind and stated that he did not know what went on at the weigh-bridge because he was never present there and made weighment only at the beamscale. In the Court it was represented that he did not even go to the beamscale except on the occasions when he had entered certain figures on the forwording notes. At least, in this Court, it was no part of his Counsel's argument that fraud was committed between the beamscale and the weigh bridge and that correct weight at the beamscale was interfered with at the weighbridge. In another place he stated that even to the beamscale he went if he had time. His one desire was not to be tied down to any particular statement. He first admitted that he and Debi Deyal used to weigh the bags but again changed that statement into a vague one of his going to the beamscale when he had time. There is no reason to believe that fraud was committed between the beamscale and the weighbridge. If he was present at the beamscale and found the weight of a consignment, it does not stand to reason that he would depend upon the information of some one else to note down the weight in the forwarding note. There cannot be the slightest doubt that this man was the principal official concerned in the issue of brass boring and that without his connivance excess material could not have been issued. Two out of the four Assessors held him to be guilty. I uphold his conviction.

Raj Narain was intimately connected with the receipt of brass boring. The stock cards were posted up by him and we have seen how the conspiracy was helped by the irregular posting up of these cards. He hesitatingly admits his connection with the weighment of stores when they arrived from the Loco Shop No. 10. He stated that after Ireland left service in April 1923 he used sometimes to witness the weighment. His defence also is the one adopted by the other accused that he acted mechanically on the information received from others. He admits that it was his business to inform loco shop No. 10 of the weight of the stores received and to post up the stock cards. He wants the Court to believe that he acted on the information of Ajudhiya *jamadar* of coolies and Ram Narain and other clerks. He pointed out that there was no reason for his suspicion of the alterations and erasures made in the advice notes because they were even passed by the stores audit and the work shop audit. This defence is easy to make but not convincing. There was general slackness of supervision but that would not help Raj Narain who was not a supervising officer but directly concerned with the

business of the department section H. One may not accept the reason for the slackness of the Audit Departments given by the learned Judge. The reasoning is a poetic one. The learned Judge says that these departments were "blinded by excess of light." A poet has used this expression to account for the blindness of the poet Milton but nonetheless it is inaccurate in fact. Similarly it is an inaccurate explanation of the slackness of the Audit Department. It must be admitted that there was universal slackness of supervision but benefit thereof cannot be given to men intimately connected with the business of a depatrment and not merely employed to supervise coolies. I am satisfied from the evidence that it was the business of Raj Narain to take over brass boring which came from loco shop No. 10 and as I have held that excess was received from there which was not shown on the stock card, Raj Narain's complicity in the fraud and in the conspiracy must follow. The Assessors were of opinion that he was not guilty but I uphold his conviction.

Debi Dayal was a traffic clerk who sent out consignments. He filled up the lower portions of the forwarding notes. His defence is that he accepted the weight put down by Maharaj Kishen. His own witness however Mohammad Hussain (D. W. No. 2), has deposed that he could not have done so. The practice is for the traffic clerk to weigh the consignment at the weighbridge and if for any reason he is compelled to accept the weight given by the consignor he must make a note "consignor's weight accepted". There is no such endorsement on any of the forwarding notes. Mohammad Hussain has further stated that it was the practice of the traffic clerk to go and witness the weighment of auctioned materials at the weigh bridge. He has also given further interesting evidence to disprove Debi Dayal's explanation regarding the X'mas wagon. He deposes that once Debi Dayal prepared a shunting order he had nothing whatever to do with the consignment. Debi Dayal's explanation, therefore, that he went to the goods shed to tranship and send off the new wagon in the ordinary course of his duties is wrong. It is certain that without the help of Debi Dayal excess consignment could not have passed out of the stores. His dealings with the X'mas wagon give proof of his interest in the despatch of excess store. One out of four Assessors held him to be guilty. His complicity is overwhelmingly proved and I uphold his conviction.

We next come to the merchant Chhedi Ram. In the general observations above I have shown how Chhedi Ram received instead of 6 tons which he purchased at the November auction as many as 24 tons of brass boring. There is no reason to distrust the testimony of Sita Ram to whom the brass boring was sold and of Tapsi Ram, former servant of Chhedi Ram, who took some of the consignments to the shop of Sita Ram. It was argued on his behalf that the connection between the consignments and the stock received by Sita Ram, was not proved. There is however the connection of dates and there is an entire absence of evidence to prove that Chhedi Ram had any other stock of brass boring in his possession at the time. Maiku Lal approver has deposed that Chhedi Ram paid bribes to the stores officials just as he himself did. That evidence is an additional proof of Chhedi Ram's dishonesty. Even apart from it, his taking away 24 tons instead of 6 proves abetment of embezzlement. It is said that the man suffers from a severe illness. Obviously it is a case of an impure mind in an impure body. Two Assessors out of four held him to be guilty. I uphold his conviction.

Finally I come to the case of Hay. His defence is of negligence of supervision. Many facts, however, have been brought home to him. First of all he had to sign a verification of the advice note certifying that correct weights had arrived from shop No. 10 to the stores. The argument of his learned Counsel was that a heap of papers was put up before him and he signed blindly. He was, however, careful to put down the date on which he signed so the signing was not so mechanical as it is pretended to be. He never made any inquiry as to how it happened that advice notes were posted up sometimes so late as two months after they were received. On every stock card there are his initials at the top. He explains that he put those initials because the Audit Department raised an objection that they could not be satisfied of the correctness of the entries without the signature of a gazetted officer. The appellant must be credited with a certain amount of intelligence and must have known that the Audit Department did not desire his signature for the

sake of adornment of the stock card but to satisfy themselves that the weights were correctly entered. It was submitted that the work of the department was so great that the appellant could not exercise any effective control. There is, however, no report of his brought on the record to higher authorities that he was unable to exercise any control. Even when some deficiency was found by the stock examiner, no inquiry into the matter was ordered by him. Any time that it came to his turn to check the stock he noted an excuse that it was too much in quantity to be checked by actual weight. The learned Judge does not believe the evidence produced by the prosecution to prove that the appellant used to be present at the weighbridge so I shall make no reference to that evidence.

The evidence of the approver Maiku Lal is to the effect that he actually paid Rs. 2,600 to the appellant twice, once Rs. 1,000 about the 8th of March 1923 and again Rs. 1,600 about the 21st of April. The learned Sessions Judge stated that he attached no importance to the statement but I am not in agreement on this point. The way the learned Judge has looked at the case has detracted to a certain extent from the effectiveness of his judgment. Often when he meant that he would have possibly not convicted if a certain evidence had stood by itself, what he has stated is that he would attach no importance to that evidence. His point of view really was that the evidence standing by itself was not convincing but when supported by other evidence it carried conviction. That is the view I personally take of the evidence regarding the payment of bribes to the appellant. In the body of the judgment it might appear that the learned Judge depended on no evidence against the appellant except the one of his borrowing money from the approver Maiku Lal, yet on page 59 when he sums up the case against the appellant he has made reference to several matters which when he discussed them he seemed to consider as trifles. I have read the statement of Maiku Lal and I am much impressed by the prompt answers he gave in cross-examination. He was questioned in great detail and rightly about the money which he paid to the appellant and his answers all prompt and such as would be acceptable to any reasonable person. He said that bribes were not entered in the account books. If a merchant's business led him to pay a bribe once in a way it may be disguised in some other name but when his business depended entirely on the payment of bribes to different persons continually no such disguise was possible. The method adopted was to put aside a certain sum of money and form a fund for the payment of bribes and to keep that money out of account books. No reason is apparent why Maiku Lal should fly at such high game. There is also no suggestion that the Investigating Officer Mr. Peters would have special satisfaction by the prosecution of a European holding the position that the appellant did. I think the learned Judge was correct in pointing to the natural manner in which the appellant's guilt came to light. In the appellant's statement I find some reference to the animosity of a man of the name of William. Who he is, is not apparent on the record nor did the appellant's learned Counsel make any reference to this matter. In my opinion the question was a very serious one as to why Maiku Lal should implicate the appellant and if there had been the slightest cause for him to do so, I feel certain that it would have been placed before me.

Besides the receipt of the bribe the appellant borrowed money from Maiku Lal. He thought this was not contrary to any rules of his department. This is difficult to believe as he is a Government servant and all Government servants are forbidden from having any money dealings with persons with whom they may have to come into contact in their official capacity. It was said and the evidence of that gentleman was produced that an Additional Government Pleader, B. Gokul Chand Rai, advised him to borrow money from his contractor.

The loans, however, go further. The appellant not only acted contrary to rules but borrowed money which he had no expectations of payment. A very rich brother in the Punjab is spoken of but did not appear as a witness. Another brother in a humbler situation in life appeared as a defence witness. This was not sufficient. I do not know how it is among Anglo Indians but from my experience of Indians and Indian life, I know that a well-to-do man with five crores instead of 5 lacs will not have sufficient means to satisfy the greed or profligacy of his poor relations. The existence of a rich brother does not necessarily imply his capacity to satisfy the wants of his many poor relations. All the hope the

appellant had of paying such a large sum of money as Rs. 4,500 with interest at 10 per cent. per annum was out of an increment of Rs. 50 per month which he expected to receive, a year after the loans. Very little would have been left over from Rs. 600 a year after payment of interest.

As regards these loans, arguments were raised on both sides from a misunderstanding of what they were. One side said that money would not have been borrowed by cheques if the borrowing was dishonest and the other side pointed to the second loan being borrowed in cash and not by cheque. The whole point of Maiku Lal's evidence is that these advances were really loans but that they were to be re-paid in bribes. At the end of 1923 news of an inquiry into Railway frauds was noised abroad, so the occasion never arose to set off any payment of bribe against the loans. To me it appeared that no point was made by the learned Counsel, Mr. Alston when he said that the money was borrowed as publicly as may be. The question is whether the payment of the money was to be made as Maiku Lal has suggested or in the ordinary course as any other debtor would. An answer to this question is not settled by the public manner of the borrowing of the loan.

Possibly the case has not been happily put by the learned Judge. He says that a loan connotes re-payment of the money sooner or later. Perhaps that is not the right way of putting it because if such were the case there would be no insolvency. The real question is whether there was any intention on the part of the appellant of paying back the money in the ordinary way. Here there are excellent reasons given by the learned Judge for the conclusion that the appellant had no such intention. The bills produced by the appellant himself prove conclusively his profligacy and determination to live beyond his means. A man who has got himself involved in debt would be expected to retrench. The behaviour of the appellant carries conviction to my mind that there was something behind the loans and that he did not apprehend the possibility of having to pay them. As the rich brother has not appeared as a witness I do not believe that he would have been ready to pay the debts contracted by his brother merely for show expenses and not out of necessity. For these reasons I believe Maiku Lal's statement that the loans were to be paid off on receipt of excess materials and not in cash.

A very serious point arises how a *kalwar* of the shrewdness of Maiku Lal would advance Rs. 4,500 knowing the appellant's ways of life and the improbability bordering on impossibility of his recovering the money. His learned Counsel Mr. Alston noted this weakness in the defence and addressed some vague and general arguments to the Court about the money-lender's greed and trust in luck. These deserve no consideration. What he further said was that Maiku Lal wanted to get the appellant into a trap so that on disclosure of the fraud he may have a hold over the appellant. It must be remembered, however, that Maiku Lal did not approach the appellant but that the advances were always made by the appellant to Maiku Lal. To repel the learned Counsel's argument, the notes written by the appellant to Maiku Lal are of great importance. It is not Maiku Lal who hangs a bait in front of a victim but it is the appellant who goes in pursuit of the money.

It was pointed out by Mr. Bahadurji that if there had been a conspiracy the appellant would not have been instrumental in getting rid of the services of Ireland. There could have been a short answer to this that Ireland was held to be not guilty by the lower Court so there was no force in the argument. I shall not take advantage of that reply because I believe that Ireland was as wrongly acquitted as Sheo Dayal. It is difficult to understand the frame of mind of conspirators and no answer can be given with confidence. It is possible that Ireland, an Anglo-Indian, was troublesome in demanding his share of the bribe and the appellant may have thought it safe to get rid of him because as pointed out by the lower Court Ireland could with difficulty expose the fraud without implicating himself. It is interesting to note that Ireland was got rid of between the first bribe alleged by Maiku Lal and the second bribe. The first bribe was given about the 8th of March 1923 and the second about the 21st of April and Ireland's services were dispensed with on the 12th of April. This point was of course rightly made by the learned Counsel but in my opinion it is not of sufficient moment to nullify the effect of the other evidence.

The fervour and eloquence with which Mr. Bahadurji argued the case of his client

made it safe for the Court that no point of importance will be left out. Possibly there was a personal conviction as well. The arguments in the case have lasted for five days and with two Saturdays and two Sundays I have pondered over the matter for nine days. Thinking over the matter as an ordinary reasonable being, which after all is the crucial test, I have found myself unable to take a line of argument that would make the position of the learned Counsel acceptable to me. I must hold Hay to be guilty. All the Assessors held him not to be guilty, but that opinion is not acceptable to me.

The Railway Administration laid itself out to be robbed and it was robbed. The appellants succumbed to a vicious system and were not able to break away from it. In imposing sentences there is no cause to be vindictive. Just as Hay's fall has been greater, the punishment to him will be comparatively more onerous and of wider results than to the others. I reduce the sentence of Hay and Chhedi Ram to rigorous imprisonment for one year each on both counts to run concurrently. The sentences of Maharaj Kishan, Raj Narain and Debi Dayal are reduced to 18 months' rigorous imprisonment each to run concurrently.

The appellants who are on bail shall surrender to undergo the balance of their sentences.

My acknowledgments are due to the learned Judge of the lower Court for the excellent and accurate presentation of the facts of a very difficult case in his judgment; also to the Prosecuting Inspector for his help during the hearing of these appeals.

G. H. *Sentences reduced.*
Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 319 OF 1925.
May 19, 1925.
Present:—Mr. Justice Sulaiman and and Mr. Justice Daniels.
SUKHAI—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 300, Excep. I, 302, 304—Wife leading immoral life—Remonstrance—Provocation—Death caused by stabbing—Murder—Culpable homicide.

Accused's wife lead a grossly immoral life. Afte a recent act of unchastity the accused remonstrated with her and instead of showing repentence she replied that she would continue in the course to which he objected. The accused became enraged and struck her with a stick. She struggled with him and got hold of his fingers and bit them. Accused then lost control of himself, took out a knife and stabbed her repeatedly with it with the result that she died from the injuries:

Held, that the immediate provocation offered to the accused at the time of his remonstrance coming on the top of all that had gone before was sufficient to bring the case within Exception I to s. 300 of the Penal Code and to reduce the offence of the accused from murder to one of culpable homicide. [p. 845, col. 1.]

Criminal appeal from an order of the Second Additional Sessions Judge, Gorakhpur, dated the 16th February 1925.

Mr. *K. Verma*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The accused Sukhai has been convicted under s. 302 of the Indian Penal Code of murdering his wife *Musammat* Sukhia and sentenced to transportation for life. The commission of the offence is admitted and the question is whether the offence is one under s. 302 or s. 304. On 29th November 1924 Dharam Raj headman of *Mouza* Deopur found the dead body of a woman with a number of wounds on it in his grove through which he was passing. He informed the *chaukidar* who made a report. The body still had ornaments on it and some pieces of glass bangles were picked up near where the body had been lying. It was not known at first who the woman was but she was identified through one *Musammat* Jagrani who had known her as *Musammat* Sukhia, the wife of the accused. The Sub-Inspector then proceeded on 30th November to the house of the accused. He found the house shut up. The accused had shifted to another house. The Sub-Inspector went there and found him. Eventually the accused gave up some ornaments to the Sub-Inspector and a *kurta* and *dhoti* bearing stains of blood were found in his house. In the pocket of the *kurta* was a *knife*. The accused was sent before a Magistrate and made a confession under s. 164 of the Cr. P. C., to which he has adhered both before the Committing Magistrate and at his trial.

There is no doubt that the deceased woman was grossly immoral. The accused has told a long story of her repeated misbehaviour and how in order to look after her he had to give up going out to other

villages for work (he is a goldsmith) and do his work at home. Eventually he left home with her with intent to go to Bengal but in spite of repeated promises she did not reform. On the day of the murder they were intending to return together along with their little girl aged seven to their village Madhwapur. They arrived at Bhatni Station in the afternoon and had to wait for a train till about 10 P. M. While they were there the accused says that he found his wife just outside the station having intercourse with a man. He threw a brick at the man who went away. This story sounds incredible but it is corroborated by the evidence of the accused's little girl *Musammat* Nanki and the learned Judge appears to have accepted it. At any rate they travelled together to Salimpur and there alighted and proceeded to the grove at Deopar where the body was found. The accused's account of what followed is that after the girl had gone to sleep he upbraided his wife with her misconduct. Instead of being repentant she said that she would again do such acts upon his head. Thereupon he became enraged and struck her with a stick. She struggled with him and got hold of his fingers and bit them. He then lost control of himself and took out a knife and began to stab her with it. He does not know how many blows he inflicted. The medical evidence shows that he went on stabbing her repeatedly. The Civil Surgeon has detailed a list of fifty-three different injuries on the body. Many of these were minor injuries, and as the learned Judge says, the medical evidence shows that there were not less than a hundred injuries on the body altogether. The account of what happened at the grove receives corroboration from the fact that the accused was medically examined when he was admitted to Jail and there were marks on his fingers which might have been the marks of teeth.

The Judge has believed the accused's story to be the substantial truth and we must accept it as such. We think that the immediate provocation at the grove coming on top of all that had gone before was sufficient to come within Exception I to s. 300 of the Indian Penal Code, and to reduce the offence from murder to culpable homicide. We are prepared to make some reduction of offence and sentence, but we cannot leave out of account altogether the very savage nature of the attack which was made on the deceased and the large number of injuries which were inflicted by the accused. We alter the conviction to one under s. 304 of the Indian Penal Code and reduce the sentence to one of ten years' rigorous imprisonment.

Z. K. *Sentence reduced.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 72 OF 1925.

March 6, 1925.

Present:—Justice Sir John Bucknill, KT., and Mr. Justice Kulwant Sahay.

MUNNI LAL SAO AND OTHERS—PETITIONERS

versus

GATTI AHIR AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Dispute relating to land—Procedure—Jurisdiction of Magistrate—Order under s. 144, duration of—Observation as to possession, effect of.

Section 144 of the Cr. P. C. is of general application and contains nothing which ousts the jurisdiction of a Magistrate in cases of *bona fide* disputes as to possession of land. Where, however, s. 107 or s. 145 of the Code will meet the requirements of the case, s. 144 is not an appropriate remedy and if it is found that the danger was not so imminent that it could not be otherwise averted an order under s. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another whose claim to possession is a mere pretence is threatening to interfere with that possession the Magistrate is entitled to resort to the special summary procedure of s. 144, if immediate provision or speedy remedy is desirable. [p. 846, cols. 1 & 2.]

Where in the course of a proceeding under s. 144 of the Cr. P. C. the Magistrate finds that there is a *bona fide* dispute of possession of land likely to cause a breach of the peace he is bound immediately to take action under s. 145 of the Code. The use of s. 144 is a suitable method of avoiding a breach of the peace only if it is clear upon a reading of the Police report that the claim of the party creating the disturbance is not a claim made in good faith. [p. 846, col. 2.]

An order purporting to be under s. 144 of the Cr. P. C. has no power after the expiry of two months from the date of the order and any observation made in such an order by the Magistrate as regards the possession of any of the parties must be treated simply as an incidental observation meant to enable the Magistrate to make an order under the section. Such an observation cannot have the force of an order under s. 145 of the Code and is of no use in determining the question of actual possession, if the question arises in a subsequent proceeding. [p. 847, col. 2; p. 848, col. 1.]

Criminal revision against an order of the Sub-Divisional Magistrate, Buxar, dated the 19th of December 1924.

Messrs. *K. P. Jayaswal* and *Manohar Lal*, for the Petitioners.

Mr. *P. C. Rai*, for the Opposite Party.

JUDGMENT.

Kulwant Sahay, J.—This is an application on behalf ot the second party in a proceeding under s. 144 of the Cr. P. C. against an order of the Sub-Divisional Magistrate of Buxar, dated the 19th of December, 1924, whereby he declared the first party to be in possession of the land in dispute and made an order restraining the second party from interfering with the possession of the first party.

The petitioners went before the District Magistrate against this order under cl. (*a*) of s. 144 of the Cr. P. C., praying that the order passed by the Sub-Divisional Magistrate might be rescinded. The learned District Magistrate has rejected the application by his order, dated the 17th of January, 1925.

The point raised by the learned Counsel for the petitioners is that the dispute in the present case was a *bona fide* dispute concerning 120 *bighas* of land in the village and that the Magistrate had no jurisdiction to initiate proceeding under s. 144 of Cr.P.C. but he could only act under s. 145 of the Code. The question as to the powers of the Magistrate to act under s. 144 or under s. 145, Cr. P. C., has been considered by this Court in several cases. In the Full Bench Case of *Shebalak Singh* v. *Kamaruddin Mandal* (1), Mullick, J., observed as follows: "Section 144 is of general application and contains nothing which ousts the Magistrate's jurisdiction in cases of *bona fide* disputes as to possession of land. But where s. 107 or s 145 will meet the requirements of the case, s. 144 is not an appropriate remedy and if it is found that the danger was not so imminent that it could not be otherwise averted an order under s. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another whose claim to possession is a mere pretence is threatening to interfere with that possession the Magistrate is clearly entitled to resort to the special summary procedure of s. 144 if immediate prevention or speedy remedy is desirable". Jwala Prasad, J., in considering the same question agrees with Mullick, J., that it is open to a Magistrate to take proceedings under s. 144 in cases of disputes relating to possession of land when there is an imminent danger of a breach of the peace in connection with land disputes ; but his Lordship observed as follows "To me it appears that when, in the course of a proceeding, under s. 144 of the Cr.P.C. the Magistrate finds that there is a *bona fide* dispute as to possession of land likely to cause a breach of the peace he is bound immediately to take action under s. 145. Chapter XII comprising that section is headed 'Disputes' as to immovable property". Then his Lordship quotes s. 145. He is of opinion that in such cases the proper procedure to adopt is a proceeding under s. 145 and not one under s. 144 of the Cr. P. C. The same view was expressed by Roe and Imam, JJ., in *Kaniz Amina* v. *Emperor* (2) Their Lordships laid down the following two propositions, first, that the Magistrate is not required to take proceedings under s. 145 if he is satisfied that by other methods he can avoid a breach of the peace ; and, secondly, that the use of s. 144, Cr. P. C., is a suitable method of avoiding a breach of the peace only if it be clear upon a reading of the Police Report that the claim of the party creating disturbance is not a claim made in good faith. It is, therefore, necessary to see in the present case whether the dispute between the parties was a *bona fide* dispute relating to the possession of the land in dispute. Now it appears from the orders of the Courts below the land in dispute was originally *parti* and full of thorn and belonged to *Musammat* Sheobasi. Ramanand Sahu who was her son-in-law used to look after the property on her behalf. The petitioners Nos. 1 and 2 are mortgagees in possession of the village. The other petitioners claim to have taken settlement of the land in dispute from petitioner Nos. 1 and. 2. The case of the petitioners was that the land was the *bakasht* land of the proprietors. The case of the opposite-party was that they had taken settlement of this land from Ramanand Sahu thirteen or fourteen years ago and that they have been since then in possession on payment of rent to the landlords, but that recently the

(1) 68 Ind. Cas. 149; 2 Pat. 94; 1 Pat. L. R. 2 (Cr.); (1922) Pat. 241; 3 P. L. T. 573; 4 U. P. L. R. (Pat.) 57; 23 Cr. L. J. 549; (1922) A. I. R. (Pat.) 435.

(2) 47 Ind. Cas. 65; 3 P. L. J. 243; 4 P. L. W. 354; 19 Cr. L. J. 869.

landlords have been trying to oust them from possession of the land because they refused to pay enhanced rent. On the 23rd of September 1924 the opposite party filed an application before the Sub-Divisional Magistrate stating the fact of their possession and the fact that there was a likelihood of a breach of the peace as the landlord and his men would try to oust and remove the crops grown by them; and they prayed for proceedings under s. 144. The learned Magistrate referred the petition to the Police for report. The Police submitted a report on the 11th of October 1924 in which they reported that the opposite party were in possession; and they recommended that proceedings under s. 144 might be taken against the first party. The learned Magistrate, however, on a perusal of the Police Report, made an order on the 24th of October 1924 that no action was necessary. On the 17th of November 1924, a telegram appears to have been sent by Bijay Singh, who is one of the petitioners in this case, to the Sub-Divisional Magistrate, stating that the opposite party were threatening to commit rioting and murder and to damage the crops; and asking the Magistrate to protect peace. Upon the receipt of this telegram the Sub-Divisional Magistrate again asked the Police for a report and on the Police Report he, on the 17th of November 1924, passed the following order, "Police Report dated the 11th October 1924, reconsidered. Restrain the second party under s. 144, Cr.P.C., from interfering with the possession of the first party over the plots named in Police Report. Cause may be shown against the order on or by 27th November 1924." Now upon the authorities, just referred to, this order of the 17th of November 1924 was a perfectly proper order and it was within the competence of the Magistrate to pass this order to prevent a breach of the peace. The telegram sent by one of the petitioners showed that there was an urgent necessity of taking action to prevent a breach of the peace and the Magistrate was perfectly justified in taking emergency step by making order under s. 144 on the 17th of November 1924. In compliance with this order both parties appeared before him and showed cause. They produced documentary evidence and it appears that the documents produced by the present petitioners consisted of the finally published Record of Rights, certain *batwara* papers and other document. The survey *khatian* showed the land in dispute to be the proprietor's *bakast* land. The partition paper also showed the land to be the proprietor's *bakasht* land. It was, therefore, clear upon the evidence produced by parties that there was a *bona fide* dispute as regards the possession of the land. The presumption of the Record of Rights and of the partition papers was in favour of the petitioners; on the other hand, the Police Report was in favour of the opposite party, and their allegation was that they had taken settlement of this *bakast* land from Ramanand Sahu and that they had reclaimed the *parti* land. There was, therefore, clearly a case in which there was a *bona fide* dispute between the parties as regards possession. Upon the authorities referred to, when the Magistrate saw that there was *bona fide* dispute between the parties he ought to have at once initiated proceedings under s. 145 of the Cr. P. C. Instead of doing that he considered the statement filed by the parties and the documents produced by them, heard arguments and in effect made an order finding the first party to be in possession and declaring their possession and restraining the second party from interfering with the possession of the first party. I am of opinion that when the Magistrate found that there was a *bona fide* dispute between the parties he ought to have called upon the parties to produce their evidence on the question of possession and to have proceeddings to determine the question of possession in the manner provided by s. 145 of the Code. The order, however, of the learned Sub-Divisional Magistrate, dated the 19th of December 1924, after two months from that date had no force; and it is contended by the learned Counsel for the opposite party that two months having expired and the order having spent its force, it is unnecessary to consider the legality of this order.

As I have said, the order purports to be one under s. 144, Cr. P. C., and, therefore, after the expiry of two months this order has absolutely no force. The observation of the learned Sub-Divisional Magistrate as regards possession of the first party is simply an incidental observation in order to enable him to make an order under s. 144. This observation cannot have the force of an order under s. 145 of the Code and is, therefore, of no use in determin-

ing the question of actual possession, if the question arises in a subsequent proceeding.

The order having spent its force it is not necessary to set it aside. Under these circumstances the application must be dismissed.

Bucknil, J.—I agree.

Z. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 148 OF 1924.
May 26, 1925.
Present :—Mr. Justice Sulaiman and Mr. Justice Daniels.
Babu BANKEY LAL KAPOOR—PETITIONER
versus
THE ALLAHABAD BANK, LTD., MORADABAD AND EMPEROR—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 517—Embezzlement by servant—Money paid by accused to creditor handed over by latter to Police—Order directing return of money to complainant, legality of.

The Sub-Agent of a Bank embezzled a certain amount of money belonging to the Bank and paid a part of it to his creditors in payment of his debts. The Police traced one of these payments and the creditor to whom the payment had been made handed the money back to the Police. The Sub-Agent was tried and convicted of the offence of embezzlement and at the conclusion of the trial the Court ordered that the money which was handed over to the Police by the creditor of the accused should be handed over to the complainant Bank as property in respect of which an offence appeared to have been committed:

Held, that the order was justified by the terms of s. 517 of the Cr. P. C. under which the Court purported to Act.

Civil revision from an order of the District Judge, Moradabad, dated the 26th February 1924.

Mr. *Shiva Prasad Sinha*, for the Petitioner.

Dr. *K. N. Katju*, for the Opposite party.

JUDGMENT.

Daniels, J.—This is an application for revision against an order of the Sessions Judge of Moradabad refusing to interfere with an order returning certain property to the complainant. The Allahabad Bank Ltd., prosecuted one Gopal Lal, the local Sub-Agent of the Allahabad Bank, who had absconded with about a lac of rupees. It transpired that Gopal Lal had been sending part of the embezzled money to his creditors in payment of his debts. He sent a sum of Rs. 2,400 to the applicant Banke Lal Kapoor in notes under insured cover. The Police traced this payment, and the applicant handed the money back to them. At the conclusion of the trial the Court ordered it to be handed over to the complainant under the provisions of s. 517, Cr. P. C., as property in respect of which an offence appeared to have been committed.

The present application is filed as a civil revision, but as it is against the order of a Criminal Court, if any revision lies at all, it must be under s. 439 of the Cr. P. C. We think, however, that the order of the Court below is not open to attack in revision. That order is strictly justified by the terms of s. 517, under which the Court below has acted. The Court was satisfied that this was property in respect of which an offence had been committed, and it was property to which the Allahabad Bank claimed to be entitled. We accordingly dismiss the present application. As the application was filed as a civil revision we allow costs to the answering respondent including in this Court fees on the higher scale. At the hearing before us the Allahabad Bank has not been represented.

Sulaiman, J.—I concur. I think we have no power to compel the Allahabad Bank, who has received the money, to refund the amount to the Court or to pay it back to the applicant.

Z. K. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 40 OF 1925.
March 31, 1925.
Present :—Mr. Daniels, J. C.
Musammat GILLI—ACCUSED—APPLICANT
versus
EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 503—Penal Code (Act XLV of 1860), s. 235—Possession of materials for counterfeiting coins—Assistant Mint Master of Calcutta Mint, whether expert witness—Commission, issue of, legality of.

The Assistant Mint Master of the Calcutta Mint is an expert witness with regard to coins and instruments for coining and a Magistrate does not act illegally in allowing him to be examined on com-

mission instead of insisting on his personal attendance.

Criminal revision against an order of the Sessions Judge, Gonda, dated the 10th January 1925, confirming that of Assistant Sessions Judge, Gonda, dated the 11th December 1924.

Mr. *Kanhaiya Lal Nigam*, for the Applicant.

ORDER.—The applicant has been convicted under s 235, Indian Penal Code, and the conviction has been upheld by the learned Sessions Judge in appeal. After hearing Counsel at length in support of the application I am satisfied that there are no good grounds for interference in revision. It is difficult to take seriously the suggestion that the Assistant Mint Master of the Calcutta Mint is not to be regarded as an expert witness. Nor can I agree that the Court acted illegally in allowing him to be examined on commission instead of insisting on his personal attendance. I dismiss the application.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 727 OF 1924.

November 7, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

NAWAB ALI—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 360—Security proceedings—Deposition not read over to witnesses, effect of—Illegality.

Where in a proceeding under s. 110 of the Cr. P. C. the provisions of s. 360 of the Code are not complied with, the enquiry is vitiated and the order passed by the Magistrate in the proceedings must be set aside.

Criminal revision against an order of the Sessions Judge, Dacca, dated the 2nd July 1924, confirming that of the Sub-Divisional Magistrate, Munshigunge, dated the 26th February 1924.

Babu *Radhika Ranjan Ghua*, for the Petitioner.

Babu *Heramba Chandra Guha*, for the Crown.

JUDGMENT.—It is clear that the provisions of s. 360 of the Cr. P. C. were not complied with in the present inquiry. The order passed by the learned Magistrate is accordingly set aside, and further inquiry directed—such inquiry to be held by some Magistrate other than the Magistrate who had dealt with the case.

Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 110 OF 1925.

March 24, 1925.

Present:—Mr. Justice Stuart.

GULAB SINGH AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 466—Forgery—Railway clerk making entry in register at instance of superior officer acting bona fide*—Offence—Criminal Procedure Code (Act V of 1898), s. 215—Commitment, when can be quashed.*

Certain goods were consigned to the complainant and on arrival of the goods at their destination the complainant was required by the Station Master to unload the goods within a certain period. After the complainant had unloaded the goods, accused, a goods clerk, entered the time of the unloading in the register. The Station Master subsequently discovered that in unloading the goods the complainant had blocked the line on which the wagon was standing and called upon the complainant to clear the line. After the line had been cleared the Station Master directed the accused to alter the time of the unloading of the goods from that previously entered in the register to that at which the line had been cleared:

Held, that under the circumstances, even if the Station Master's view as to the correct time when the goods had been unloaded was erroneous, the accused was not guilty of an offence under s. 466 of the Penal Code.

Criminal revision from an order of the Magistrate, First Class, Agra, dated the 19th of January 1925.

Mr. *C. Ross Alston*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Commitments should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution. In this particular case there is a fatal flaw. There is no case in law at all. The two persons whom the Committing Magistrate has ordered to be prosecuted for forgery under s. 466 of the Indian Penal Code are two Railway clerks and the case against them is briefly this.

They are responsible for the upkeep of certain registers. Two wagons containing coal arrived at Agra Railway Station and the consignee was given till a certain hour to unload. He completed his unloading by

a certain hour and the time of completion was recorded accordingly in the register, but he was not only, according to the view of the Station Master, obliged to complete unloading by a particular time in order to save payment of demurrage but he was also responsible for putting the wagons in such a position as to enable them to be despatched, and if he did not have the wagons cleared, by that time so as to be capable of despatch, the Station Master considered that he was liable to pay demurrage even though the wagons had been unloaded. The consignee had actually unloaded the wagons by a certain time and that time was entered in the registers but the Station Master subsequently discovered that while unloading he had blocked the passage of the wagons by leaving accumulations of coal on the permanent way so that the wagons' despatch (to Tundla) had been delayed. The Station Master told the consignee to clear the line so that the wagons might be despatched. The consignee cleared the line. The Station Master then went to the clerks in charge of the registers and told them to alter the hour of unloading from the hour originally recorded when the wagons had been actually unloaded to the hour which he now gave them when the line had been cleared so that the wagons could be despatched. The two clerks carried out his orders and it is for this and this alone that they have been committed to Sessions on a criminal charge.

It is admitted that they were acting under the orders of their superior officer, that they could not have had any possible *animus* in the matter and that the consignee had no complaint against them. The Station Master's interpretation of the liability of the consignee had been found to be wrong by a Small Cause Court Judge. I have nothing to say upon that point.

The Civil Court has found that the consignee was not liable to pay demurrage. But there was absolutely nothing dishonest, improper or irregular in the Station Master holding the view which he did hold, even though it was an incorrect view, and for him to tell the clerks to alter the time of unloading to the time when he honestly thought that the wagons had been technically unloaded was in no way a criminal offence and the clerks who acted under his orders were in no way responsible.

I consider that the action of the Civil Court which ordered the prosecution was most unfortunate and that it would be most improper to permit this prosecution to continue as on the face of it there is no case of any sort or kind.

I accordingly quash the proceedings, set aside the order of committal of the two applicants and direct that their bail bonds be cancelled. This order will have the effect of an order of absolute acquittal with no reflection of any kind upon the conduct of the applicants.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 842 OF 1924.

November 1, 1924.

Present:—Mr. Justice Harrison.

LABH SINGH—ACCUSED—PETITIONER

versus

NARINJAN DAS—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 196 (as amended)—Complaint regarding the falsity of Return of Election Expenses without order of or under the authority from Government—Cognizance by Magistrate—Punjab Electoral Rules, r. 5 (4)—Words "in a judicial proceeding", whether affect s. 196, Cr. P. C., as amended.

In r. 5 (4) of the Punjab Electoral Rules, the words "in a judicial proceeding" by a Magistrate do not override or amplify the clear provisions of the amended s. 196, Cr. P. C., and, therefore, do not empower a Magistrate to take cognizance of a complaint regarding the falsity of a Return of Election Expenses, unless the complaint is filed by the order of or under the authority from the Governor-General in Council, etc., as laid down in the amended s. 196, Cr. P. C. [p. 851, col. 2.]

Application for revision of an order of the Sessions Judge, Sialkot, dated the 4th June 1924, affirming that of the Magistrate, First Class, Sialkot, dated the 8th May 1924.

Dr. *Gokal Chand Narang*, for the Petitioner.

Mr. *Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Dewan Narinjan Das describing himself as a complainant moved the District Magistrate of Sialkot to hold a judicial inquiry under r. 5 (4) of the Punjab Electoral Rules as to whether Mr. Labh Singh, a rival candiate at an election, had lodged a false return of his election expenses. He invited him to hold as a result of that inquiry that Mr. Labh Singh had incurred the penalties prescribed in

that rule and was not eligible for election for five years. The complaint was sent to Sardar Balwant Singh Garewal for disposal. It was contended by the other side that the Magistrate had no jurisdiction. Two preliminary issues were framed:—the Magistrate electing to follow the procedure of a Civil Court—

(1) Has this Court no jurisdiction unless it is empowered to hear the petition by the Local Government?

(2) Have the Courts at Sialkot no jurisdiction to entertain this petition?

In a brief order dated the 8th May 1924 the Magistrate held that the meaning of the rule was clear and that he was empowered to give a judicial finding as regards the falsity of the return. To this somewhat bald assertion he added no sort of explanation of how he (the Magistrate) came to function, and how he came to be seized with the petition requiring him to carry out the inquiry. An application for revision was presented to the Sessions Judge who seems to have been influenced by the fact that the Commissioners, who had inquired into an election petition arising out of this election, had remarked that the petitioner could have this matter of the election expenses decided by a Magistrate, without explaining how he was to set about it. The Sessions Judge came to no conclusion himself one way or the other and refused to take any action because he could not make up his mind as to whether the view taken by the Magistrate was right or wrong.

Now, the law regarding mal-practices in connection with elections is contained in Act XXXIX of 1920 whereby the Indian Penal Code was amended by the addition of s. 171 (A) to (I). By a subsequent amendment of s. 196 of the Cr. P. C. it was laid down that no proceedings regarding these new offences could be launched without a complaint by order of, or under authority from, the Governor-General in Council, or the Local Government, or some officer empowered by the Governor-General in Council in this behalf. No such complaint has been made, and it is, therefore, clear that under the Cr. P. C. the Magistrate had no jurisdiction whatever.

The question remains whether the rule on which the Magistrate relies creates any jurisdiction, civil or criminal, separate and apart from that described above. This rule says that, if a return of election expenses is not lodged in the manner prescribed, or is found either by Commissioners holding an inquiry into the election, or by a Magistrate in a judicial proceeding, to be false in any material particular, certain consequences shall follow. The appointment of Commissioners and the method in which they shall perform their duties form the subject-matter of clear and comprehensive rules made by the Governor-General in Council under the Government of India Act. A finding by such Commissioners is placed on the same footing as that of a Magistrate functioning as such; but the rules do not provide for a Magistrate holding an inquiry on the same lines as the Commissioners. The contention of the respondent and the view taken by the Magistrate is that the words "in a judicial proceeding" in some manner override or amplify the clear provisions of s. 196 of the Cr. P. C., and empower him to take cognizance without a proper complaint, or in other words that the reference in the rule to a "judicial proceeding" creates jurisdiction, and further that the jurisdiction so created in the Magistrate is that of a Civil Court or rather is to be exercised in accordance with the C. P. C. I can find no possible authority for this view and the respondent has been unable to show me any. If in a judicial proceeding regularly and properly conducted a finding is given by a duly authorized Magistrate, that finding carries certain consequences. This is not tantamount to saying that the safeguard wisely introduced by s. 196 is to be considered as a dead letter and that any Magistrate on a complaint or report being placed before him is authorized and competent to hold an inquiry and give a finding involving the same consequences as if he had acted in accordance with the law.

I hold that the action taken by the Magistrate was wholly *ultra vires* and I quash the proceedings.

S. D. *Revision accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 74 AND 86 TO 89 OF 1925.

March 30, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

SARJU SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 33—Death of witness—Statement made in enquiry, whether admissible—Cross-examination, absence of, effect of—Witness changing sides and making contradictory statements, evidence of, value of—Identification in jail, value of—Judge, duty of.

A Judge should not assume the role of a prosecutor, and where a witness has made a clear and definite statement as to a certain point the Judge should not endeavour to make the witness change his statement. [p. 853, col. 2.]

Where a statement made by a witness in an enquiry is sought to be used against the accused at the trial under s. 33 of the Evidence Act, the fact that there was practically no cross-examination of the witness on the occasion when he made the statement, although there was opportunity to cross-examine, renders the evidence of little or no value. [*ibid.*]

Ibrahim v. *Emperor*, 18 Ind. Cas. 406; 17 C. W. N. 230; 14 Cr. L. J. 70, relied on.

A witness who is shown to be capable of changing sides and who has made statements in favour of both the prosecution and the accused is an unreliable witness, and no guarantee of truth remains in respect of either of his statements. [*ibid.*]

Identification in jail is no substantive evidence. It can only be used as corroborative of identification made at the trial in the presence of the Judge. [p. 853, col. 2; p. 854, col. 1.]

Appeal against an order of the Additional Sessions Judge, Bahraich, dated the 12th January 1925.

Mr. *John Jackson*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—Sarju Singh, Kanchan Singh, Patal, Autar, Bhagwati Hukum Singh and Sagar have been convicted and sentenced to five years' rigorous imprisonment each under s. 395 of the Indian Penal Code by the learned Additional Sessions Judge of Bahraich. With these appellants was also tried one Nanku for the same offence but he has been acquitted by the learned Judge.

Lachmi Narain (P. W. No. 1) is the resident of village Ghurdauriya in the Nepal territory. He carries on the business of purchasing and selling *ghee*. On the 16th September 1924 he started with a certain number of ponies carrying tins of *ghee* for Risia Railway Station. Each pony carried four tins. Lachmi Narain was accompanied by Chedi and Wali Muhammad, each being the owner of one pony and also by a boy called Sheo Nath. The majority of the ponies had gone ahead but two had lagged behind. In the midst of the Bhinga forest one of these two ponies bolted and threw down the load of the four tins which he was carrying. Chedi and Wali Muhammad pursued the pony and Lachmi Narain tried to collect the *ghee* and put it back in the tins. He also asked the boy Sheo Nath to go back to the village and bring a new tin. After waiting for about 2 hours for Sheo Nath, Lachmi Narain himself went to his village to fetch an empty tin. Meanwhile Chedi and Wali Muhammad had returned to the spot and were left in charge of the two ponies and the 8 tins of *ghee*. Lachmi Narain returned to the scene with the new tin and re-loaded it with the *ghee* from one of the broken tins. The party with the two ponies each loaded with four tins of *ghee* started again. They had gone a distance of about 100 or 125 *kasis* when they were overtaken by dacoits. At this time the sun had either completely set or was just setting. The dacoits when they first made their appearance were only two in number. According to Lachmi Narain one of them was carrying a *lathi* and the other a gun. Lachmi Narain was hit by a *lathi* and the dacoit carrying the gun levelled it at him. Lachmi Narain then managed to run away from the place and reached the village Parsa, which is about three miles from the scene of the first attack. Four *gharis* after Sheo Nath, Chedi and Wali Muhammad also joined him. They had the two ponies with them but not the tins of *ghee* which were carried away by the dacoits.

From the above narrative of events it is clear that the dacoits except two appeared on the scene after Lachmi Narain had run away. According to the evidence of Wali Muhammad (P W. No. 4) about 5 other dacoits had come up. They caught Chedi and struck him with a *lathi* blow. They also beat Wali Muhammad. They searched Chedi and Wali Muhammad and found Rs. 6-8 0 with Wali Muhammad of which they robbed him. Then they tied Wali Muhammad, Sheo Nath and Chedi and made them sit down. Six of the dacoits then drove away the two ponies with the tins of *ghee* loaded on them. After two or three hours two of the dacoits returned with the ponies but there were no tins of *ghee*. Sheo Nath was released and having

untied his companions he, Chedi and Wali Muhammad went to Parsa with the two ponies and joined Lachmi Narain there. Two of the eight tins were since recovered. They bore the name of one Badlu to whom they belonged.

On the evidence produced in the case there can be no question as to the fact that the dacoity did take place and the only question which I have to decide is as to the complicity of these appellants. At the hearing of the appeal Sarju Singh, Patal and Kanchan Singh were represented by Counsel, Mr. John Jackson. I now proceed to deal with the case of each of the seven appellants separately.

I.—Kanchan Singh.—At the trial the only direct evidence against Kanchan Singh is furnished by the statement of Chedi recorded before the Magistrate at the inquiry. Chedi could not be produced at the trial because he had died in the interval. Chedi's statement at the inquiry is assailed on two grounds: (1) That he had had an opportunity of seeing the accused at the *thana*, and (2) that his statement even if admissible in evidence is of little value, no cross-examination worth the name having been directed against his evidence.

As to the first point, we find the following statement in the evidence of one Farzand (P. W. No. 14):—"The *thanadar* took this man (Bhagauti) to the *thana*. I went with the *thanadar*. At the *thana* Chedi, Wali Muhammad and Lachmi Narain were present.....Nanku, Sagar, Sarju Singh, Patal, Kanchan Singh were arrested on the same date on which this accused (Bhagwati) was arrested. Sagar had been arrested a day before. The remaining five were arrested on one and the same date. The *thanadar* took all these five men to the *thana* at one and the same time." This evidence is clear and definite in one respect and, that is, that when Nanku, Sarju Singh, Patal, Kanchan Singh and Bhagwati were taken to the *thana* as arrested persons Chedi was present at the *thana*. The learned Judge then intervened and in answer to the questions put by him the witness stated that Lachmi Narain, Wali Muhammad and Chedi were not at the *thana* on the day when these accused were taken there. They arrived at the *thana* on the following day. Having elicited the last-mentioned statement the learned Judge then proceeded to point out to the witness the discrepancy between the two statements. On this the witness said "I saw these men in the *thana* on the following day after the accused had been challaned and not on the first day." I very much regret that the learned Judge took the role of a prosecutor. Be that as it may, the two contradictory statements of the witness must have the effect of creating serious doubts as to the case for the prosecution that Chedi was brought face to face with the accused for the first time after the dacoity during the regular identification proceedings in the presence of the Magistrate. Further, it may be that the statement of Chedi recorded at the inquiry is technically admissible in evidence at the trial, the fact, however, remains that only one question was put in cross-examination by Counsel of one of the accused and the statement closes with a note "No cross-examination by others." In substance, therefore, there is no cross-examination though there was an opportunity to cross-examine. In the absence of such cross-examination the evidence is, in my opinion, of little or no value. I entirely agree with the reasoning of the learned Judges in the case of *Ibrahim* v. *Emperor* (1) The seriousness of the point that Chedi had seen the accused persons at the *thana* is fully realized by the learned Judge and in this connection his comment on the statement of Farzand is as follows:—"My impression is that the witness was siding with the accused when he made this statement about the presence of the prosecution witnesses at the *thana* when the five accused were taken there...I disbelieve this part of his statement..."Now if Farzand is capable of changing sides he is clearly an unreliable witness. No guarantee of truth remains in respect of either of his two statements. Kanchan Singh must, therefore, be acquitted.

II.—Sarju Singh.—As against him the learned Judge refers to the evidence of Lachmi Narain, who says that he identified the accused among the dacoits. He also refers to the evidence of Wali Muhammad but that is of no value at all because Wali Muhammad failed to identify the accused in Court though it is said that he had identified him in jail. Identification in jail is no substantive evidence. It may only be used as corroborative of identification made at the trial in the presence

(1) 18 Ind. Cas. 406; 17 C. W. N. 230; 14 Cr. L. J. 70.

of the Judge. The learned Judge also notices the evidence of Farzand, who said that he saw the accused going with others to the Bhinga side a few days before the dacoity. This may be of some value if there were more or less direct evidence against the accused. The case against Sarju Singh, therefore, rests on the evidence of Lachmi Narain alone. In my opinion it is wholly unsafe to base conviction of the accused on the evidence of Lachmi Narain. Lachmi Narain's evidence at the trial as to the identification of Sarju Singh is not supported in any measure by his first report. Further in his statement to the Police at the investigation he had clearly stated that the dacoits were wearing *dhanthas* and only eyes could be seen. That statement read as a whole amounts to this that Lachmi Narain was unable to identify any one of the two dacoits who had appeared on the scene in his presence. Sarju Singh must, therefore, be acquitted.

III.--Patal.—As against Patal the learned Judge relies upon the evidence of Chedi recorded at the inquiry. I have already considered that evidence in details in connection with Kanchan Singh's case and for the reasons there stated I am unable to accept Chedi's statement as worthy of reliance. The learned Judge also refers to the statement of Farzand, who says that he saw the accused going with others into the Bhinga jungle a few days before the dacoity. This evidence will be too slender a foundation for conviction. Patal also must be acquitted.

IV.—Bhagwati.—Apart from the evidence of Chedi, on which the learned Judge relies and I do not rely, we have against this accused clear evidence of two other witnesses, Badri (P. W. No. 6) and Bans Gopal (P. W. No. 5). These two persons were gathering fuel wood in the jungle when they saw the dacoits taking Chedi, Wali Muhammad and Sheo Nath with them. Amongst the dacoits they identified Bhagwati accused. The appeal of Bhagwati must, therefore, be dismissed.

V.—The evidence against Autar is the same as I have already noticed in considering the case of Bhagwati. Autar's appeal is also dismissed.

VI.—Hukum Singh.—Against this accused, apart from the evidence of Chedi taken at the inquiry we have very little evidence and that is to be found in the statement of Farzand, who says that he saw this accused along with others going to Bhinga side where the dacoity was committed. This happened three or four days before the dacoity and is consequently to my mind of no circumstantial value whatsoever. The witness further said that he saw this accused and some other accused returning from the Bhinga side with four tins of *ghee*. This again happened about a week after the dacoity. I can attach no weight to such evidence. Hukum Singh must, therefore, be acquitted.

VII.—Sargar.—Highly damaging evidence against this accused lies in the fact that he was found carrying the two tins of *ghee* which bore the name of Badlu to one Sangam Lal in Rani Purwa. This is deposed to by Bhagwan (P. W. No. 13). The appeal of Sagar must, therefore, be dismissed.

The result is that the appeals of Sarju Singh, Patal, Kanchan Singh and Hukum Singh are allowed, the conviction and sentence of each of them are set aside and they are set at liberty. The appeals of Bhagwati, Autar and Sagar are dismissed.

Z. K. *Appeals partly allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 316 OF 1924.

January 23, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Fforde.

BAHAWALA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164, 342—Confession, recording of—Warning to accused that confession might be used as evidence against him, absence of, effect of—Examination of accused before recording prosecution evidence, legality of.

An accused person cannot be examined under s. 342 of the Cr. P. C. before any evidence for the prosecution has been recorded, inasmuch as there is no evidence against him and there is no circumstance which he can be called upon to explain. [p. 855, cols. 1 & 2.]

A Magistrate recording a confession under s. 164 of the Cr. P C. must warn the accused that he need not make a confession and that if he does so, the confession might be used as evidence against him. Failure to give this warning to the accused would render the confession inadmissible in evidence against the accused. [p. 856, col. 1.]

Appeal from an order of the Sessions Judge, Shahpur at Sargodha, dated the 19th March 1924.

Mr. *Muhammad Alam*, for the Appellant.

Mr. *Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.

Scott-Smith, J.—Bahawala has been convicted by the Sessions Judge of Shahpur of the murder of Surkhru on the night between the 28th and 29th of July 1923, and has been sentenced to death. He has appealed to this Court through Counsel and the case is also before us for confirmation of the sentence of death under s. 374, Cr. P. C.

The facts of the case are fully given in the judgment of the learned Sessions Judge and we need not repeat them. The conviction is based upon the evidence of *Musammat* Kaki, P. W. No. 2, the widow of the murdered man, upon a retracted confession of Bahawala and upon the fact that during the Police investigation he produced from the hut occupied by him and others a bloodstained *kurta*.

On the 3rd of September 1923, the Police put up an incomplete *chalan* before Mr. Bhanot, the Committing Magistrate, and requested him to take the statement of *Musammat* Kaki, but first of all he recorded the statement of the accused and afterwards in the accused's presence he recorded that of *Musammat* Kaki. The statement of the accused then recorded by him is printed at pages 20-21 of the paper-book. It was retracted before the Committing Magistrate on 28th January 1924. Objection is taken to this confession on the ground that, if it was recorded under s. 164, Cr. P. C., the provisions of that section have not been complied with, and if it was recorded under s. 342 of the Code, it was illegally so recorded because at that time no evidence had been taken against him.

Section 342 of the Code is as follows:—

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence."

In the present case the accused was examined by the Court before any evidence for the prosecution had been recorded and as there was no evidence against him, there were no circumstances which he could be called upon to explain and he, therefore, could not be examined under the section in question. In point of fact the statement was recorded before the commencement of the preliminary enquiry before the Committing Magistrate and should, therefore, in my opinion, be taken to have been recorded under s. 164, Cr. P. C. This section lays down that before recording any such confession the Magistrate shall explain to the person making it (1) that he is not bound to make a confession, and (2) that if he does so it may be used as evidence against him. It is also laid down that "no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make, may be used as evidence against him, and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

At the head of the so-called confession there is a memorandum of enquiry as follows:—

"The accused has been questioned and he states that whatever he is going to say is out of his own free-will and no pressure has been brought to bear on him by the Police or any one else. That he is making this statement absolutely voluntarily."

At the conclusion the Magistrate certified, "That it was taken in my presence and hearing: that it was read over to the accused and admitted by him to be correct and that it is a full and true account of the statement made by the accused."

This certificate does not comply with the provisions of s. 164. The chief omission is that there is nothing to show that Bahawala was told that he need not make a confession and that if he did so it might be used as evidence against him. At the conclusion of the case for the prosecution and after hearing arguments the learned Sessions Judge recorded a note to the effect that it was necessary to ascertain whether the Magistrate recorded the accused's statement

under s. 342 or s. 164, Cr. P. C. Mr. Bhanot was accordingly summoned and gave evidence which will be found at page 23 of the printed paper-book. The only question put to him on behalf of the prosecution was whether he examined the accused Bahawala first or after *Musammat* Kaki, and his answer was that he examined the accused first and *Musammat* Kaki afterwards. No attempt was made to ascertain whether the Magistrate had in point of fact complied with the provisions of s. 164. In answer to questions put in cross-examination he said that he told the accused that this statement of his might incriminate him and might bring about his conviction and that he was at liberty to make a statement to this effect or not. This does not satisfy me that the Magistrate warned the accused that he need not make a confession and that if he did so it might be used as evidence against him. Under these circumstances I am of opinion that the confession is wholly inadmissible in evidence and must be excluded from consideration.

As regards the evidence of *Musammat* Kaki, it must be remembered that she was the appellant's paramour, and on her own admission accompanied him to the scene of the murder and waited outside the hut while the appellant went in and murdered her husband. She then assisted him to put the murdered man on his bed and covered him with a *chadar*. After that she returned to the village and shut herself up in her house and gave no information to any one until the next morning when she told Allahyar, P. W No. 7, privately what had happened. In these circumstances I would hold that she was to all intents and purposes an accomplice of the murderer and consider that it would be unsafe to rely upon her uncorroborated evidence against the appellant.

The only other evidence that remains is the production of the bloodstained *kurta* by the appellant. There is no evidence to show how much blood was on this garment, and the presence of blood upon a *zemindar's* clothing is not in itself a very important piece of evidence.

Under the circumstances I consider that this appeal should be accepted and the conviction and the sentence being set aside Bahawala should be acquitted.

Fforde, J.—I agree.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 944 OF 1924.

January 28, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice B. B. Ghose.

SANATAN BHATTACHARYA—PETITIONER

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 117, 356, 357, 360—Security proceedings—Evidence, record of—Procedure—Non-compliance with provisions of s. 360—Illegality.

Per *Newbould, J.*—Section 356 of the Cr. P. C. must be held to prescribe the manner in which evidence should be recorded in warrant cases. It, therefore, follows that the provisions of s. 360 of the Cr. P. C. are applicable to proceeding under s. 117 of the Code when a person is called upon to show cause why he should not furnish security for good behaviour and failure to comply with the provisions of that section would vitiate the enquiry or trial. [p. 857, col. 1.]

Per *Ghose, J.*—The provisions of s. 360 of the Cr. P. C. are matters of procedure and having regard to the fact that the directions contained in the section are mandatory the disregard of the provisions of that section with regard to any trial or enquiry vitiates the whole trial or enquiry. [p. 857, col 2.]

Section 360 of the Cr. P. C. only refers to evidence taken under s. 356 or 357 of the Code. Although according to the provisions of s. 117, sub-s. (2) of the Code, evidence should be recorded in cases referred to in that section in the manner prescribed for recording evidence in warrant cases that does not make s. 356 applicable in all its terms, because s. 356 specifically refers to enquiries under Chs. XII and XVIII only and does not refer to Ch. VIII of the Code. The result, therefore, is that in making enquiries under s. 117 evidence should be recorded as in a warrant case, but Ch. VIII of the Code not having been referred in s. 356, s. 360 of the Code has no application to the record of such evidence. [*ibid.*]

Criminal revision against an order of the Sessions Judge, 24-Parganahs, Alipore, dated the 13th August 1924, affirming that of the Sub-Divisional Magistrate, Alipore, dated the 31st May 1924.

Babus *Birbhusan Dutt* and *Sikhar Kumar Bose*, for the Petitioner.

Mr. *Khundkar*, for the Crown.

JUDGMENT.

Newbould, J.—The question that arises in this Rule is whether the provisions of s. 360, Cr. P. C. are applicable to proceedings under s. 117, Cr. P. C., when a person is called upon to show cause why he should not furnish security for good behaviour.

In cl. (2) of that section it is provided that such an enquiry shall be made in the manner hereinafter prescribed for conducting trials and recording evidence in warrant

cases. Section 360, Cr. P. C. refers to evidence taken under s. 356 or 357. Though s. 356 does not expressly refer to warrant cases it refers to all cases other than summons cases and cases mentioned in sub-s. (1) of s. 260, cls. "(*b*)" to "(*m*)." These clauses include some cases which are warrant cases, but only cases of minor offences. The Code does not prescribe a manner for recording evidence applicable to all warrant cases. I think that to give a reasonable meaning to the words in s. 117, s. 356 must be held to prescribe the manner in which evidence should be recorded in warrant cases. If this is so, it follows that s. 360, Cr. P. C., is applicable and failure to comply with the provisions of that section would vitiate the enquiry or trial which has resulted in an order under s. 118 of the Code.

On behalf of the Crown it is pointed out that enquiries under Chs. XII and XVIII of the Code are specifically mentioned in s. 356 and it is argued that if it was intended to make this section applicable to any proceeding under Ch. VIII also, that would also have been expressly mentioned. It seems to me that the Legislature having provided that evidence should be recorded as in warrant cases in s. 117 did not think it necessary to again refer to these proceedings when dealing with the question of the manner in which evidence was to be recorded. My attention has also been drawn to the case of *Benode Behari Nath* v. *Empepor* (1). It is true that it is hard to distinguish the reasoning under which it was there held that the provisions of s. 342 are not applicable to cases of enquiry under s. 117 from the argument advanced on behalf of the Crown in opposing the present rule. But there are two other unreported cases to one of which I was a party—Criminal Revision Case No 727 of 1924, decided on the 7th November, 1924 [*Nawab Ali* v. *Emperor* (2)] and Criminal Revision Case No. 851 of 1924, decided on the 25th November 1924, and in both of these it was held that an omission to comply with the provisions of s 360, Cr. P. C, in proceedings under s. 117, Cr. P. C. vitiated the trial. Following these decisions I must make this Rule absolute.

B. B. Ghose, J.—As we are bound by the previous decisions of this Court on the question now before us I agree that this Rule must be made absolute so long as these decisions are not overruled by a Full Bench. Personally I entertain considerable doubt whether s. 360, Cr. P. C., applies to proceedings under Ch. VIII of that Code. The provisions of s. 360 are matters of procedure and having regard to the fact that the directions are mandatory the disregard of the provisions of that section with regard to any trial or enquiry vitiates the whole trial or enquiry. But in construing a matter of procedure, which does not involve any question of principle, we must be guided by the actual words of the Code and s. 360 only refers to evidence taken under s. 356 or 357 of the Cr. P. C. Although according to the provisions of s. 117, sub-s. (2) of the Code evidence should be recorded in cases referred to in that section in the manner prescribed for recording evidence in warrant cases that does not make s. 356 applicable in all its terms, because s. 356 specifically refers to enquiries under Chs. XII and XVIII only and does not refer to Ch. VIII. The result, therefore, is that in making enquiries under s. 117 evidence should be recorded as in a warrant case. But Ch. VIII not having been referred to in s. 356, s. 360 of the Code would not apply to the record of such evidence.

As this Bench is now constituted it cannot refer this question to a Full Bench, my learned brother having expressed his opinion previously on this matter to which he adheres. We must consider ourselves bound by the decisions referred to in his judgment.

ORDER.—We set aside the order passed against the petitioner under s. 118, Cr. P. C. It will be open to the District Magistrate to take further proceedings against the petitioner if he thinks fit.

Z. K. *Rule made absolute.*

(1) 81 Ind. Cas. 909; 50 C. 985; (1924) A. I. R. (C.) 392; 25 Cr. L. J. 1085.

(2) 88 Ind. Cas. 949; 52 C. 470.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1163 OF 1924.

December 8, 1924.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

EMPEROR—PETITIONER

versus

BIMAL PARSHAD—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 307, 418, 449, Ch. XXXIII—Trial by Jury—Disagreement between Judge and Jury—Reference to High Court—Procedure.

In ordinary cases tried by Jury there is no appeal except on a matter of law under s. 418 of the Cr. P. C. Where, however, a case is tried by Jury under the provisions of Ch. XXXIII of the Code, an appeal lies to the High Court on matters of fact as well as on matters of law under s. 449 of the Code. In such a case the findings of the Jury on questions of fact are not final, and if there is a disagreement between the Judge and the Jury and the case is referred to the High Court under s. 307 of the Code, the High Court must consider all the evidence in the case and give judgment after considering it as well as the opinions of the Judge and the Jury. [p. 858, col. 2; p. 859, col. 1.]

Case-law referred to.

Criminal Revision against an order of the Sessions Judge, Ambala, dated the 27th July/2nd August, 1924.

Mr. *D. R. Sawhney*, for the Petitioner.

Lala *Moti Sagar*, R. B., (with him Messrs. *Amar Nath Chona* and *Sagar Chand*), for the Respondent.

JUDGMENT.—The accused Bimal Parshad Jaini was tried by the Sessions Judge, Ambala, and a special Jury under the provisions of Chap. XXXIII of the Cr. P. C. on a charge under ss. 161/116 of the Indian Penal Code for having offered a bribe of Rs. 200 in currency notes to Mr. R. Reaks, Assistant Chief Controller, Indian Stores Department, Simla, with the motive to induce the said Mr. Reaks to use his influence in obtaining a post for the accused in the Stores Department. The Jury unanimously brought in a verdict of not guilty, and the learned Sessions Judge has referred the case to this Court under s. 307 (1) of the Cr. P. C. on the ground that, in his opinion, the verdict is perverse and absolutely contrary to the evidence on the record which establishes the guilt of the accused beyond all reasonable doubt.

Before coming to the facts we find it necessary to deal with certain arguments which Mr. Moti Sagar on behalf of the accused has addressed to us upon the question as to the principles which should guide this Court in dealing with this reference under s. 307 of the Cr. P. C. His contention is that this Court should only interfere with the verdict of a Jury when it considers that it is wholly unreasonable or perverse. Attention has been drawn to the following authorities:—

Queen v. *Ram Churn Ghose* (1) in which Markby, J. made the following remarks:—

"We entirely agree with the observations which have been made in similar cases by other Division Benches that we should not interfere with the verdict of a Jury unless it were established in the clearest possible manner that they had wholly miscarried in their conclusion upon the case. They are the constituted tribunal upon questions of fact in the districts where the Jury system has been introduced, and it will be wholly destructive of that institution if the greatest possible confidence is not placed on them."

Queen v. *Sham Bagdee* (2) in which it was held that "the High Court will exercise the powers vested in it by s. 263 (corresponding to s. 307 of the present Code) only in cases in which it finds the verdict of the Jury clearly and undoubtedly wrong."

Emperor v. *Swarnamoyee Biswas* (3) in which it was stated that the High Court would not interfere under s. 307 in every case of doubt or in every case in which it might with propriety be said that the evidence would have warranted a different view. Their Lordships approved of the decision in *Queen* v. *Sham Bagdee* (2).

Emperor v. *Golam Kader* (4), where it was held that the High Court would not interfere against the verdict of the Jury unless it could be said that it was not possible for the Jury to have arrived at the verdict at which they arrived.

Reg. v. *Khanderav Bajirav* (5) and *Emperor* v. *Charles John Walker* (6) [in which *Emperor* v. *Swarnamoyee Biswas* (3) was followed.]

On the other side the Public Prosecutor referred to the case of *Emperor* v. *Lyall* (7), where such a strict view was not taken and it was held that it was not necessary for the prosecution to show that the opinion of the Jury was perverse or clearly or manifestly wrong. It appears to us that the decisions in the cases cited by Mr. Moti Sagar were based upon the view expressed by Markby, J, in the case of *Queen* v. *Ram Churn Ghose* (1) to the effect that the Jury are the constituted tribunal upon questions of fact. Moreover in ordinary cases tried by a Jury there is no appeal except on a matter of law, see s. 418 of the Cr. P. C. Important changes have been introduced into the present Cr. P. C. by Ch. XXXIII. In s. 449, which is

(1) 20 W. R. Cr. 33.

(2) 20 W. R. Cr. 73; 13 B. L. R. Ap. 19.

(3) 21 Ind. Cas. 900; 41 C. 621; 14 Cr. L. J. 660.

(4) 82 Ind. Cas. 356; 28 C. W. N. 876; (1924) A. I. R. (C.) 956; 25 Cr. L. J. 1284.

(5) 1 B. 10; 11 Mad. Jur. 215; 1 Ind. Dec. (N. S.) 7.

(6) 83 Ind. Cas. 935; 26 Bom. L. R. 610; (1924) A. I. R. (B.) 450; 26 Cr. L. J. 211.

(7) 29 C. 128; 6 C. W. N. 253.

in that Chapter, it is laid down that "where a case is tried by Jury in the High Court or Court of Session under the provisions of this Chapter, then, notwithstanding anything contained in s. 418 or s. 423, sub-s. (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law." In a case, therefore, tried under this Chapter the finding of a Jury on a question of fact is no longer final and under these circumstances we think that the authorities, which lay down that the High Court will not interfere in a case referred under s. 307 unless it is shown that the verdict of the Jury is wholly unreasonable or perverse, lose much of their force and really have very little application. We consider that it is our duty in the present case to consider all the evidence and to give judgment after considering it as well as the opinions of the Sessions Judge and the Jury.

The facts of the case are fully given in the report of the learned Sessions Judge. The case for the prosecution is briefly as follows:—

The accused, on the morning of Sunday the 20th April 1924, went to interview Mr. Reaks in his room in the Catholic Club, Simla, where he was residing, and, after saying that he wished to apply for a post in Mr. Reaks' department, offered him 20 currency notes of Rs. 10 each saying, "I have brought this as a present for you." Mr. Reaks immediately caught hold of the accused, and, after getting the notes counted by his servant Kanhaya (P. W. No. 3), turned the accused out of his quarters and out of the compound.

The defence was that the accused accidently pulled these notes out of his pocket at the same time as his certificates which he wished to show to Mr. Reaks in support of his application and that he put the notes on the table and offered the original certificates for Mr. Reaks' perusal saying, "I present these to you for your perusal."

Only four witnesses were examined for the prosecution, and their evidence is given in full detail in the report of the Sessions Judge. Mr. Reaks is the only witness who gives evidence as to the offer to him of the bribe of Rs. 200. Kanhaya's evidence is not really very important because the accused himself admits that he put the notes on the table and that Mr. Reaks then and there seized hold of him. The evidence of Mr Salt (P. W. No. 4) is, however, of importance. He states that he was standing in the porch of the Catholic Club after breakfast on the day, in question when the accused followed by Mr. Reaks passed within two yards of him. As Mr. Reaks passed he held out his hand in which there were some papers and called out to the witness, "Here is an other case." The accused subsequently came back and entreated Mr. Salt to intercede for him with Mr. Reaks. Mr. Reaks is an officer holding an important post, and the Sessions Judge states that he gave his evidence in a most straightforward and convincing manner. There is absolutely nothing against him, and *prima facie* there is no reason whatever for disbelieving his evidence. Mr. Moti Sagar has suggested that he may have misunderstood the accused; but, having regard to his evidence and his clear statement that the accused offered the notes saying that he had brought them as a present, we do not see how it can be possible that the witness made any mistake. The accused put in a written statement in his defence in which he insinuated that Mr. Reaks had made up a false case against him because he was under a cloud and thought he would in this way exonerate himself in the eyes of his superior officers. He did not, however, clearly allege that Mr. Reaks was under a cloud and there is nothing on the record to show that there was anything against this witness, and we cannot find any reason whatsoever for disbelieving his evidence. The defence to the effect that the accused pulled out Rs. 200 in currency notes by accident with his certificates is, in our opinion, incredible. Mr. Reaks has distinctly stated that no certificates were produced and the accused did not up to the time of the trial produce any certificates at all and there is no evidence on the record that he possessed any. In our opinion the verdict of the Jury is wholly unreasonable, and we fully agree with the report of the learned Judge and the reasons given therein for his opinion. We, therefore, convict the accused of an offence under ss. 161/116 of the Indian Penal Code. Considering his youth, we do not think it necessary to pass a very severe sentence upon him. We accordingly sentence him to three months' rigorous imprisonment and a fine of Rs. 200 or one

month's further rigorous imprisonment in default.

Z. K. *Reference accepted: Accused convicted.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 348 OF 1924.

November 3, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

SARAT CHANDRA KAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 364—Examination of accused, record of—Record not made, effect of—Breach—Irregularity.

At the close of the prosecution case in a Sessions trial the Judge made the following note:—"The statements of the accused were read out to each of them and they were asked if they would add anything here. They stated that they would not, except *C*. What he stated here is recorded by the Court." The Court then examined a Court witness and further examined the accused and made the following note:—"After the conclusion of the examination of the witness the Court examined the accused again. They stated that they had nothing further to say and declined to examine any witness in defence." No record was made of the examination of the accused except in the case of the examination of *C*:

Held, that a record of the examination of the accused under the provisions of s. 364 of the Cr. P. C. was obligatory and that the absence of it had caused serious prejudice to the accused and that, therefore, the trial was vitiated and must be set aside.

Criminal appeal against an order of the Sessions Judge, Sylhet, dated the 18th April 1924

Mr. *Monnier* (with him Babu *Radhika Ranjan Guha* for Babu *Nripendra Chandra Das*), for the Appellants.

Mr. *B. M. Sen*, for the Crown.

JUDGMENT.—The principal ground urged in this appeal is that the *ejahar* (Ex. 1), which was treated as a dying declaration of the deceased, was not legally proved in the case, and, therefore, was wrongly admitted in evidence. In support of this contention reliance has been placed upon the decisions in the cases of the *Empress* v. *Samiruddin* (1), *King Emperor* v. *Mathura Thakur* (2), *King-Emperor* v. *Daulat Kunjra* (3) and some other cases of this Court, and it was contended that the cases of *Gouridas Namasudra* v. *Emperor* (4) and *Emperor* v. *Balaram Das* (5), in so far as they purport to take a different view, were wrongly decided, or at any rate are distinguishable. We do not propose to decide this point, as, in our opinion, the appeal succeeds on one of the several other grounds urged, and there must be a re trial of the case.

It appears that at the close of the prosecution case the learned Sessions Judge, on the 12th April 1924, examined the accused persons, and what took place on that occasion was noted by the learned Judge in the order-sheet in these words:—"The statements of the accused were read out to each of them, and they were asked if they would add anything here. They said that they would not, except Chanda Dhupi. What he stated here is recorded by the Court" Therefore, on the 15th April 1924, the learned Judge examined a Court witness, and further examined the accused, and made the following note in the order-sheet: "After the conclusion of her examination (meaning that of the Court witness) the Court examined the accused again. They stated that they had nothing further to say, and declined to examine any witness in defence."

It appears no record was made of the aforesaid examination under the provisions of s 364 of the Cr. P. C., except in the case of the examination of the accused Chanda Dhupi, made on the 12th April 1924. In our judgment in *Emperor* v. *Nani Mandal* (6), we have given our reasons for holding that such a record is obligatory, and the absence of it may seriously prejudice accused persons.

We must, therefore, allow the appeal, set aside the convictions of the appellants and the sentences passed on them and direct that they be re-tried in accordance with law. Pending such re-trial, the appellants will remain on the same bail as they are on at present. As the case will have to be tried again, we think it desirable that in that trial steps should be taken to prove the contents of the document Ex. 1 in the manner laid down in the case of *Empress* v. *Samiruddin* (1) if it be not altogether impossible to do so.

(1) 8 C. 211; 10 C. L. R. 11; 4 Ind. Dec. (N. S.) 135.
(2) 6 C. W. N. 72.
(3) 6 C. W. N. 921.
(4) 2 Ind. Cas. 841; 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186.
(5) 71 Ind. Cas. 685; 49 C. 358; (1922) A. I. R. (C.) 382; 24 Cr. L. J. 221.
(6) 86 Ind Cas. 345; 52 C. 403; 41 C. L. J. 50; (1925) A. I. R. (C.) 575; 26 Cr. L. J. 761.

Let a copy of the judgment of this Court in *Emperor* v *Nani Mandal* (6), be sent to the learned Sessions Judge for his information.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 809 OF 1924.
January 21, 1925.
Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Fforde.
AMIR ZAMAN—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 288—Words "for all purposes subject to the provisions of Evidence Act", purpose of—Retracted statement of witness transferred to Trial Court's record—Such statement, whether substantive evidence or only of corroborative or contradictory force.

The words "for all purposes subject to the provisions of the Indian Evidence Act", are introduced in s. 288, Cr. P. C., for the purpose of removing any doubt as to the right of the Court to treat the evidence given before the Committing Magistrate as substantive evidence in the trial, when such evidence has been transferred to that Court's record. Therefore, where a witness after corroborating the statement of an approver before the Committing Magistrate goes back upon his statement before the Sessions Judge, and the latter transfers, under s. 288, Cr. P. C., to his own record the statement of the witness made before the Committing Magistrate, the statement so transferred may be used as substantive evidence in the case precisely as if it had been made before the Sessions Judge himself. There is nothing to restrict the use of such statement only to corroborate or contradict the evidence given before the Sessions Judge. [p. 862, col. 1.]

Appeal from an order of the Sessions Judge, Rawalpindi, dated the 3rd September 1924.

Mr. *M. Sleem*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.

Fforde, J.—Amir Zaman, the present appellant, and Muhammad Khan, have been tried by the Sessions Judge of Rawalpindi, with the aid of four Assessors, for the murder of Said Wali. Muhammad Khan has been acquitted, and the appellant has been convicted and sentenced to death. In the conviction of the appellant and acquittal of Muhammad Khan the four Assessors unanimously concurred.

The facts as presented by the prosecution are shortly as follows :—

Musammat Pono, widow of the murdered man, being anxious to get rid of her husband owing to the fact that he had become impotent as the result of ill-health, consulted the appellant who was married to her sister *Musammat* Rahmat Jan. *Musammat* Pono suggested that her husband should be murdered to which suggestion the appellant agreed and proposed that the husband should be induced to visit his house on the pretext that *Musammat* Rahmat Jan was seriously ill. The deceased consented to this visit and started off with the appellant on the morning of the 18th April 1924, arriving at the appellant's house in the afternoon. That night the appellant and the deceased slept on one *charpoy* while *Musammat* Pono and her sister slept on another, all four sleeping in the same *kotha*. During the night *Musammat* Pono heard sounds of blows and saw the appellant striking the deceased with a *lathi*. *Musammat* Rahmat Jan ran outside to give an alarm, but was dragged back by the appellant who then struck the deceased some more blows with the *lathi*, killing him on the spot. The appellant and Muhammad Khan then wrapped the dead body in a piece of cloth, put it into a gunny bag and carried it away. A considerable time after they returned. Muhammad Khan then proceeded to dig a hole in the *thalli* in which the appellant buried the clothing of the deceased, consisting of two shirts, a waistcoat, a *kullah*, a *lungi*, a pair of *pajamas*, a notebook and a discharge certificate.

The above facts are deposed to by *Musammat* Pono who turned approver. *Musammat* Rahmat Jan in the Committing Magistrate's Court fully corroborated the details of the murder as narrated by *Musammat* Pono, but before the Sessions Judge she professed to have no knowledge of these matters. The Sessions Judge thereupon transferred the deposition made by her in the Committing Magistrate's Court to the Sessions' record in accordance with the provisions of s. 288, Cr. P. C. In addition to these two witnesses Harnam Singh, Head-Constable, P. W. No. 21, and a number of other witnesses have proved that the appellant led them to a certain spot where there was a heap of stones and, on these stones being removed, the dead body of the murdered man was discovered. The dead body was found to be wrapped in a piece of cloth and enclosed in a gunny bag, precisely as described by the approver and her sister. Harnam Singh and other wit-

nesses also proved that on the same day he and a number of persons followed the appellant to his house where the appellant dug out the *thalli* and produced from it the articles which *Musammat* Pono and her sister deposed to having seen him bury there on the night of the murder.

Mr. Sleem for the appellant argues quite rightly that the evidence of *Musammat* Pono the approver should not be accepted without material corroboration and he contends that the statement of *Musammat* Rahmat Jan as given before the Committing Magistrate cannot be accepted as evidence in view of her subsequent retraction in the Sessions Judge's Court. Mr. Sleem argues that the words " for all purposes subject to the provisions of the Indian Evidence Act, 1872", which have been added to s. 288, Cr. P. C., by the amending Act confine such evidence to purposes of corroboration and contradiction in accordance with ss. 155 and 157, respectively, of the Evidence Act. In other words Mr. Sleem's argument is that the deposition before the Committing Megistrate cannot be taken as substantive evidence in the case, but can only be received in so far as it either corroborates or contradicts the evidence given before the Sessions Judge. I cannot agree with Mr. Sleem's contention. I think it is quite clear that the evidence of a witness which has been recorded under the provisions of s. 288, Cr. P. C., may be acted upon by the Court precisely as if that evidence had been deposed to before the Sessions Judge. The amending words " for all purposes subject to the provisions of the Indian Evidence Act, 1872 ", merely mean that the law of evidence enacted in that Act must be complied with. For instance, evidence which had been wrongly admitted by the Committing Magistrate, in violation of the provisions of the Evidence Act, could not be transferred to the Sessions' file. The amendment to s. 288 is obviously introduced for the purposes of removing any doubt as to the right of the Court to treat the evidence given before the Committing Magistrate as substantive evidence in the trial, when such evidence has in the discretion of the Trial Court been properly brought on to that Court's record.

In my opinion, there is ample evidence to corroborate the story of the approver and there can be no doubt that the appellant has been rightly convicted of the murder of Said Wali.

I would accordingly dismiss this appeal and confirm the sentence of death.

Scott-Smith, J.—I concur in the proposed order and in the interpretation of s. 288 of the Cr. P. C.

S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 278 OF 1924.

March 16, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

THE NABADWIP MUNICIPALITY —COMPLAINANT

versus

PURNA CHANDRA MUKERJI—ACCUSED—RESPONDENT.

Bengal Municipal Act (III of 1884), s. 202—Order under section, whether can be based on report of Subordinate Officer—Opportunity to parties of being heard, absence of—Order, legality of—Revision, whether lies.

An order passed by a District Magistrate under s. 202 of the Bengal Municipal Act is an order passed in a judicial proceeding and the High Court has power to revise the order. [p. 863, col. 2.]

A Magistrate exercising his powers under s. 202 of the Bengal Municipal Act is not engaged in a criminal proceeding and can base his order upon a report made by a Subordinate Officer. [*ibid.*]

Before passing an order under s. 202 of the Bengal Municipal Act a Magistrate must give the parties concerned an opportunity of being heard, and an order passed under the section without such opportunity being given is liable to be set aside in revision. [*ibid.*]

Reference under s. 438, Cr. P. C., made by the Sessions Judge, Nadia.

Dr. *Bijon Kumar Mukerji* and Babu *Jatish Chandra Guha*, for the Complainant.

Mr. *D. N. Bagchi* and Babu *Mohini Mohon Bhattacharji*, for the Accused.

JUDGMENT.—This is a Reference under s. 438, Cr. P. C., made by the Sessions Judge of Nadia recommending that two orders passed by the District Magistrate under s. 202 of the Bengal Municipal Act, dated the 27th June and 20th October 1924, be set aside.

The facts so far as they are necessary for the decision of this Reference are as follows:—By his letter No. 182, dated 23rd June 1924, the Vice-Chairman of the Nabadwip Municipality informed the District Magistrate of Nadia that on the 26th April the Commissioners passed a resolution re-

garding the raising of the northern portion of the Municipal Road named Dwarik Babu's Road. Babu Purna Chandra Mukerji, the Chairman of the Municipality in opposition to this resolution erected a brick wall the very next morning right across the northern portion of the said road. On the 31st May the Commissioners passed a resolutson that a notice under s. 202 of the Bengal Municipal Act might be issued on Babu Purna Chandra Mukerji requiring him to remove the wall. On the 2nd June the Vice-Chairman issued a requisition on Babu Purna Chandra Mukerji under this section. As he failed to remove the obstruction within the prescribed time the Magistrate was asked in this letter to pass necessary orders for removal of the encroachment. On receipt of this letter the District Magistrate by an order dated the 25th June requested Babu Satish Chandra Bose, Sub-Deputy Collector, to hold a local enquiry and report by the morning of the 27th. The Sub-Deputy Collector held a local enquiry in the presence of the Vice-Chairman, Babu Purna Chandra Mukerji and others. On receipt of his report the Magistrate on the 27th June recorded an order in which he stated that he did not think that an order by him under s. 202 of the Municipal Act was justifiable and that he did not see his way to order summary removal of the wall. This decision was conveyed to the Municipality by the District Magistrate's letter No. 329 M, dated 1st July 1924. The Vice-Chairman replied in his letter No. 258, dated 18th/21st July 1924, asking for reconsideration of the order and repeated this request in a letter of reminder No. 412, dated 19th September 1924. On the 20th September the District Magistrate asked his Senior Deputy Collector Babu C. C. Gupta to hold an enquiry in the presence of parties and report. This officer held an enquiry accordingly and submitted a report dated 20th October 1924. On receipt of this report the District Magistrate passed an order on the same date directing the Municipality to remove the obstruction under s. 202 of the Municipal Act and recover cost from Babu Purna Chandra Mukerji.

The learned Sessions Judge on an application made to him by Babu Purna Chandra Mukerji to set aside the order of the 20th October has recommended that both the order of the 27th June refusing to take action and the order of the 20th October taking action under s. 202 of the Municipal Act be set aside on the ground that the District Magistrate could not perform his function under this section by acting on the report of another Magistrate.

We think that the Magistrate's procedure was wrong in the present case but for a different reason from that stated by the learned Sessions Judge. We agree with him that the decision of a Divisional Bench of this Court in the case of *Aloka Mohon Saha* v. *Narayanganj Municipality* (1) is authority for holding that an order made under s. 202 of the Bengal Municipal Act, 1884, is a judicial proceeding and we have power to revise the order of the Magistrate. But though the Magistrate was bound to act judicially we do not think he was debarred for that reason only from acting on a report made by a subordinate officer. There is nothing that offends the first principles of justice in such procedure. In a civil suit a Court can issue a commission for a local enquiry to a suitable person and take action on the report submitted by such a person. A Magistrate, exercising his power under s. 202, is not engaged in a criminal proceeding. No procedure is prescribed by the section and we do not think he would be wrong in following, so far as they seem applicable, the provisions of the C. P. C. But the Magistrate was wrong in passing orders on these reports without first giving the parties concerned an opportunity of being heard.

The provisions of s. 202 so far as they are relevant to the present Reference are in the following terms:—"The Commissioners may issue a notice requiring any person to remove any wall which he may have built .....on any road...and if such person shall fail to comply with such requisition within eight days of the receipt of the same, the Magistrate may, on the application of the Commissioners, order that such obstruction.....be removed and thereupon the Commissioners may remove any such obstruction..... .....and the expenses thereby incurred shall be paid by the person who erected the same."

This section gives the Municipal Commissioners somewhat drastic powers and as might be expected the Legislature has pro-

(1) 59 Ind. Cas. 137; 24 C. W. N. clxviii (168); 22 Cr. L. J. 25.

vided safeguards against the arbitrary exercise of these powers. One of these safeguards appears to have been overlooked in the present proceedings by all concerned. This is that provided by s. 176 which a reference to s. 175 shows to be applicable to a requisition made by the Commissioners under s. 202. Section 176 gives the person against whom the requisition is made the right to prefer an objection in writing to the Commissioners. This objection has to be heard and disposed of by the Chairman or Vice-Chairman except in cases where the work will cost more than three hundred rupees, when the objection will be decided by the Commissioners in meeting. Under s. 178 the Chairman or Vice-Chairman or the Commissioners at a meeting, as the case may be, shall, after hearing the objection and making any inquiry which they may deem necessary record an order withdrawing, modifying or making absolute the order against which the objection is preferred. This section further provides that if this order does not withdraw the requisition, further time shall be specified within which it shall be carried out. Section 180 gives the Commissioners power to execute the work or do anything if it is not done within the time specified in the requisition by the person required to do it. They can act under this section without applying to the Magistrate under s. 202. But by proceeding under this latter section, if they obtain an order from the Magistrate, they are protected from a suit in the Civil Court by the provisions of s. 205. Apart from the authority we have cited above we should hold that the Legislature could never have intended to enable a Magistrate to deprive a person of his right to a civil action for acts done by the Commissioners in excess of their powers except by a judicial order passed after hearing the parties concerned.

From the papers before us it does not appear that any objection was preferred by Babu Purna Chandra Mukerji under s. 176. The learned Advocate who appears on his behalf informs us that such an objection was preferred and that he has a copy of this objection in his brief. If this is so we do not understand why no objection was taken to the whole proceedings on the ground that this objection has not been determined according to law. The Vice-Chairman in his letter of the 23rd June makes no reference to any order under s. 178. But if such an order had been passed, making absolute the original requisition of the 2nd June, it would be necessary for the Vice Chairman to inform the Magistrate that there had been a failure to comply with the requisition within the time extended by the order absolute.

For the above reasons we accept this Reference. We hold that the orders passed by the District Magistrate of Nadia both on the 27th June and on the 20th October 1924, were illegal orders since the Magistrate did not act judicially in that he passed these orders without giving the parties concerned an opportunity of being heard. We set aside these orders and direct the Magistrate to hear the parties concerned and after making such enquiry as may be necessary decide whether he should make an order directing that the wall be removed.

Z. K. *Reference accepted.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 603 OF 1924.
November 25, 1924.
Present:—Mr. Justice Das.

KISHORE AHIR AND OTHERS—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Security proceedings—Opposing factions, whether can be proceeded against in one proceeding.

The two opposing parties to a dispute cannot be proceeded against under s. 107 of the Cr. P. C. in one proceeding.

Criminal revision from a decision of the Sessions Judge, Shahabad, dated the 9th September 1924, modifying that of the Sub-Divisional Magistrate, Buxar, dated the 31st July 1924.

Mr. *P. C. Rai*, for the Petitioners.

JUDGMENT.—This application must succeed on the short ground that there was no power in the Magistrate to draw one proceeding against two different factions. The order of the learned Magistrate shows that he tried 53 men belonging to two different factions in a proceeding under s. 107 of the Cr. P. C. It has been held in *Kamal Narain Chowdhry* v. *Emperor* (1), that the two opposing parties in a dispute cannot be proceeded against under s. 107, Cr. P. C., in one proceeding. In accordance with this decision I allow the application and set aside the order of the learned Magistrate.

Z. K. *Order set aside.*

(1) 11 C. W. N. 472; 5 C. L. J. 231; 5 Cr. L. J. 197.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 1144 OF 1921.

April 10, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

ANWAR-UL-HAQ AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NAZAR ABBAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144, O. XXII, r. 4—Appeal—Death of respondent—Substitution, absence of—Appeal decreed, effect of—Restitution—Objection to appellate decree, whether can be taken.

A decree obtained against a dead person is a nullity, and objection to the nature of the decree may be taken in execution proceedings.

A joint decree for possession of a house was passed in favour of two plaintiffs and they obtained possession of the house in execution. An appeal was preferred by the judgment-debtor and the decree was reversed in appeal. The defendant applied under s. 144, C. P. C., for restoration of possession of the house. It was objected on behalf of one of the plaintiffs that the other plaintiff had died before the decree of the Trial Court had been reversed by the Appellate Court and that the decree of the Appellate Court was, therefore, a nullity:

Held, (1) that the decree of the Appellate Court having been obtained against a dead person was a nullity so far as the deceased plaintiff was concerned;

(2) that the decree of the Trial Court being a joint decree in favour of both the plaintiffs, and that the appeal having abated against one of them could not have been decreed against the other;

(3) that, consequently, the decree of the Trial Court in favour of the plaintiffs still stood and that the Executing Court could not restore to the defendant possession of the house which had been given to the plaintiffs in execution of their decree.

Appeal from an order of the District Judge, Ambala, dated the 16th February 1921, affirming that of the Munsif, First Class, Ambala, dated the 16th October 1920.

Mr. *Durga Das*, for the Appellant.

Mr. *Barkat Ali*, for the Respondents.

JUDGMENT.—The present appeal arises out of an order passed in execution proceedings. Anwar-ul-Haq and Ishtiaq Hussain, minors, sued for possession of a house as vendees and got a joint decree from the lower Courts. This decree was set aside by the High Court, and the suit was dismissed on the 2nd March 1920. Before that time the decree-holders had got possession of the house in execution proceedings on the 29th April 1919. Ishtiaq Hussain died on the 21st May 1919. The appeal was filed in the High Court on the 14th June 1919, Ishtiaq Hussain deceased being made a party. Prior to judgment in the High Court no application was made to bring the legal representatives of Ishtiaq Hussain on the record and the decree was passed in ignorance of the fact that he had died. Subsequently Anwar-ul-Haq applied to the High Court for review of judgment, but the application was dismissed, Chevis, Acting, C. J., remarking that whether the decree of the High Court could be executed or not was a matter that had to be settled in execution proceedings. The original defendants having made an application in the Execution Court for restoration of possession of the house, the lower Courts have concurred in ordering the possession to be restored to them holding that they cannot go behind the decree of the High Court.

Anwar-ul-Haq and the representatives of Ishtiaq Hussain have filed a second appeal in this Court, and it is contended on their behalf that the decree of the High Court, setting aside the decree of the lower Courts and dismissing the plaintiffs' suit, is a nullity because at the time when it was passed Ishtiaq Hussain was dead and his legal representatives had not been brought upon the record. Counsel referred, *inter alia*, to the cases of *Balaram Pal* v. *Kanysha Majhi* (1), *American Baptist Foreign Mission Society* v. *Ammalanadhuni* (2), *Janardhan* v. *Ramchandra* (3), *Sripat Narain Rai* v. *Tirbeni Misra* (4), *Imam Uddin* v. *Sadarat Rai* (5) and *Bhai Nihal Singh* v. *Chait Singh* (6), wherein it was held that a decree passed against a dead person is a nullity. In *Bhai Nihal Singh* v. *Chait Singh* (6), it was held that no appeal lay from such a decree, and that the proper course for the representatives of the deceased person was to treat the decree passed against him as a nullity and to object in execution proceedings. No authority contrary to these has been cited by Counsel for the respondents, and in accordance with them we hold that the decree passed against Ishtiaq Hussain by the High Court on the 2nd March 1920 is a nullity. The decree in favour of Anwar-ul-Haq and Ishtiaq Hussain was a joint decree and the appeal in the High Court could not proceed against Anwar-ul-Haq alone after the death

(1) 53 Ind. Cas. 548.
(2) 48 Ind. Cas. 859.
(3) 26 B. 317; 4 Bom. L. R. 23.
(4) 45 Ind. Cas. 21: 40 A. 423; 16 A. L. J. 327.
(5) 5 Ind. Cas. 897; 7 A. L. J. 228: 32 A. 301.
(6) 31 P. R. 1886.

of Ishtiaq Hussain without bringing the legal representatives of the latter on the record. The abatement of the appeal against Ishtiaq Hussain involves, therefore, the abatement of the appeal as a whole.

Under these circumstances the decree of the lower Courts in favour of Anwar-ul-Haq and Ishtiaq Hussain still stands and the Executing Court cannot restore to the other party possession of the house which was given to them in execution of their decree.

We, therefore, accept the appeal and setting aside the order of the lower Courts reject the application of Nazar Abbas and others for restoration of possession of the house in dispute, and we direct that they should bear the appellants' costs throughout.

P. B. A. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 94 OF 1923.

January 12, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Rankin.

BHUBAN MOHAN GHOSE—DEFENDANT—APPELLANT

versus

CO-OPERATIVE HINDUSTAN BANK, LD., AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. I, r. 3, O. XLI, r. 22—Transfer of Property Act (IV of 1882), s. 59—Registration Act (XVI of 1908), s. 17—Mortgage suit—Adverse claim of person not privy to mortgage, whether can be determined—Misjoinder—Irregularity—Appeal—Decree, whether can be set aside—Appeal filed by one defendant—Cross-objections by co-defendant, whether can be entertained—Equitable mortgage—Registration, whether necessary.

A suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagee are sought to be investigated, is open to objection on account of misjoinder and inconvenience. The question, however, is not one of jurisdiction and at most the misjoinder is an irregularity or inconvenience, and where there has been no prejudice by reason of the misjoinder the irregularity, if any, is not such as would justify an Appellate Court in setting aside the decree. [p. 869, col. 1.]

Where a decree is passed against two defendants, the interest of one of whom is adverse to the other, and one of them files an appeal against the decree the mere fact that in his appeal he urges grounds which support the claim of the other defendant, does not disentitle the latter from filing cross-objections to the appeal putting forward grounds in support of his own claim. Such cross-objections are properly filed under r. 22 of O. XLI of the C. P. C. and must be entertained. [p. 869, cols. 1 & 2.]

A certain sum of money was advanced by a Bank to a debtor for the purchase of certain property on the understanding that when the property was purchased it would be utilized as additional security for the Bank's advances. In pursuance of this arrangement the title-deed of the property after it was purchased was handed over to the Manager of the Bank and the debtor also gave a letter to the Manager containing a record of the agreement which had been made between the parties:

Held, that the letter did not constitute the bargain between the parties being merely the record of a transaction which had already been completed and that consequently, it did not require registration and was admissible in evidence to prove the transaction. [p. 868, col. 2.]

Appeal against the judgment of Mr. Justice Pearson, dated the 10th April 1923.

Messrs. *L. P. E. Pugh* and *B. Basu*, for the Appellant.

Messrs. *Langford James* and *A. K. Roy*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is a cross-objection filed under O. XLI, r. 22 of the C. P. C., by Srimati Susila Bala Dasi who is the wife of Bhuban Mohan Ghose.

The suit was brought against Surendra Nath Pramanick and Bhuban Mohan Ghose carrying on business under the name, style and Firm of "Eastern Trading and Engineering Co."

The third defendant was Srimati Susila Bala Dasi, and the fourth was Priag Das-Jamuna Das, who are alleged to be puisne mortgagees.

One of the allegations of the plaintiff Bank was that premises No. 56, Amherst Row, had been mortgaged to the plaintiffs by deposit of the title-deed as additional security for the amount owing to the Bank on an account called "O" which the defendants Nos. 1 and 2 had with the Bank.

Bhuban Mohan Ghose and his wife Susila Bala Dasi alleged in their written statements that these premises belonged to Susila; on the other hand, the plaintiffs alleged that Susila was merely the *benamidar* of defendants Nos. 1 and 2.

The learned Judge held that the premises were the property of the firm, *i. e.*, of the defendants Nos. 1 and 2 and that Susila was merely the *benamidar* in respect of the said premises. He gave a declaration that the Bank was entitled to a charge on the said premises; and he directed accounts to be taken, and in default of payment of

the amount found due he directed a sale of the premises.

There were other questions decided in the suit, but the cross-objection relates to 56, Amherst Row, only.

Judgment was given on the 10th of April 1923 and, on the 16th of June 1923, Bhuban Mohan Ghose filed an appeal against the said judgment.

On the 25th of June Susila applied for leave to file a memorandum of appeal. It appears that the time for filing the appeal had expired, and her application was refused

On the 3rd of July Susila is alleged to have been served with notice of her husband Bhuban Mohan Ghose's appeal; and, on the 1st of August she filed the cross-objection which is the subject-matter of this appeal.

On the 20th of August 1923 Bhuban Mohan Ghose applied for extension of time to file the paper-book. He was allowed two months' further time, but he was directed to furnish security to the extent of Rs. 1,500 on or before the 14th of September 1923. This security was not given, with the result that on the 11th of March 1924 Bhuban Mohan Ghose's appeal was dismissed for default.

Susila Bala obtained leave to print the paper-book and to proceed with her cross-objection but this was subject to any objection which might be taken at the hearing.

The learned Counsel for the Bank took a preliminary point that the objection of Susila was not a cross-objection within the meaning of the above-mentioned rule and urged that the objection should not be entertained by this Court. After hearing the arguments on the preliminary point, my learned brother and I decided to hear the objection of Susila on its merits and we postponed our decision on the preliminary point. I propose to deal with the merits in the first instance. The first point made by the learned Counsel, who appeared for Susila, was that assuming that the premises No. 56, Amherst Row, were the property of the defendants Nos. 1 and 2, there was no valid mortgage. He argued that when the title-deed was deposited by Bhuban Mohan Ghose with the Manager of the Bank, a letter dated the 31st October 1918 was given by Bhuban Mohan Ghose to the Manager, which constituted the bargain between the parties, that it was not registered under the Indian Registration Act and consequently it was not admissible in evidence and that no oral proof of the mortgage was admissible.

The learned Judge held that registration was not necessary because it could not be said that it was the letter of 31st October 1918 and nothing else that created the charge: he based this decision on the evidence of the Bank Manager which he accepted as truthful and reliable evidence.

The principle which is applicable to this point was stated by Lord Carson in *Subramonian* v. *Lutchman* (1). After examining the authorities relating to the matter, Lord Carson is reported to have said as follows: "Applying the principles thus laid down to the present case, what this Board has to determine is, did the document of 15th July 1908, constitute the bargain between the parties, or was it merely the record of an already completed transaction?" In my judgment that is the test which should be applied to the question involved in this case. The effect of the evidence of the Manager of the plaintiff Bank is that Bhuban Mohan Ghose told him that he was purchasing the property, 56, Amherst Row, for the firm, that Bhuban Mohan Ghose asked him to assist by advancing the money necessary for the purchase, and that when the property was purchased it would be used as additional security to the Bank for the advances made by the Bank to the defendants Nos. 1 and 2.

This happened in August 1918. Accordingly the money was advanced to the extent of about Rs. 12,000 on the understanding that it would be used for the purchase of the property and that the property would be given as an additional security to the Bank.

The property was in fact purchased in August 1918.

On the 31st October 1918 the Manager of the Bank was in the office of Bhuban Mohan Ghose, and I have no doubt that the object of the visit was to obtain the title-deed of the premises No. 56, Amherst Row. On that day Bhuban Mohan Ghose handed the conveyance to the Bank Manager.

The Bank Manager was examined as to what happened on that occasion, several

(1) 71 Ind. Cas. 650; 50 C. 338 at p. 345; 28 C. W. N. 1; (1923) A. I. R. (P. C.) 50; 44 M. L. J. 602; 52 M. L. T. 184; 25 Bom. L. R. 582; 1 R. 66; 2 Bur. L. J. 25; 38 C. L. J. 41; 18 L. W. 416; (1923) M. W. N. 762; 50 I. A. 77 (P. C.).

answers were obtained to questions of a leading character.

Eventually he was asked to state what happened on that date. His evidence was as follows:—

"*Q.*—Tell me what happened on the date on which this letter was made over to you and the title-deeds were handed over?

"*A.*—He handed over the title-deeds to me and I wanted from him a letter. I said you must give me a letter to say that this deposit is an equitable mortgage, and he sent this letter to me.

"*Q.*—The Court:—How long after the handing over to you of the document was the letter given to you?

"*A.*—It may have been on the same day or a day or two after this was brought to me. This was to be brought to me from time to time and whenever required he would hand over the document to me, and that day he handed it over to me, but whether it was on the same or a day or two after that, I do not exactly remember."

Again in cross-objection the Manager was asked.

"*Q.*—Until a letter was given you considered there would be no valid mortgage? Why not?

"*A.*—I knew it was the firm's property.

The money was taken from me on the understanding that the property would be purchased for the firm and I would get that property as security. Bhuban told me that distinctly many times.

"*Q.*—At this interview did you tell Bhuban that according to Bank's laws a married woman's property could not be taken as security unless she has fully explained the nature of the security and the consequence thereof?

"*A.*—There was no such talk. He only laughed at me when I wanted his wife's letter.

"*Q.*—Who drafted this letter which was signed by Bhuban, this letter of 31st October 1918?

"*A.*—I do not remember. I do not think I did. I only gave general directions as to what should be mentioned in that letter.

"*Q.*—You were satisfied that the letter was in order?

"*A.*—I got that letter from him subsequently and I kept it in the safe. I did not carefully go into it. I thought it was all right."

It, therefore, appears to me on the evidence of the Bank Manager, which the learned Judge accepted and the truth of which has not been seriously attacked in this Court, that the money was advanced in August 1918 by the Bank on the understanding that the property would be purchased by the firm of the defendants Nos. 1 and 2 and that when purchased the property would be utilized as additional security for the Bank's advances. It was in pursuance of this arrangement that the title-deed was handed to the Bank Manager on the 31st October 1918 by Bhuban Mohan Ghose. There was no record of the arrangement which had been made and it was, therefore, only reasonable that the Bank Manager should ask for a letter from Bhuban Mohan Ghose.

Consequently the letter of the 31st October 1918 was given as a record of the agreement which had been made.

The wording of the letter is not only consistent with but, in my opinion, supports this view.

The phrase "we beg hereby to keep with your Bank" seems to point to the fact that the deed had already been placed in the hands of the Bank, and the letter was written for the purposes of stating the object for which the Bank was entitled to keep the same.

The fact that the Bank Manager subsequently drafted a letter which he desired Susila to sign does not, in my judgment, militate against this view.

The Bank Manager said that he came to know that the conveyance was in the name of Susila when he received it on the 31st October 1918, and the Manager, when he discovered this, naturally desired a letter from Susila; he stated: "Though he said it was the firm's property, yet I thought it safe to have his wife's permission in writing."

I understand from this that he was told the property belonged to the firm but the property appeared to be in the name of Susila. Consequently, *ex majore cautela* he desired a letter from Susila. The result is that, in my opinion, the letter of the 31st October 1918 did not constitute the bargain between the parties: on the contrary, it was merely the record of a transaction which had already been completed. Consequently, oral evidence of the transaction was admissible.

The next point relied upon by the learned Counsel for Susila was that she should not have been made a party to the suit and

that the suit should have been dismissed as against her.

It was argued that the only proper parties to a suit on a mortgage in which the prayer is amongst other things for a sale, are the mortgagor and mortgagee and any parties who may have acquired an interest from them subsequently to the mortgage, and that no adverse party who is a stranger to the mortgage should be joined as a party to the suit or, in other words, that the only proper parties to such a suit are persons interested in the equity of redemption.

Speaking generally, it may be said that a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagee are sought to be investigated, is open to objection on the ground of mis-joinder and inconvenience: see *Radha Kunwar* v. *Reoti Singh* (2).

The question, however, is not one of jurisdiction, and at most the mis-joinder is an irregularity or inconvenience; in this case the plaintiffs' case was that the mortgage was made by Bhuban Mohan Ghose on behalf of the firm and that Susila was merely the *benamdar* and consequently she was joined as a party. That question was investigated in the suit. Evidence was called in respect thereof and the learned Judge found that the plaintiffs' case was true. I am not satisfied that on the facts of this case it was improper for the plaintiffs to join Susila as a party. Assuming, however, for the moment that it was irregular for the plaintiffs to join Susila as a party to the suit, it is clear that she has not suffered any prejudice by reason of the course which was adopted. In my judgment the irregularity, if any, is not such as would justify this Court in setting aside the decree. The learned Judge on the facts came to the conclusion that the premises were the property of the firm and that Susila was merely the *benamdar*. I see no reason for disagreeing with the learned Judge in this respect.

The result is that I am of opinion that this appeal should be dismissed.

In view of the conclusion, at which I have arrived on the merits of the objections raised by Susila, it is not necessary to give any decision on the preliminary point raised by the learned Counsel for the plaintiff Bank. It is sufficient for me to say that as at present advised and without deciding the question, I am not satisfied that the objection of Susila was one which ought not to be entertained and adjudicated upon by the Court. For the above reasons, in my judgment, the cross-objection of Susila must be dismissed with costs.

Rankin, J.—I propose to deal first with the question whether the cross-objection taken by Susila ought to be entertained on the merits.

Mr. Langford James for the respondent Bank contends that her objections are not cross-objections, that they are directed solely against the plaintiffs and that they repeat Bhuban's own grounds of appeal. He says that Susila should have filed her own independent appeal in time and that to allow her cross-objections in this case is to defeat the limitation law. He relies upon the principle deduced from certain decided cases that cross-objections as between respondents are not as a rule admissible. It appears to me that the difficulty on this part of the case arises entirely because Bhuban in his grounds of appeal made a certain number of complaints against the judgment of the learned Judge which did not lie in his own mouth at all. He complained that the interest of Susila had been held to belong to himself or to his firm. He complained that the property of Susila was being taken from her to the extent of the mortgage notwithstanding she had never authorized the mortgage and he complained further that it was being taken from her although the mortgage was void for want of registration of the memorandum.

Now one can understand that a man has an interest to object to a declaration that he has mortgaged his wife's property without her permission, but the judgment of the learned Judge in this case was given in the presence both of Bhuban and of Susila. If the judgment stands, Susila could never sue her husband on the ground that he had in fraud of her intermeddled with her property. Accordingly, on this part of the case most of the grounds of Bhuban's appeal were grounds which might be good or bad in the mouth of Susila

(2) 35 Ind. Cas. 939; 20 C. W. N. 1279; 14 A. L. J. 1002; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 38 A. 488; 5 L. W. 456 (P. C.).

but which on the face of them had nothing really to do with him.

Now, it is quite plain that the rights of Susila, whatever they may be, cannot be taken from her because her husband has wrongly chosen to fight her case as well as his own. She must be entitled to fight her own case. Looking at it from that point of view one has to ask oneself whether Susila's cross-objections are really objections directed against Bhuban. In my opinion, whatever Bhuban may admit and whatever Bhuban may assert, Susila's contentions that the property was hers and not Bhuban's and that if Bhuban mortgaged it at all he did it without her authority—these contentions are contentions adverse to Bhuban's interest. They may not be contrary to what Bhuban says; but the learned Judge has disbelieved both Bhuban and Susila altogether. Seeing that her claim in this appeal to substantiate that the property was hers and that she never authorized a mortgage is a claim to have that established as against Bhuban as well as against the plaintiff Bank, it appears to me that the cross-objections are cross-objections in the full sense of the word. She is establishing or seeking to establish a right of her own adverse to Bhuban's right. That fact has consequences as against the plaintiff-respondent. But this is not a purely lateral cross-objection between the respondents in which the appellant is not interested.

For these reasons it appears to me that the case does not come within the decisions which say that in the case of a purely lateral objection as a rule the Court will not permit it to be urged. I think, therefore, that Mr. Langford James' preliminary point fails.

The next question is whether or not this suit was bad for mis-joinder of causes of action and cannot be entertained. It appears to me that there is a certain danger, in dealing with the decided cases, of omitting to notice that the form of this question has been very greatly changed since the case most relied upon before us was decided. I refer to the case of *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (3). It is the leading authority in this Court upon this subject. The case was decided in 1906 and the case proceeded upon the Code of 1882 and upon certain prior decisions in the Privy Council and elsewhere. In 1896 a change was made in O. XVI, r. 1 of the Rules of the English Supreme Court. It was made as a consequence of a decision in the House of Lords in *Smurthwaite* v *Hannay* (4) [compare also *Sadler* v. *Great Western Railway* (5).] In the English Rules as in the present Code, there is one order dealing with joinder of parties—O. XVI. There is another order dealing with joinder of causes of action—O. XVIII. The change was made by inserting certain words into O. XVI and, I do not think, it can be said to have been well-settled that the change enlarges the right to join causes of action until the decision in *Bullock* v. *London General Omnibus Co.* (6). It was followed by the case of *Compania Sansinena* v. *Houlder* (7).

It is now, however, well-settled that the change in O. XVI, r. 1 does extend to enlarge the right to join causes of action. In England as regards defendants r. 4 of O. XVI was not dealt with, but by course of decisions it is now established that the change in r. 1 impliedly makes a corresponding change in r. 4. That took a considerable further time to establish, but the authority for that may be seen in such a decision as *Thomas* v. *Moore* (8).

Now, until 1908 the law in India under the Code of 1882 was the old law of *Smurthwaite* v. *Hannay* (4), but in 1908 the Legislature not only carried into effect the English change of 1896 by altering the words of what is now r. 1 of O. I but it carried into effect also an express alteration of r. 3 of O. I applying the change specifically to defendants Rule 3 now reads: "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction is alleged to exist, whether jointly, severally, or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise."

It may be observed that when the Code

(3) 33 C. 425; 3 C. L. J. 205.

(4) (1894) A. C. 494; 63 L. J. Q. B. 737; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485.

(5) (1896) A. C. 450; 65 L. J. Q. B. 462; 74 L. T. 561; 45 W. R. 51.

(6) (1907) 1 K. B. 264; 76 L. J. K. B. 127; 95 L. T. 905; 23 T. L. R. 62.

(7) (1910) 2 K. B. 354; 79 L. J. K. B. 1094; 103 L. T. 333.

(8) (1918) 1 K. B. 555; 87 L. J. K. B. 577; 118 L. T. 298.

intends that certain causes of action should not be joined at all or except with special leave, it says so. Certain causes of action cannot be joined with suits to recover immoveable property. There is another Rule precluding the joinder of causes of action against an executor, but there is no such Rule in the case of mortgage suits.

There is further in O. XXXIV, r. 1, a revised edition of what used to be s. 85 of the Transfer of Property Act and that rule is to the effect—"All persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage." The old phrase in s. 85 having any interest in the property comprised in a mortgage gave rise to considerable difficulty and was altered in 1908. Whether one is dealing with s. 85 or with O. XXXIV (1)—the purpose of the Rule is to state what parties are necessary parties in a pure mortgage suit and the Rule is in no way directed to the question whether any causes of action may be joined with a claim upon a mortgage or, if so, in what circumstances.

I would like here to make a parenthetical observation. In a case such as the present the plaintiffs' cause of action against Susila was not in substance or otherwise a cause of action in ejectment. They had no claim and they made no claim to possession of the property. So far as the plaintiffs were concerned, they were bound to suppose that if they got a mortgage-decree Susila or her husband or any body else interested in the equity of redemption might very well pay off the mortgage, in which case the plaintiffs never would have a claim to possession either by themselves or through any auction-purchaser taking under a sale in their suit.

These matters being premised, it seems to me that the present case must be governed not by the old Rules of the old Court of Chancery but by the Code. It seems to me further that the case for the present purpose is highly exceptional. I am not going into the facts, but the question whether a mortgage had been concluded or not was in that case inextricably bound up with the question of *benami*. It was also bound up with the question whether or not Bhuban was a partner of Surendra. That question of partnership in turn affects the question whether the property was given by Bhuban to his wife. In turn that affects the question whether or not the document of the 31st October was itself the repository of the agreement to mortgage or was a mere record of a completed transaction. If in this case the plaintiffs had sued upon their mortgage raising no question of Susila's title to the property and if afterwards they brought a suit for a declaration that she was a mere *benamdar* and that her interest was bound by the mortgage, not one but several identical questions of fact would have had to be litigated twice. The mortgage in this case, if Susila was not a *benamdar*, was in everybody's view a pure nullity. It was suggested at the Bar that the proper course was to bring a simple mortgage suit, sell the interest of the plaintiffs (which might very well be nothing) under the decree, and then let the auction-purchaser litigate with Susila the question of her title. Whatever is right or wrong, that undoubtedly would have been calamitous. The only possible way to ensure that the property should not be wasted from the point of view of the mortgagors and the mortgagees would have been to bring a declaratory suit against Susila to a conclusion before this mortgage interest was sold. In these circumstances and these being the provisions of the law as to joinder it appears to me that the correct view in this matter is to ask whether the case does or does not come under r. 3, of O. I. However, painful it may be to old fashioned equity lawyers to find causes of action lying together in one suit, if such a case comes under O. I, r. 3, it cannot be held to be incompetent. In my opinion, the case is very plainly within O. I, r 3. If there were any objection on the ground of convenience, it must be observed that this case was tried in the High Court and not before a Munsif, with the apparatus of settlement of issues at the first hearing. Susila could, either before the filing of the written statement or immediately after have applied to the Judge under O. II, r. 6 to have a separate trial if she wanted to make that application. As I understand what she did she acted just as if the case was being tried in the *mofussil*. She took the ground of mis-joinder in her written statement and the matter only came before the learned Judge when the parties were prepared for trial. The point was taken not as a point of convenience under O. II, r. 6, but as a point of law which the learned Judge as a matter of procedure was bound to give effect to. The learned Judge rejected that argument as I think correctly. He was satisfied

that there was no reason or prejudice to Susila in the course of the trial, and rightly did not regard the joinder of the causes of action in the circumstances of this case as incompetent.

After discussing English cases and American cases Mr. Justice Mookerjee in the case of *Juggeswar Dutt* v. *Bhuban Mohan Mitra* (3) gives two sets of reasons as the basis of his judgment. He says: "In our opinion the rule is founded on two broad and intelligible grounds. In the first place it is based on the reason that a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and mortgagee, are sought to be investigated, is open to objection on the ground of mis-joinder and multifariousness. Under ss. 44 and 45 of our C. P. C., there cannot be joinder of causes of action of this description" Subsequently the Legislature has taken that ground away. "In the second place", says the learned Judge, "if adverse claims be allowed to be litigated in a mortgage suit, such claims may obviously be determined by a Court, which would have no jurisdiction to entertain a suit for their determination, if properly framed. The valuation of a suit to enforce a mortgage is dependent upon the amount claimed by the plaintiff, which may obviously have no relation to the value of the property in respect of which an adverse claim is set up," and he gives illustrations to show that there would be difficulty in these circumstances. The present case was tried on the Original Side where there is no question of valuation and no question of Court-fee. The property was a property situated within the jurisdiction of the Original Side and there is under the second ground mentioned by Mr. Justice Mookerjee no difficulty at all in the present case. I would point out, however, that the position in such a case as the present is not simply that of an ordinary mortgage claim. The plaintiffs in effect sought against Susila a declaration that she was only a *benamdar*. They got such a declaration. Under s. 17 of the Court Fees Act you can join two or more things as far as the Code allows: and, the amount of fees will be the accumulated amount you have to pay for each cause of action. Under the Suits Valuation Act in case of a declaration where there is no right to consequential relief, it would appear that the case is not one where the charge is *ad valorem* and consequently, the matter is governed by s. 9 which allows the High Court to make rules. It is quite clear that a cause of action cannot be joined unless the Court has jurisdiction to deal with it. I see no special difficulty or complication when we come to join a cause of action in a mortgage suit as distinct from any other suit. For these reasons I do not think that the objection as to mis-joinder requires us to allow the present appeal. I must not, however, be understood to throw doubt upon the need for a high degree of caution before permitting questions of paramount title to be investigated in a mortgage suit. Both as to competence and convenience there will generally be much to consider.

Reference has been made to the case of *Radha Kunwar* v. *Reoti Singh* (2). There the observation is that the adverse claim was entirely independent of the mortgage transactions. Their Lordships stated that they thought that the joinder of these parties was irregular and that it would only tend to confuse. I only desire to observe that if we look at the terms of O. I, r. 3, we find that joinder is not always permitted where a right to relief arises out of the same transaction: there is a further condition, namely, "where if a separate suit were brought against such a person any common question of law or fact would arise." It appears to me that the *dictum* with reference to the case of *Radha Kunwar* v. *Reoti Singh* (2) affords no justification for refusing to apply the terms of O. I, r. 3.

As regards the question of registration of the document of 31st October I entirely agree with the judgment of the learned Chief Justice and have nothing to add.

Z. K. *Cross-objection dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 45 OF 1924.

March 3, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

ATA MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHANKAR DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17 (1) (d), 49—Evidence Act (I of 1872), s 116—Lease fixing yearly

rent, whether requires registration—Possession, nature of, determination of—Lease, unregistered, whether may be referred to—Landlord and tenant—Estoppel.

A lease which fixes a yearly rent payable every six months, requires registration under s. 17 (1) (*d*) of the Registration Act. [p. 873, col. 2.]

An unregistered lease which requires registration, although inadmissible in evidence under s. 49 of the Registration Act, may be referred to in order to determine the nature of the defendant's possession, and where the lease shows that the possession is that of a tenant under the plaintiff, neither the defendant nor persons claiming through him can be permitted to deny the title of the plaintiff under s. 116 of the Evidence Act. [p. 874, cols. 1 & 2.]

Varada Pillai v. *Jeevarathnammal*, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.) and *Qadar Bakhsh* v. *Mangha Mal*, 73 Ind. Cas. 889; 4 L. 249; 5 L. L. J. 175; (1923) A. I. R. (L.) 495; 5 L. L. J. 555, followed.

Letters Patent Appeal against the judgment of Mr. Justice LeRossignol, dated the 23rd January 1924.

Sheikh *Niaz Muhammad*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The plaintiff-respondent sued the four defendants for possession of a house, alleging that he had leased it to Hamukhan, defendant No. 1, as his tenant, in 1901 and that he had subsequently executed other leases. He sued for possession on the ground that defendant No. 1 failed to pay rent for three years and refused to vacate the house. Defendants Nos. 2 to 4 were made parties on the allegation that they were in possession claiming as vendees of defendant No. 1.

Defendant No. 1 pleaded that he had always been in possession of the house, and that he had mortgaged only one room to the plaintiff, and that subsequently the mortgage had almost completely been redeemed. Several leases were produced, and there was a question whether they were admissible in evidence or not. The learned District Judge held that they were admissible in evidence, and that plaintiff had proved defendant No. 1 as his tenant. The claim was accordingly decreed.

Defendants Nos. 2 to 4 filed a second appeal in this Court, which was heard by a Judge in Chambers. The latter held that there was one lease at all events of 1909 which did not require registration, and was, therefore, admissible in evidence. As this lease was admissible in evidence, he was of opinion that the finding of the Courts below, based upon that lease, that the relation of landlord and tenant did exist between the plaintiff and Hamukhan, defendant No. 1, was a finding of fact which could not be impeached in second appeal. He, therefore, upheld the order of the lower Courts.

Defendants Nos. 2 to 4 have now filed this appeal under cl. 10 of the Letters Patent.

Lala Fakir Chand raised a preliminary objection that there was no legally filed appeal before the Judge in Chambers as the memorandum of appeal was not accompanied by a copy of the judgment of the First Court, and that, therefore, there could be no appeal under cl. 10 of the Letters Patent. The record shows that there was previously an appeal to this Court from an order of the District Judge refusing to set aside a dismissal in default, and in that appeal a copy of the judgment of the Trial Court was filed. Under the memorandum of appeal which has been decided by the Judge in Chambers there is a note to the effect that the copy of the judgment of the Trial Court is filed with that of the previous appeal. No objection was taken as to the absence of the copy of this judgment before the Judge in Chambers, and, therefore, it cannot be taken now. All that we have to see is whether the judgment now appealed from is right or not.

The Judge in Chambers stated in his judgment as follows:—

"The lease is for one year and not for more than one year. It fixes the rent at Rs. 1-12-0 per annum, but it provides that the rent shall be payable in six-monthly instalments, and it further provides for ejectment if the rent is not paid at the end of the year. In my opinion, this is not a lease reserving an annual rent. If a lease is for an indefinite time and fixes a a rent payable per annum, in such a case the lease would be one falling within the definition of lease reserving a yearly rent."

Now the lease does fix Rs. 1-8-0 and not Rs. 1-12-0 as the annual rent, though it goes on to say that the rent shall be payable half yearly. This, however, does not alter the fact that the lease does reserve a yearly rent. Moreover, it does not appear that it was only for one year. It was for an indefinite time so long as the rent was paid at the end of each year. As the lease fixes a yearly rent, we consider that its registration was obligatory under s. 17 of the Registration Act.

It has, however, been contended by Counsel for the respondent that the question

of registration or non-registration loses force by reason of the decision of their Lordships of the Privy Council in the case of *Varada Pillai* v. *Jeevarathnammal* (1). In that case certain documents were put forward as proving a gift in favour of one *Musammat* Duraisani. Their Lordships held that, although the petitions and order produced in evidence did not amount to a gift of the land, they led to the inference that the subsequent receipt of the rents by *Musammat* Duraisani was a receipt in the character of donee and owner of the land and, therefore, in her own right and not as trustee or manager for her mother and aunt. They also said that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions were not admissible to prove a gift, they might nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani.

Having regard to this decision it is urged by Lala Fakir Chand that the previous decisions laying down that an unregistered deed is inadmissible to prove the nature of the possession are no longer binding. In the case of *Qadar Bakhsh* v. *Mangha Mal* (2), it was held that the sale-deed, though inadmissible for want of registration to prove title, might be referred to in order to ascertain the nature of the possession sought to be disturbed. This and the Privy Council decision are sought to be distinguished on the ground that in those cases the person in possession of the property was allowed to refer to the unregistered deeds in order to show that his possession was adverse and not permissive. It is contended that they do not apply to the case of a plaintiff who seeks to prove that the person in possession entered into possession by his permission and not adversely. We do not think that any such distinction can be drawn. In our opinion the lease of 1909, though unregistered and though inadmissible under s. 49 of the Indian Registration Act, can yet be referred to in order to show the nature of Hamukhan's possession. It shows that Hamukhan's possession was that of a tenant under the plaintiff. This being so neither he nor the appellants who claimed through him can be permitted to deny the title of the landlord, *i. e.* of the plaintiff, having regard to s. 116 of the Indian Evidence Act.

It was also urged on behalf of the appellant that the leases were not shown to refer to the whole house in dispute, and that they might very well refer only to one room as stated by Hamukhan. The word used in the leases, however, is *makan* and not *kothri*, and we, therefore, consider that there is no force in this contention.

The appeal fails, and dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 721; 10 L. W. 679; 24 C W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C,) 64; 22 Bom. L. R. 444; 46 I. A. 285.

(2) 73 Ind. Cas. 889; 4 L. 249; 5 L. L. J. 175; (1923) A. I. R. (L.) 495; 5 L. L. J. 555.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 314 OF 1922.

March 18, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

CHANCHAL MAHTON AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mahanth BHAGWAN GIR—PLAINTIFF AND MR. R. HUDSON AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 116—Landlord and tenant—Lease for term of years—*Raiyat *holding under lessee, position of—Occupancy rights, whether can be acquired—Ejectment—Notice, whether necessary.*

Semble:—A person holding under a lease for a term of years cannot make any contracts of tenancy with *raiyats* except contracts for a term not exceeding the period of his lease. A *raiyat* holding under such a person without any lease must be presumed to be in possession for successive terms of one year under an oral lease. Such a *raiyat* cannot acquire occupancy rights under s. 116 of the Bengal Tenancy Act, nor can he claim the rights of a non-occupancy *raiyat* under any part of the Act. The special Law of Limitation laid down in Sch. III of the Bengal Tenancy Act is not applicable to the case of such a *raiyat* and he is liable to ejectment as a trespasser at the instance of the proprietor on the expiry of the tenancy of his lessor with which his own is co-terminous. [p. 876, col. 1.]

Appeal from a decision of the District Judge, Darbhanga, dated the 2nd December 1921, affirming that of the Munsif, First Court, Darbhanga, dated the 4th July 1918.

Mr. *N. N. Sinha*, for the Appellants.

Messrs. *Anand Prasad* and *B. K. Sinha*, for the Respondents.

JUDGMENT.

Mullick, J.—In 1876 the proprietor, the predecessor of the plaintiff, settled 24 *bighas*, 10 *kathas* of *khudkasht zerait* land with one Teg Ali for a period of nine years and thereafter with the 1st party defendants who are the proprietors of the Jitwarpur Factory by successive leases from 1885 (corresponding to 1293 *F. S.*) down to 1914 to (corresponding to 1321 *F. S.*). In 1322, the plaintiff made a demand for *khas* possession, but no possession was given by the Factory till 1324. Negotiations for a new lease went on during that year and the next year, and finally on the 23rd September 1916 the present suit was lodged for a declaration of title and recovery of possession. It was discovered that the defendants 1st party had caused to be recorded in the survey papers that they were in possession of only 7 *bighas*, 8 *kathas* and 1 *dhur* of *zerait* land, and that the remainder of the land constituted the occupancy *raiyati* holdings of the 2nd party defendants.

The Munsif found that the plaintiff was entitled to recover *khas* possession of the whole 24 *bighas*, 10 *kathas*.

In appeal the District Judge came to the same conclusion.

In second appeal the High Court was of opinion that the District Judge's reasons for holding that the lands were *zerait* were not conclusive and it remanded the whole appeal for re-hearing and decision in accordance with law.

The District Judge has re-heard the appeal and come to the same conclusion as before and the present second appeal is preferred against his judgment of the 2nd December 1921.

The first question is whether the lands in suit are private lands within the meaning of s. 116 of the Bengal Tenancy Act. Section 120 of the Act prescribes what lands the Revenue Officer shall record as proprietor's private lands and it provides that "if any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue Officers." The learned District Judge has upon evidence found that an area of 7 *bighas*, 8 *kathas*, 1 *dhur* is admittedly *zerait*. With regard to the remaining 16 *bighas* odd he has accepted the evidence adduced by the plaintiff. That evidence was to the effect that the proprietor had cultivated it with his own ploughs and bullocks since three or four years before the lease of 1876. In my opinion there was evidence from which the inference could be drawn that the land was private land and the finding of the District Judge cannot be challenged in second appeal.

The next question is, whether the plaintiff has rebutted the entry in the Record of Rights which shows the 2nd party defendants to be occupancy *raiyats* in the 16 *bighas* odd. The District Judge finds by implication that the Record of Rights has been rebutted by the plaintiff who gives evidence that there never was any *raiyat* on these lands. He relies upon the recitals in the leases given to Teg Ali in 1876 and to the predecessor of the 1st party defendants in 1881 which speak of the lands being in the possession of the lessor. He also relies upon the circumstance that no power was given in the lease in favour of Teg Ali to settle *raiyats* on the land. The lease of 1881 in favour of the 1st party defendants is not so clear. It recites that "the lessee by holding possession and occupation and by making and causing to be made proper cultivation of the lease-hold property either by himself growing indigo or other crops or by making settlement with the tenants according to his own choice shall appropriate the proceeds thereof till the term of the lease." The learned Judge apparently construes these words as meaning that the lessee shall arrange for the cultivation of indigo and other crops through agents, and not through persons inducted as *raiyats*. He finds that there was no tenant on the land when the 1st party defendants entered into possession and the case made by the 2nd party that they were in possession from before and that they gave *kurtwali pattas* first of all to Teg Ali and then to the 1st party defendants and put them in possession, cannot be believed. These *kurtwali pattas* came down to the year 1310 and the learned Judge finds that the whole story of the 1st party's acquiring possession from the tenants is false and that the *pattas* were created in order to supply evidence for the Settlement operations. These findings inasmuch as they involve the rebuttal of the Settlement record, would have been sufficient to dispose of the case but the learned Judge adds at the end of his judgment that even if the 2nd party defendants were settled as *raiyats* by the Factory they did not acquire any right of occupancy. It is not clear how he comes to this conclusion. Pos-

sibly his reasoning may be this: the first party were holding under a lease for a term of years and, therefore, they could not make any contracts of tenancy with *raiyats* except contracts for a term not exceeding the period of their lease, no lease registered or unregistered is produced; the tenants, therefore, could only have been in possession for successive terms of one year by oral lease; s. 116 does not permit the accrual of occupancy rights in favour of such tenants and it has been held by the Privy Council in *Jagarnath Das* v. *Janki Singh* (1) that they cannot claim the rights of a non-occupancy *raiyat* under any part of the Bengal Tenancy Act and that the special Law of Limitation in Sch. III of the Act does not apply; therefore the tenants are liable to ejectment as trespassers on the expiry of the tenancy of their lessors with which their own was co-terminous. The mere finding that the lands are the private lands of the proprietor was not sufficient for the disposal of the suit, but possibly the learned Judge's reasoning was as given above.

But the point really does not arise and it is not understood why the learned Judge has discussed a case which has not been made by either party. The case made by the *raiyat* defendants was not that they at any time were inducted into the lands by the Factory but that the lands were their ancient ancestral occupancy holdings. The Munsif does appear to have found that there had been such an attornment at intervals between 1312 and 1322 and that the tenants had become non-occupancy *raiyats* but that as they were not claiming under a lease they were not non-occupancy *raiyats* to whom the period of limitation of six months prescribed for suits for ejectment applied. This was nobody's case and in fact it was destructive of the case made by the 2nd party defendants.

The 1st party have given up the land in their possession and have no further interest in the litigation and the appeal will, therefore, be dismissed with costs against the 2nd party defendants.

Bucknill, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 66 Ind. Cas. 337; 1 Pat. 340; 3 P. L. T 197; 35 C. L. J. 506; 43 M. L. J. 55; 26 C. W. N. 833; (1922) M. W. N. 410; (1922) A. I. R. (P. C.) 142; 31 M. L. T. 231; 49 I. A. 81 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 254 OF 1922.

April 11, 1924.

Present:—Mr. Hallifax, A J. C.

PAGA PATIL—PLAINTIFF—APPELLANT

versus

ISHWARDAS—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Civil Procedure Code (Act V of 1908), s. 102—Suit to recover damages for wrongful act done in respect of immoveable property, nature of —Small Cause—Appeal, second, whether lies.

A suit to recover the value of the loss caused to the plaintiff by the wrongful act of the defendant in respect of immoveable property is not a suit for the profits of immoveable property within the meaning of Art. 31 of Sch. II to the Provincial Small Cause Courts Act. The value claimed by the plaintiff may be more or less than the profits received by the defendant from the immoveable property and it need not necessarily have any relation at all to those profits. The fact that it happens to be the same does not make the suit one for profits. In such a case the defendant may produce his accounts as evidence of the amount of the profits he had received but that is entirely at his option. He may, if he chooses, withhold that evidence and allow the inference to be drawn that if it were put forward it would go against him. Such a suit cannot be called a suit for an account within the meaning of Art. 31 and is, therefore, a suit of a small cause nature and if the value of the suit is less than Rs. 500 no second appeal is competent. [p. 877, cols. 1 & 2.]

In order to bring a suit within the purview of Art. 31 of Sch. II to the Provincial Small Cause Courts Act, the plaintiff must demand an account and the defendant must be bound to render it if the suit succeeds. [p. 877, col. 2.]

Appeal against a decree of the District Judge, Bhandara, dated the 21st February 1922, reversing that of the Second Munsif, Bhandara, dated the 9th of August 1921.

Mr. *N. G. Bose*, R. B., for the Appellant.

Sir *B. K. Bose*, and Messrs. *D. T. Mangalmoorti* and *P. N. Rudra*, for the Respondent.

JUDGMENT.—The plaintiff-appellant is owner of a share in a forest in which *lac* is produced and he held a lease covering the year 1920 for the propagation and collection of *lac* in another share of the same forest from its owner. The defendant-respondent removed *lac* from the whole jungle in October 1920 under colour of a lease of later date than the plaintiff's granted by the *lambardar* of the village in which the forest is situated. The plaintiff accordingly sued for Rs. 500 as representing the loss caused to him by the wrongful removal by the defendant of the *lac* appertaining to his own share and to

the share of which he held a lease, estimating the loss as equal to the part of the value of the *lac* removed by the defendant proportionate to the share in the forest in which the right to the *lac* was his.

In the First Court it was held that the lease granted to the defendant by the *lambardar* was invalid and he was ordered to pay Rs. 60-4-0 to the plaintiff. The finding as to the value of the *lac* extracted from the forest is based on the depositions of four witnesses called by the plaintiff, which are discredited and regarded as exaggerations, and nothing at all on the other side except a bald and very improbable statement by the defendant in his deposition that that was all he got. He failed to produce any account-books in support of his statement. The same view of the incident of the burden of proof, which is shown to be wrong in *Jailalsao* v. *Lal Fatehsingh* (1), was taken in the lower Appellate Court. In that Court, however, it was held that the defendant's right to extract the *lac* was better than the plaintiff's and the suit was dismissed.

In this Court the learned Advocate for the defendant-respondent has taken the preliminary objection that under s. 102 of the C. P. C., no second appeal lies for the reason that the suit was for Rs. 500 only and of the nature cognizable by a Court of Small Causes. This objection must prevail. On the other side it is urged that the suit is "for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant," and is, therefore, excluded from the jurisdiction of the Small Cause Court by Art. 31 of the Schedule of the Provincial Small Cause Courts Act. Even the words quoted are not a correct description of the suit. It is a claim for the payment of the value of the loss caused to the plaintiff by the wrongful act of the defendant in respect of immoveable property. That value may in any case be more or less than the profits received by the defendant from the immoveable property and it need not necessarily have any relation at all to those profits. The fact that it happens to be the same does not make the suit one for profits.

But even if this were a suit for the profits of immoveable property it would still not come within the class of suits mentioned in Art. 31. That is much narrower, as the suit must also be "a suit for an account" that is to say the plaintiff must demand an account and the defendant must be bound to render it if the suit succeeds. In a case like this the defendant may produce his accounts as evidence of the amount of the profits he had received, but that is entirely at his option He may if he chooses withhold that evidence and allow the inference to be drawn that if it were put forward it would go against him; he did so in this case, though both the lower Courts wrongly emitted to draw the proper and somewhat obvious inference from the fact. It seems to me quite impossible to call such a suit one "for an account."

This view of the matter was taken by the Madras High Court in *Ramasami Aiyangar* v. *Govinda Iyer* (2), where it is discussed at greater length, if I may say so with respect, than its complexity seems to me to warrant. On behalf of the appellant I am referred to the Allahabad case of *Drig Pal Singh* v. *Kunjal* (3) in which Muhammad Rafique, J., took the contrary view. From that for the reason already stated I must with deference, dissent especially as I cannot reconcile it with the views consistently expressed by all the other High Courts in India and also by a Division Bench of the Allahabad High Court in *Prasadi Lal* v. *Imdad Husen* (4) though this case was not reported in the Indian Law Reports.

As the suit was for a sum of money not exceeding Rs. 500 and of the nature cognizable by a Court of Small Causes this appeal is forbidden by s. 102 of the C. P. C. and must be dismissed. The appellant will pay all the costs.

Z. K. *Appeal dismissed.*

(1) 75 Ind. Cas. 826; 20 N. L. R. 52; (1924) A. I. R. (N.) 117

(2) 38 Ind Cas. 1; 31 M. L. J. 839; 20 M. L. T. 512; 5 L. W. 443.

(3) 44 Ind. Cas. 689; 40 A. 142; 16 A. L. J. 55.

(4) A. W. N. (1898) 10.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 104 OF 1923.

February 26, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

THE HIMALYA ASSURANCE COY. LTD.—APPLICANTS

versus

MESSRS. ASSUDAMAL HARBHAGWANDAS—OPPONENTS.

Arbitration Act (IX of 1899), s. 12—Arbitration—Power of Court to extend time for making award—Dispute arising out of Policy of Insurance—Tribunal different from one contemplated in policy—Award, validity of.

The Court has power under s. 12 of the Arbitration Act to extend the time for making of an award, even after the expiry of the time originally fixed for making the award.

Where parties agree to submit their disputes under a policy of insurance to arbitration under ordinary reference under the Arbitration Act to a Tribunal different from the one contemplated by the policy, but in itself legal, an award made by such a Tribunal is not in any way bad on that account.

Appeal against an order of Mr. Madgowkar, A. J. C., dated the 18th September 1923.

Mr. *Fatehchand Assudamal*, for the Applicants.

Mr. *Dipchand Chandumal*, for the Opponents.

JUDGMENT.—This was an application by the Himalya Assurance Co., Ld., asking us to revise the order of Mr. Madgowkar, Additional Judicial Commissioner, who directed an award to stand filed. This award has been given by the Umpire Clayton and the matters at issue between the parties, the Himalya Assurance Co., Ld, and Messrs. Assudomal Harbhagwandas refer to a policy issued by the Assurance Co. and a claim under that policy in consequence of a fire which took place on the assured premises.

Two objections are taken to the order of Madgowkar, Additional Judicial Commissioner. In the first place, the arbitration matter took a long time and the arbitrators did not come to any decision and, therefore, sent the matter to the decision of an Umpire. The consequence was that the Umpire failed to give a decision by the 10th of June which was the last date under the circumstances on which he could legally give a decision. He did not apply to the Court, but on the 25th of June himself proceeded to extend time, and owing to the time so extended he gave his award on the 20th of July.

No doubt, as the learned Additional Judicial Commissioner found, the umpire was *functus officio* by the 23rd of June and he could not himself give any award without the intervention of the Court. But it has been held in far more serious cases than this, that the Court has power under s. 12 to extend the time for making of the award whether the time for making the award has expired or not. And under the circumstances of this case, there seems no doubt that the Court, that is to say, Madgowkar, Additional Judicial Commissioner, wisely exercised his discretion in there and then extending the time.

The second objection taken is that the Tribunal which pronounced this award was not that contemplated by cl. 18 of the policy. That may well be the case. Clause 18 of the policy which refers to the means by which the quantum of damages is to be ascertained provides *inter alia* that the umpire and the arbitrators should sit together when the umpire is carrying on his functions. In this case the umpire did not sit with the arbitrators and if he was exercising his jurisdiction under cl. 18 then the Arbitration Tribunal was improperly constituted and its award would be a nullity. But we do not see that the Tribunal who has pronounced the award was the Tribunal constituted under cl. 18 of the policy. There is no reference to cl. 18 of the policy in the reference and the matter is to be decided by the Tribunal constituted by that reference (page 3 in the paper-book) and is considerably more extensive than that which is intended to be disposed of under cl. 18. It might, of course, well have been the case that either party might have said that under cl. 18 it is necessary before any right of action or suit accrues under the policy that the quantum of damage should be ascertained in a particular way and until that is done, we do not intend to proceed to arbitration. But as they did not do that but executed a plain and simple reference under the Indian Arbitration Act which does not require the umpire to sit along with the arbitrators but merely requires that he should be appointed or nominated by the arbitrators before they proceed on the reference, it is clear that the signatories of that reference must be held to have waived their right to refuse to proceed till the quantum of damages was found under cl. 18 and having so waived it, it is now too late to go back and refuse to

be bound by the award of the Tribunal to which they submitted themselves. We think, therefore, the fact that the arbitration proceedings were under the reference before the Tribunal other than that contemplated by cl. 18 of the policy but in itself legal is no ground for holding that the award is, in any way, bad.

That being so we must agree with the order of the learned Additional Judicial Commissioner and dismiss this revision application with costs.

P. B. A. *Revision dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 210 AND 211 OF 1924.

December 4 & 8, 1924.

Present:—Mr. Dalal, J. C., and Mr. Ashworth, A. J. C.

February 10, 1925.

Present:—Mr. Daniels, J. C.

February 26, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

GAJADHAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

LAL BEHARI—PLAINTIFF—RESPONDENT.

Oudh Laws Act (XVIII of 1876), ss. 9, 10—Pre-emption—Co-sharer, meaning of—Notice—"Person concerned," meaning of—Foreclosure of property belonging to joint Hindu family—Member of family not party to suit, whether can pre-empt.

Per *Daniels, J. C.*, and *Ashworth, A. J. C.* (*Dalal, A. J. C.* dissenting):—A member of a Hindu joint family does not acquire a right of pre-emption by reason of a decree for foreclosure of joint family property in which he himself is a co-parcener. [p. 886, col. 2.]

Per *Daniels, J. C.*—No one can pre-empt a sale or foreclosure of his own property. Whatever other property a man may hold he cannot thereby obtain a right to pre-empt a sale or foreclosure by which his own interest in the property is transferred. A person cannot successively occupy the position of vendor and pre-emptor in respect of the same transaction. [p. 886, col. 1.]

The word "co-sharer" in s. 9 of the Oudh Laws Act is used with reference to the ordinary constitution of a village proprietary community where there has been no partition. In such a community the co-proprietors are owners of fractional shares out of the entire proprietary right and are entitled to a proportion of the total assets according to the shares recorded in the *khewat*. But a co-sharer must be some one distinct from the person whose share is foreclosed. A man cannot be a co-sharer with himself. [p. 885, col. 1.]

A co-sharer cannot pre-empt if he denies the title of the person who has sold the property. [*ibid.*]

By s. 10 of the Oudh Laws Act notice is to be given to the "persons concerned," that is, to the persons who are entitled to a right of pre-emption by reason of the sale. Therefore, the question whether a person is entitled to notice depends on whether he has a right of pre-emption or not. [p. 886, col. 1.]

Per *Ashworth, A. J. C.*—An undivided member of a joint Hindu family cannot, apart from the other members of the family, unless he represents the whole family as *karta*, claim to be a co-sharer within the meaning of s. 9 of the Oudh Laws Act. Such an individual member cannot be permitted to claim in the case of a sale of joint family property that he is other than a vendor or co-vendor of the property. [p. 882, col. 2.]

The expression "co-sharer" in s. 9 of the Oudh Laws Act means a juristic person and not merely an individual who collectively with other individuals constitutes a single juristic person. [*ibid.*]

No individual member of a joint Hindu family can claim to be a co-sharer on the basis of joint family property. If, however, he possesses separate property, he can claim to be a co-sharer by virtue of that separate property and in the latter capacity he would be entitled to pre-empt a sale by the family of which he is a member of joint family property. [p. 882, col. 2; p. 883, col. 1.]

Where one or more of the members of a joint Hindu family are recorded in the village papers as co-sharers, the other members not so recorded should be held, by reason of their omission to get their names also recorded to receive notices on behalf of the whole family under s. 10 of the Oudh Laws Act. [p. 884, col. 1.]

Per *Dalal, A. J. C.*—Where a foreclosure decree is passed against joint family property behind the back of some of the members of the family, without their being made parties to the suit and without notice to them, any one of such members would have a right to pre-empt the foreclosure. [p. 882, col. 1.]

In s. 10 of the Oudh Laws Act there is no mention of a constructive notice. Every co-sharer is entitled separately to a notice or the procedure should be adopted of sticking it up on the *chaupal* or other public places of the village in which the property is situated. [*ibid.*]

The right of pre-emption is given even to a member of the village community and it does not stand to reason that the law desired to deprive of the right of pre-emption co-sharers who were owners of property other than the property sold or foreclosed simply on the ground that they happened to have a share in the vended or foreclosed property. [*ibid.*]

(Case-law referred to).

Appeal against a decree of the First Additional District Judge, Barabanki, dated the 31st March 1924, upholding that of the Subordinate Judge, Barabanki, dated the 21st January 1924.

Messrs. *St. G. Jackson* and *G. N. Misra*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.

Dalal, Offg. J. C.—(*December 4, 1924*).—These second appeals were certified by a learned Judge of this Court to be fit for hearing by a Bench, so they have been

heard by a Bench of two Judges of this Court.

The plaintiff Lal Bihari and the two plaintiffs Rajeshuri Dat and Radhika Dat instituted two separate suits for pre-emption on the ground of a foreclosure decree obtained by Gajadhar and others against Ram Bali, Sri Narain and *Musammat* Gangajali, widow of Bikramjit. Ram Bali, Sri Narain and Bikramjit had two brothers, Tirbhuwan Dat and Raj Bahadur. Radhika Dat and Rajeshuri Dat plaintiffs in Suit No. 75 are sons of Tirbhuwan Dat while Lal Bihari plaintiff of Suit No. 74 is the son of Raj Bahadur. Neither the plaintiffs of the two suits, nor their fathers were defendants of the foreclosure decree dated 23rd January 1908. In consequence of that decree Gajadhar Prasad and others took possession of the property in suit. The plaintiffs are admittedly recorded as co-sharers of property in the village Barela other than the property foreclosed. The suit for pre-emption to enforce their right under s. 13 of the Oudh Laws Act (XVIII of 1876) is based on ground (*a*) of that section that no due notice was given to them as required by s. 10 of that Act. The defence was that the plaintiffs were persons interested in the property which was foreclosed so they were not entitled to notice and if entitled to notice the notice to the defendants of the foreclosure suit was tantamount to a notice to them. Both the subordinate Courts rejected this defence on the basis of the ruling reported as *Ramadhin* v. *Surajpal Singh*, (1). As usually happens in subordinate Courts, the Judges presiding in the two lower Courts took no trouble to discover first the facts of the case. It is possible that if those had been determined no question of law or application of the ruling quoted above would have arisen. In both the subordinate Courts and here arguments were based on the following assumptions:—

(1) that the plaintiffs had an interest in the property foreclosed,

(2) that the property foreclosed was joint family property belonging to the joint family made up of the defendants to that suit and the plaintiffs of the present suits, and

(3) that the property at present owned by the plaintiffs is similar joint family property and not their separate self-acquired property.

(1) 65 Ind. Cas. 772; 25 O. C. 57; 8 O. L. J. 506; (1922) A. I. R. (O.) 115.

The Court will, therefore, arrive at a decision of law in the dark region of facts. If there is disagreement with the opinion of law expressed by the subordinate Court the suit will have to be remitted to the Trial Court for decision of issues which ought to have been decided and were wrongly and unfortunately assumed to the detriment of the plaintiffs.

On the point of law there is conflict of authority. The cases in favour of the plaintiffs pre-emptors are:—

Lachmi Narain v. *Raghunath* (2nd Civil Appeal No. 652 of 1885 decided on 21st December, 1885) *Hazari Singh* v. *Joot Singh* (2), and *Ramadhin* v. *Surajpal Singh* (1). In this Court there is a judgment by a Single Judge in conflict with the tenor of the above decisions in *Param Deo Singh* v. *Jai Mal Prasad* (2nd Civil Appeal No. 428 of 1906 decided on 5th November 1906).

In the appeal file of 1885 (*Lachmi Narain* v. *Raghunath*, Second Civil Appeal No. 652 of 1885, decided on 21st December, 1885) there exist only the grounds of appeal and the judgment of this Court, which is short. The grounds of appeal however indicate that the case was one like the present where a member of a joint Hindu family sued to pre-empt joint family property after it was sold. A learned Judge of this Court Mr. Duthoit held that the plaintiff had such right and set aside the decree of the lower Appellate Court. In the case reported as *Hazari Singh* v. *Joot Singh*, (2), it was held that the sons in a joint Hindu family are to be regarded as co sharers for the purposes of pre-emption. The unreported case of 1885 was quoted with approval and followed. The case reported as *Ramadhin* v. *Surajpal Singh*, (1), was one of sale but the circumstances were exactly those of the case before this Court. My learned brother Wazir Hasan has eloborately considered the case law on the subject and held that on sale of a joint family property by one of the members of the family a suit for pre-emption by another member of the same family is maintainable. In the unreported case of 1906 it was held that such a suit was not maintainable.

On behalf of the appellants reference was made to the case of *Ram Dayal* v. *Bhajj Lal* (3) which is explained in *Ramadhin* v. *Surajpal Singh* (1). The plaintiff in that suit owned no property other than

(2) 1 O. C. 252. (3) 7 O. C. 61.

that which was sold, so the facts of that case were different and the decision there will not govern the present case.

There is the same conflict of authority in Allahabad. In *Raghu Nath* v. *Rahat Begam* (4) a Bench of the Allahabad High Court held that where the members of the family of a *lambardar* were given a right to pre-empt property according to the terms of the *wajib-ul-arz* the right of the plaintiff, a member of the family, was not barred because the property which was sold happened to be joint family property in which the plaintiff had a share. In *Janak Singh* v. *Ganga Bishan* (5) the son of a Hindu vendor was not held to be a co-sharer entitled to enforce his right of pre-emption on the basis of his share in the property sold. This case however is similar to that reported as *Ram Dayal* v. *Bhajju Lal* (3) and may be distinguished. In the case of *Pratap Narain Singh* v. *Shiam Lal* (6) a Bench of the Allahabad High Court held that the sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of joint family property made by the father as manager and for legal necessity. The Judges distinguished the case reported as *Raghu Nath* v. *Rahat Begam* (4), but with all respect I am unable to discover any distinction.

On behalf of the respondent reliance was placed on the Full Bench decision in *Gandharp Singh* v. *Sahib Singh* (7) that members of a joint undivided family other than the member who is recorded in the village record as a co-sharer in the *mahal* are co-sharers for the purpose of pre-emption. The vendees of that case resisted a suit for pre-emption on the ground that they were co-sharers in the village and this defence was upheld by the Full Bench. I agree with my learned brother in the conclusion which he derives in *Ramadhin* v. *Surajpal Singh* (1) from this Full Bench judgment that such members could equally enforce the right of pre-emption as co-sharers in the capacity of plaintiffs. Considerable support is given to this view by the fact that the unreported decision of *Lachmi Narain* v. *Raghunath* (Second Civil Appeal No. 652 of 1885 decided on December 21, 1885, of this Court already noticed was based on the Full Bench ruling and pronounced by a Judge Mr. Duthoit who had previously been a Judge of the High Court and was one of the Full Bench of Justices who pronounced the judgment in the Full Bench case. He applied the principles of the Full Bench ruling in the same way as my learned brother has done.

Such being the state of the case law on the subject I consider it advisable to form my own opinion on the Statute Law unembarrassed by the opinions of other Judges and reasons advanced by them in their support. Under s. 9 of the Oudh Laws Act where the property to be foreclosed is a proprietary tenure the right to pre-empt such property belongs firstly to co-sharers of the sub-division of the tenure, secondly to co-sharers of the whole *mahal* and thirdly to any member of the village community. The plaintiffs of the two suits fall within every one of these three categories. They are, therefore, entitled to a right of pre-emption. The right arises because no due notice was given to them as required by s. 10 of the Act. The answer of the appellants is:—

(1) that the plaintiffs were not such co-shares as are mentioned in s. 9 because it was their property which was foreclosed,

(2) that by reason of the property foreclosed being their property they would not be entitled to notice, and

(3) that if they were entitled to notice constructive notice was given to them because of the notice of the suit to the defendants to the suit for foreclosure.

There is no proof that a notice as required by s. 10 was served on the defendants to the foreclosure suit. The appellants relied upon the presumption to be drawn from the fact that a decree for foreclosure was passed.

Section 9 of the Act draws no distinction between different classes of co sharers. The foreclosure decree was not passed against the plaintiffs, so it is difficult for me to understand how they can be debarred from the position of co-sharers entitled to pre-empt, when they are also co-sharers of property other than the one which has been foreclosed. It was argued on behalf of the appellants that this reasoning of mine would lead to an absurdity because the vendors or the persons against whom a decree for foreclosure was passed would themselves in that case be entitled to pre-empt as co-sharers. The absurdity

(4) 3 A. L. J. 641; A. W. N. (1906) 240.
(5) A. W. N. (1884) 13.
(6) 55 Ind. Cas. 37; 42 A. 264; 18 A. L. J. 116; 2 U. L.P R.(A.) 32.
(7) 7 A. 184; A. W. N. (1884) 326; 4 Ind. Dec. (N. S.) 394.

however is imaginary and arises from a want of understanding of the Act In the cases which are cited as rendering this reasoning absurd no right of pre-emption would arise under s. 13 because those men would have received due notice under s. 10. I shall be prepared to follow my reasoning to its logical conclusion that if these very men prove that the foreclosure decree was passed against them *ex parte* and the foreclosure effected without their knowledge they would have a right to pre-empt on the ground that they had received no due notice as required by s. 10.

In s. 10 there is no mention of a constructive notice. Every co-sharer is entitled separately to a notice, or the procedure should be adopted of sticking it up on the *chaupal* or other public places of the village in which the property is situated. Right of pre-emption is given even to a member of the village community and it does not stand to reason that the law desired to deprive of the right of pre-emption co-sharers who were owners of property other than the property sold or foreclosed simply on the ground that they happened to have a share in the vended or foreclosed property.

It was argued by the appellants that as the plaintiffs submitted to the foreclosure decree they must be taken to admit that the mortgage which resulted in foreclosure was made by a manager of a joint Hindu family for legal necessity. I shall not bind the plaintiffs to any such admission. A way may have been open to the plaintiffs to attack the decree on grounds open to them under the Hindu Law but there is also a second remedy open to them under the Statute Law of Oudh to sue for pre-emption. I do not know any reason why the plaintiffs should be tied down to one remedy and the other remedy should be denied to them. A foreclosure decree was passed against joint family property in which the plaintiffs had a share behind their back, without their being made parties to the suit and without notice to them. When the law requires that the plaintiffs should be given direct notice I refuse to consider the question of constructive notice. I shall not add words to the Statute by implication or in pursuance of certain doctrines of Hindu Law. Wisdom lies in following the clear words of Statute and not in trying to be clever and in attributing to legislators ideas which nev entered their heads at the time of the legislation in 1876 which was prior to the passing of the Transfer of Property Act and when legal ingenuity had not evolved in India legal conceptions outside the understanding of ordinary men. It is well known that for a great many years Courts of Law had held that a decree under the Transfer of Property Act bound only those against whom it was passed. I for one shall never believe that the Legislators of 1876 predicted the future evolution of legal ideas and framed a Statute to provide for representation in suits and constructive notice. It may be mentioned that under Regulation XVII of 1806, which governed foreclosure in 1876, foreclosure was effected by application under s. 8 and not by suit and the Zillah Judge was required to issue notice only to the mortgagors and there was no general rule like r. 1 of O. XXXIV that all persons interested in the right of redemption shall be joined as parties. Under those conditions, Legislators of 1876 would have considered it inequitable that persons interested in the equity of redemption other than the mortgagors should be deprived of the right of redemption.

I would dismiss both the appeals with costs.

Ashworth, A. J. C. (*December* 8, 1924).—I am unable to concur with my learned brother either in the view—

(*a*) that an individual member of a joint Hindu family can, apart from the other members of the family, (unless he represents the whole family as *karta*), claim to be a co-sharer within the meaning of s. 9 of the Oudh Law Act (XVIII of 1876); or

(*b*) that, assuming (*a*) to be correct, such individual member can be permitted to claim that he is other than the vendor (co-vendor) of property belonging to the family of which he is a member, where such property is sold.

I am assuming that the title to pre-empt is based, by such individual member, merely on his interest in joint family property and not on a separate interest in property beloging to him as an individual.

It appears to me that the expression "co-sharer" in s. 9 of the Oudh Laws Act must mean a juristic person and not merely an individual who collectively with other individuals constitutes a single juristic person.

Consequently no individual member of a joint family can claim to be a co-sharer on

the basis of the joint family property. If he possesses separate property, he can claim to be a co-sharer by virtue of that separate property and I see no reason why in the latter capacity he should not be entitled to pre-empt a sale by the family of which he is a member of the joint property. It is difficult for me to treat the proposition (*b*) on an assumption which I hold invalid but if by any process of reasoning proposition (*a*) could be correct I take it that the individual member of the joint Hindu family would be a co-sharer by virtue of his interest in the joint family property. In this case his *quantum* of interest in pre emption is the same as his *quantum* of interest in the property and consequently he would be vendor to the same extent as he is pre-emptor.

Nor do I find any sufficient authority in the ruling quoted by my learned brother to prevent the adoption of this view. *Lachmi Narain* v. *Raghunath* (Second Civil Appeal No. 652 of 1885 decided on 21st December 1885), was as pointed out, based on *Gandharp Singh* v. *Sahib Singh* (7). Now in that ruling it was merely held that two vendees not recorded as co-sharers in the village could not be regarded as strangers within the meaning of the *wajib-ul-arz* and it was held that they were co-sharers because they formed a joint Hindu family with two recorded co-sharers their co-vendees. It is not stated in the ruling whether the sale to the four vendees was a sale to them as joint members of a Hindu family or as individuals. It would only be in the latter case that the ruling would furnish any support for the view of my learned brother. It is true that in *Lachmi Narain* v. *Raghunath* (Second Civil Appeal No. 652 of 1885 decided on 21st December 1885) the case was one on all fours with the present case but I cannot be impressed by a ruling which is based on another ruling where the facts may have been different. It is true that the Judge of this Court responsible in 1885 for the ruling of *Lachmi Narain* v. *Raghunath* (Second Civil Appeal No. 652 of 1885 decided on 21st December 1885, was on the Bench of the Allahabad High Court which decided the case in *Gandharp Singh* v. *Sahib Singh* (7) but the Allahabad ruling was decided more than a year and a half before the case in this Court and the Judge may have forgotten the full circumstances. The case of *Hazari Singh* v. *Joot Singh* (2) merely was based on these two rulings just mentioned. The recent ruling of *Ramadhin* v. *Surajpal Singh* (1) is again based on these rulings. As regards *Raghu Nath* v *Rahat Begam* (4) the *wajib-ul-arz* secured the right of pre-emption to any member of the family of a *lambardar* whose share was sold. This ruling again professed to be based on *Gandharp Singh* v. *Sahib Singh* (7). It however went much further than that ruling. It rejected the District Judge's objection that the son of the *lambardar* had no property other than that sold by the *lambardar* on behalf of himself and his son. Consequently this ruling would allow pre-emption on the basis of property which had passed out of the ownership of the person claiming pre-emption, that is to say, the property in respect of which pre-emption was claimed. This I understand is going further than my learned brother would go. Apart from this, the ruling appears to me inconsistent. The person objecting to the pre-emption in that case really objected that there had not been any sale of the *lambardar's* property but merely a sale of property belonging to a joint family of which the *lambardar* was an individual member. This objection was not met by the statement that members of a joint undivided Hindu family, other than the members recorded as a sharer in the Collector's book, were co-sharers for the purpose of pre-emption. In the early part of the ruling it had been pointed out that the *wajib-ul-arz* secured a right of pre-emption to the son of a *lambardar* as such and not as a co-sharer.

On the other hand the case of *Pratap Narain Singh* v. *Shiam Lal* (6) is, as my learned brother remarks, against the view taken by him. In that case it was held that a man cannot pre-empt a sale in which a portion of his own property has actually been legally and validly transferred and in which case he is practically a vendor. Likewise *Param Deo Singh* v. *Jai Mal Prasad* (Second Civil Appeal No. 428 of 1906 decided on 5th November 1906) is in support of the view taken by me.

As to proposition (*b*) if the possession by a joint family of one piece of property is held to justify a claim by each individual member of that joint property to be a co-sharer, it must follow that the sale by the joint family of another piece of property shall be regarded as a sale by each individual member of that family, so far as pre-

emption is concerned. The logical conclusion of holding otherwise would be that the member of the joint Hindu family claiming pre-emption could claim pre-emption on the basis of the property sold, even though the family owned no other property. In *Kamadhin* v. *Surajpal Singh* (1) a distinction is drawn between consent by member of a joint family to the sale of the joint family property and the actual sale by a member of such property It was held that such individual member might take advantage of the sale for the purpose of claiming pre-emption and at the same time might deny that the sale was a sale binding on himself. This appears to me impermissible on the ground "*allegans contraria non est aundieudus*".

It does not appear to be necessary to consider the question of notice except so far as to meet the contention that the provisions of s. 10 of the Oudh Laws Act support the view which I am impugning. It is suggested that the notice required by s. 10 is a notice to individuals and would not provide for a notice to the collective owners who formed a joint family. If my view is correct, it would at first sight appear necessary to give notice to each and every of the members forming a joint Hindu family and this in practice, if not impossible might be very difficult. I have, however, little doubt that, where one or more of the members of a joint Hindu family are recorded in the village papers as co sharers, the other members not so recorded should be held, by reason of their omission to get their names also recorded, to have authorised the member or members recorded to receive notice on behalf of the whole family. Notice to the members recorded would be sufficient notice.

For the above reasons I would allow both the appeals and remand the cases to the Court of first instance for the decision of the further questions involved. I would give the appellants their costs in these proceedings and direct that other costs should abide the result.

Referring Order.—As there is disagreement between the two Judges who heard the appeals on the point of law which is stated in our judgments, the two appeals shall be heard by the learned permanent Judicial Commissioner on his return to this Court under the proviso to s. 98, C. P. C. A date of hearing shall be fixed in the first week of February 1925.

JUDGMENT.

Daniels, J. C.—(*February 10, 1925*).—These two connected appeals have been referred to me under s. 98 of the C. P. C. for decision of a point of law on which the Judges hearing the appeals have differed. The point of law is not stated as a definite proposition in the Referring Order or in the judgments of either of the Referring Judges. In Order of Reference it is described as "the point of law which is stated in our judgments," and in the judgment of the learned First Additional Judicial Commissioner. I find it stated as being the opinion of law expressed by the subordinate Court. From an examination of the judgments I find the point of law to be:

"Where, when a foreclosure decree in respect of joint family property has been passed against certain members of a Hindu joint family, other members of the same family can file a suit for pre-emption on the basis of the foreclosure decree."

Fakir Bakhsh, the head of the alleged joint family, had five sons. Three of them, apparently the three eldest, executed a mortgage of joint family property on 23rd January 1908. The mortgagee, now respresented by the first three defendants, obtained a foreclosure decree on 17th March 1917. The remaining members of the joint family did not contest the validity of the foreclosure decree, but on 17th March 19 3, nearly six years afterwards, two pre emption suits were filed, one by Lal Bihari, the adopted son of one of the mortgagors, and the other by Radhika Dat and Rajeshri Dat the sons of one of the two brothers who did not join in the mortgage.

There is no finding as to whether the mortgage was executed by the three brothers as managing members of the family or whether it was for legal necessity. Indeed the whole statement of facts on which the reference is based is hypothetical. I agree with the learned First Additional Judicial Commissioner that if the lower Courts had taken the trouble to ascertain the facts it is possible that the reference might have proved unnecessary. Mr. Sen for the respondents does not admit that the family was joint at all. Lal Bihari in para. 4 of his plaint admitted it. The other two plaintiffs in their plaint made no such admission. Indeed para. 4

of their plaint contains a statement which goes to show that according to their case the family was separated at any rate when Bikarmajit one of the mortgagors died. There was no oral examination of the parties by the Trial Court. The question whether the family was joint still remains to be decided.

I must in the meantime decide the point of law referred to me on the assumptions made by the Court below, namely, that the family was joint, that the property covered by the mortgage is joint family property in which the plaintiffs have an interest, and that the decree was a decree for foreclosure of joint family property.

The question of law which has been stated above is, in my opinion, concluded by the plain and simple proposition that no one can pre-empt a sale or foreclosure of his own property. The word "co-sharer" in s. 9 of the Oudh Laws Act is used with reference to the ordinary constitution of a village proprietary community where there has been no partition. In such a community the co proprietors are owners of fractional shares out of the entire proprietary right and are entitled to a proportion of the total assets according to the shares recorded in the *khewat*. These shares are commonly recorded in annas and pies, the entire proprietary right being recorded as sixteen annas, though other methods are also found. But a co sharer must be some one distinct from the person whose share is foreclosed. A man cannot be a co-sharer with himself. The fact that the family may have other property in the village appears to me entirely irrelevant. If a co-sharer has a twelve annas share in the village and sells eight annas, no one can possibly suggest that he has a right of pre-emption because he still remains a co-sharer to the extent of four annas. It is also immaterial whether the sale was for legal necessity or not. The very filing of a pre-emption suit assumes the validity of the sale. It was laid down by the Privy Council many years ago in *Abdul Wahid Khan* v. *Shaluka Bibi* (8) that a co sharer cannot pre-empt if he denies the title of the person who proposes to sell. If the mortgagors had purported to mortgage only their own undivided share, the position might have been different, but the reference is made on the assumption that they purported to mortgage, and that the foreclosure decree operated upon, the entire family interest in the joint property. I can see no answer to the reasoning in *Ram Dayal* v *Bhajju Lal* (3) decided by Messrs. Macleod and Chamier, as expressed in the following passage :

"It seems to me that Ram Bharose and Mul Narain are on the horns of a dilemma. They must either admit that the sale was a valid one or deny that it was so. If they admit that the sale was a valid one, then any interest they had in the property before the sale must have been lost to them on the sale taking place, and, therefore, they had no subsisting title at the date of the institution of their suit; while if they deny that their father had power to transfer their interest they are precluded from claiming pre-emption. In the latter case their proper course would appear to have been to attack the sale itself and not to sue for pre emption."

The earlier case-law is all reviewed in this judgment and it is unnecessary to refer to it. I may however say that I find it difficult to understand how *Gandharp Singh* v *Sahib Singh* (7) can possibly be cited as supporting the view of the Court below. The facts of that case are simple. The plaintiff sued to pre-empt a sale to a joint family consisting of four brothers two of whom were recorded as co-sharers in the *khewat* and two were not on the ground that only the two brothers whose names were recorded were co-sharers in the village. The contention was absurd on the face of it. The share which the brothers held belonged to the joint family and obviously all four brothers had equal rights in it. If one of them was a co-sharer all of them were co-sharers. The case could not have been decided otherwise and is no authority for the view that if one of the brothers as manager had proposed to sell the joint estate, the other three could have pre-empted the sale on the ground that they were co sharers of the vendor. The learned Judges who decided *Ram Dayal* v. *Bhajju Lal* (3) rightly held that the decision was irrelevant, and this was the view taken by the Allahabad High Court in *Pratap Narain Singh* v. *Shiam Lal* (6).

Ram Dayal v. *Bhajju Lal* (3) was decided in 1904 and remained the authoritative statement of the law for these Provinces

(8) 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique & Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 (P. C.).

for over seventeen years till it was disturbed by the decision of a Single Judge in *Ramadhin* v. *Surajpal Singh* (1). The learned Judge would not of course sitting singly have overruled a reported decision by a Bench had he not believed that he had found a means of distinguishing it in the fact that apparently there was no other property owned by the joint family. I desire to speak with the utmost respect of the opinion of the learned Judge but in this instance I cannot held thinking that the distinction which he drew was a very slender one and has in fact no real substance. As I have shown above, whatever other property a man may hold he cannot thereby obtain a right to pre-empt a sale or foreclosure by which his own interest is transferred. As has been said he cannot successively occupy the position of vendor and pre-emptor in respect of the same transaction. Nor can I admit that he does not occupy the position of vendor because he merely admits the validity of the sale and does not actually execute the sale-deed. If he admits the validity of the sale-deed, as he must do in order to pre-empt, he thereby admits that the sale was effectual to pass his own interest in the property, and this is the crucial element in the case.

The view of the law taken in *Ram Dayal* v. *Bhajju Lal* (3) has been adopted by the Allahabad High Court in a reasoned judgment *Pratap Narain Singh* v. *Shiam Lal* (6). I have also been referred to a case, not reported in the regular law reports, which shows that the same view has been accepted in the Punjab also.

The question of notice does not require separate consideration. By s. 10 of the Oudh Laws Act notice is to be given to the "Person concerned." *i. e.*, as the following sections, show, to the persons who obtained a right of pre-emption by reason of the sale. Whether the plaintiffs were entitled to notice depends on whether they have a right of pre-emption or not.

My answer to the question referred to me is that no member of a Hindu joint family acquires a right of pre-emption by reason of a decree for foreclosure of family property in which he is himself a co-parcener.

JUDGMENT.

Dalal, A. J. C. and Wazir Hasan, A. J. C.—Under s. 98, C. P. C., the point of law is hereby decided according to the opinion of the majority of Judges, *who have heard the appeals.* The decision is that no member of a Hindu joint family acquires a right of pre-emption by reason of a decree for foreclosure of joint family property in which he is himself a co-parcener.

Both the appeals are, therefore, decreed with costs of this Court and the suits remanded to the Court of first instance for trial of the issues which arise in the suits in view of the finding of law of the majority of the Judges who heard the appeals.

Z. K. *Suits remanded.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3379 OF 1924.

December 1, 1924.

Present :—Mr. Justice Pratt.

DHANRAJGIRJI NARSINGIRJI—PLAINTIFF

versus

W. G. WARD—DEFENDANT.

Bombay Rent (War Restrictions) Act (II of 1918), ss. 2 (1) (a), 13—Building let to tenant—Portion let to sub-tenant—Standard rent, ascertainment of—Basic rent, what is—Apportionment, whether to be made.

Plaintiff leased a large building to one *B* at a certain rent and the latter sub-let a portion of the building to the defendant in September 1915 at a rental of Rs. 75. *B*'s tenancy was subsequently terminated and the defendant became a tenant under the plaintiff. In proceedings under the Bombay Rent (War Restrictions) Act:

Held, that the standard rent of the portion let to the defendant out of the larger building must be ascertained on the basic rent of Rs. 75 on which the premises were first let to the defendant before 1st January 1916, and that the standard rent could not be ascertained by apportionment of the rent which *B* was paying to the plaintiff on 1st January 1916. [p. 887, col. 2; p. 888, col. 1.]

Mr. *F. S. Taleyarkhan*, for the Plaintiff.

Mr. *Pocock*, for the Defendant.

JUDGMENT.—The plaintiff is the owner of a building in Bombay known as Watson's Annexe which is let out in flats.

The defendant is a tenant of one of those flats on a monthly rental of Rs. 97. The plaintiff gave notice to quit on February 4, 1924, terminating the tenancy as from April 1, 1924. The defendant claims the privilege of s. 9 of the Rent Act, and also contends that the rent that he is paying is in excess of the standard rent.

The main issue in the suit is what is

the standard rent of the premises and in order to ascertain that, it is necessary to state briefly the terms on which the premises have been held.

The whole building known as Watson's Annexe is situated on a property which was leased by the Port Trust to the plaintiff for a term of fifty years. The plaintiff leased the whole building to one Dr. Billimoria on March 24, 1915, at a rental of Rs. 2,850, besides Rs. 649 ground rent and Rs. 980 taxes, making a total of Rs. 4,479. Dr. Billimoria sub-let the premises in different flats to different tenants and the premises which are now in the occupation of the defendant were first sub-let before January 1, 1916, at a rental of Rs. 75 in September, 1915.

The tenancy of Dr. Billimoria was terminated by a consent decree as from July 31, 1923, and from August 1, 1923, the defendant held directly under the plaintiff as his tenant. The standard rental of the flat if calculated on the first letting prior to January 1, 1916, would have to be calculated on a basic rent of Rs. 75 but at the same time the flat was also part of the whole building which was held by Dr. Billimoria at a rental of Rs. 4,479.

In the calculation of the standard rent, the first question that arises is whether the standard rent should be calculated on the actual basic rent of Rs. 75 or whether it is to be ascertained by an apportionment of the rent which Dr. Billimoria the lessee of the whole building was then paying to the plaintiff? The plaintiff's contention is that the standard rent is to be calculated on the basic rent of Rs. 75 and the defendant contends that the standard rent should be calculated by an apportionment of Rs. 4,479. The defendant's contention is based on the case of *Chapsei Umersi* v. *Keshavji Damji* (1). In that case, a godown was leased to the plaintiff at a rental of Rs. 305 and the plaintiff again sub-let the same godown at a rental of Rs. 275. Question then arose as to what was the standard rent and Setalvad, J., decided that in a case of concurrent letting there could not be two standard rents following the case of *King* v. *York* (2) where it was said that the Act operated *in rem* and not *in personam*, and that there should be one standard rent for the premises and not different standards with respect to different lettings to different individuals. Setalvad, J., therefore, decided that although the same godown was let to two different individuals for two different sums, the standard rent was the rent for which the godown was let for the first time. So here it is contended that the standard rent should be the rent at which the premises were first let to Dr. Billimoria and that that rent should be ascertained by apportionment. There seems to me to be this distinction between the cases, that, whereas in *Chapsey Amersey* v. *Keshavji Damji* (1) the same premises were let a second time, here the premises that are let a second time are not the same premises. No doubt the defendant's flat is a part of the whole building of Watson's Annexe but although it is a part of the whole building, it is obvious that the premises constituting the whole building are different from the premises constituting a part of the building. The case is not one in which jurisdiction to apportion rent arises under s. 13 (*a*) of the Act; for that section contemplates a case where there was no letting of the part at the period at which the basic rent has to be determined but the whole is let at that period and the basic rent or standard rent of the part has to be ascertained with reference to the letting of that whole. So here, if, prior to the Rent Act coming into operation, this flat had not been let but the whole building only had been let to Dr. Billimoria, then the standard rent would have to be apportioned as prescribed by s. 13 (*a*). It seems to me, therefore, that the case does not fall either within the rule in *Chapsey Umersey* v. *Keshavji Damji* (1) or within s. 13 (*a*) of the Rent Act.

The Rent Act itself in the definition of the premises refers to part of the building separately let as premises of which the standard rent has to be determined and such standard rent must be determined with reference to those premises in the manner specified by s. 2 (1) (*a*) of the Act. The standard rent, therefore, must be ascertained on the admitted basic rent of Rs. 75. Any other system of ascertainment would lead to extraordinary difficulties. For instance, in the present case, if the lease by the Port Trust to the plaintiff had not been merely a lease of the site but had been a lease of the site and the building, there would have

(1) (1919) Ind. Cas. 930; 45 B. 744; 23 Bom. L. R. 133.
(2) (1919) W. N. 59; 88 L. J. K. B. 839; 35 T. L. R. 256.

been two concurrent leases of which the apportionment could be claimed and there was no principle on which one lease should be taken into calculation instead of the other. Again, if the head lease instead of being as here the lease of one building consisting of flats had been a lease of a large number of buildings constituting a large estate, it would be almost impossible to make a correct apportionment of the rent. I do not think it was the intention of the Rent Act that landlords and tenants should be driven to do a difficult and expensive process of valuation and culculation before their rent could be ascertained.

I, therefore, decide the standard rent must be ascertained on the basic rent of Rs 75.

Mr. Taleyarkhan admits that he is unable to prove that notice of increase had been given The standard rent is, therefore, Rs. 75 plus Rs. 15 = Rs. 90. Mr. Taleyarkhan does not press for eviction on the understanding that arrears of rent will be paid on or before the 6th instant.

Decree, therefore, for plaintiff for arrears of rent and compensation from September 1, 1923, to November 30, 1924, at the rate of Rs 90 per mensem. In default of such sum being paid on or before the 6th instant decree for possession. If such sum so paid defendant to continue as a statutory tenant. No order as to costs.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN FIRST APPEAL NO. OF 1925.

May 14, 1925.

Present:—Mr. Justice Daniels.

PRAG—PLAINTIFF—APPELLANT

versus

BHAGWAN DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (ix), Sch. I, Art. 1—Foreclosure suit, dismissal of—Appeal—Court-fee payable on memorandum of appeal.

In a suit for foreclosure Court-fee is payable on the plaint upon the principal amount secured by the mortgage under s. 7 (*ix*) of the Court Fees Act. Where the suit is dismissed, the memorandum of appeal must bear an *ad valorem* Court-fee on the value of the subject-matter of the appeal under Art. 1 of Sch. I to the Act.

Raghbir Prosad v. *Shanker Bux Singh*, 21 Ind. Cas. 723: 36 A. 40: 11 A. L. J. 1016, followed.

Sangat Bakhsh Singh v. *Rawat Dijdeo Bakhsh Singh*, 67 Ind. Cas. 968 at p 970; 25 O. C. 30; (1922) A. I. R. (O) 82, dissented from.

Dr *K. N. Katju*, for the Appellant.

OFFICE REPORT.—The objection of the learned Counsel for the appellant is placed below with the following remarks for favour of disposal and order.

The suit giving rise to this appeal was brought for the recovery of Rs. 7,525 6 principal and interest from defendants and in case the money was not paid, for the foreclosure of the property in suit which was mortgaged by conditional sale. The Court below dismissed the suit with costs. Thereupon the plaintiff came up to this Court and preferred this first appeal valuing it at Rs. 7,525-6 but paying a Court-fee of Rs. 38-4. According to s. 7 cl. 9 the Court-fee on the plaint filed in the Court below was paid having been calculated on the principal money expressed to be secured by the instrument of mortgage as it was a suit by mortgagee to foreclose the mortgage and that was correct. But the same principal does not apply to appeals. In appeals of such cases the question of taxation is governed by a Full Bench ruling of this Hon'ble Court reported in *Raghbir Prasad* v. *Shanker Bux Singh* (1). Their Lordships observe at page 45* that "in the case of an appeal the Court-fee payable is an *ad valorem* Court-fee on the value of the subject-matter of the appeal. See Sch. I Art. 1 of the Court Fees Act" The subject matter in dispute in appeal in this case is Rs. 7,525 6 as given by the appellant himself as value of the appeal. He could not reduce it as it was the amount for the recovery whereof he had brought the suit. Under the circumstances I maintain that there is a deficiency in Court-fee of Rs. 346 12 in this case.

OBJECTION.—I object to the office report. The suit has been wholly dismissed. The rulings of this Court which hold that in appeals *ad valorem* Court-fee is to be paid apply only to those cases in which either the plaintiff or the defendant wants to have the amount decreed by the lower Court reduced or increased and in such

(1) 31 Ind. Cas. 723; 36 A. 40; 11 A. L. J. 1016.

*Page of 36 A.—[*Ed.*]

cases the subject-matter of the appeal may be said to be the actual difference in dispute in the appeal. But where the suit is wholly dismissed on a question of principle then it is submitted that the Court-fee payable on appeals is the same as payable in the case of suits.

TAXING OFFICER'S REPORT.—The suit giving rise to this appeal was brought for the recovery of Rs 7 525 6 principal and interest from the defendants and in case the money was not paid, for the foreclosure of the property in suit which was mortgaged by conditional sale. The Court below dismissed the suit with costs. The plaintiff then came up to this Court and preferred this first appeal valuing it at Rs. 7,525-6 and paying a Court-fee thereon of Rs. 38-4. According to s 7 cl. (ix) of the Court Fees Act, the Court-fee on the plaint filed in the Court below was calculated on the principal money expressed to be secured by the instrument of mortgage, as it was a suit by the mortgagee to foreclose the mortgage, and the sum of Rs. 38-4 was correctly paid.

The Stamp Reporter does not dispute the correctness of the Court fee of Rs. 38-4 paid in the Court below. He contends that it is not a sufficient fee on the appeal preferred in this Court In support of his contention, he quotes a Full Bench decision of this Court, *Raghbir Prosad* v. *Shanker Bux Singh* (1), wherein Banerji, Tudball and Piggott, JJ, stated in their judgment. "It is true that in a suit for redemption or foreclosure the Court-fee is payable upon the principal amount secured by the mortgage. But that applies to the suit which is instituted in the Court of first instance. In the case of an appeal the Court-fee payable is an *ad valorem* Court-fee on the value of the subject-matter of the appeal, (see Sch I, Art. 1 of the Court Fees Act)." On the strength of this ruling and as the subject-matter in dispute in this appeal is Rs. 7,525 6 as given by the appellant himself as the value of the appeal, it is maintained by the office that there is a deficiency in Court-fee of Rs. 346-12, having estimated the value of the Court-fee in accordance with Sch. I, Art. 1 of the Court Fees Act.

It is contended on behalf of the plaintiff-appellant that since the suit was wholly dismissed in the lower Court, the matter stands in appeal as it did in the lower Court, and the Court-fee is only payable on the principal sum and on nothing more. In support of this contention, Counsel for the appellant has quoted the ruling of Daniels and Lyle, Additional Judicial Commissioners of Oudh, *Sangat Bakhsh Singh* v. *Rawat Dijaeo Bakhsh Singh* (2) where the following among other conclusions was tabulated "If a suit for redemption or foreclosure has been dismissed the Court fee payable by the plaintiff-appellant on his memorandm of appeal will be computed in accordance with the provisions of cl (ix) of s. 7 of the Court Fees Act, *i. e.*, according to the principal money expressed to be secured by the instrument of mortgage. In such a case clearly the suit has not changed its nature in appeal."

In view of this conflict of rulings I direct that this matter be referred to the Taxing Judge for his decision.

JUDGMENT.—This is a Reference under s. 5 of the Court Fees Act. The question for decision is the amount of fee payable on a memorandum of appeal by a plaintiff whose suit for foreclosure of a mortgage has been dismissed. The appellant relies on an elaborate judgment of the Judicial Commissioner's Court of Oudh in *Sangat Bakhsh Singh* v. *Rawat Dijdeo Bakhsh Singh* (2) where it was held that in such a case the Court-fee payable in appeal is the same as the Court-fee payable in the Court of first instance, if the appeal was against a decree in favour of the plaintiff, the Court-fee would be on the amount in dispute. The Taxing Officer relies on the Full Bench decision in *Raghubar Prasad* v. *Shankar Bakhsh Singh* (1). The question is whether the case is covered by the Full Bench ruling. There appears to me no doubt that it is. That was a case of cross-objections by the defendants asking that a foreclosure decree should be set aside and the suit dismissed. Section 7 (*ix*) of the Court Fees Act was relied on. The Full Bench held that the fee prescribed by s. 7 (*ix*) applies only to the suit which is instituted in the Court of first instance. "In the case of an appeal the Court-fee payable is an *ad valorem* Court-fee on the value of the subject-matter of the appeal. See Sch. I, Art. 1 of the Court Fees Act." It is true that they were dealing with cross-objections by the defendant

(2) 67 Ind. Cas. 968 at p. 970; 25 O. C. 30; (1925) A. I. R. (O.) 82.

and not with an appeal by the plaintiff, but the principle on which their decision rests in equally applicable to both cases. I cannot, therefore, treat their remarks as a mere *obiter dictum* which I am at liberty to disregard. It has been suggested that I should refer this case to a larger Bench with a view to re-conciling the view of the law taken in this Province with the view taken in Oudh, but I am not prepared to unsettle the law as laid down by a Full Bench nearly twelve years ago. If the law is to be altered, it must be left to the Legislature to do it. I accordingly hold that the report of the office is correct. The appellant must make good the deficiency of Rs. 345-12-0 within two months from this date.

Z. K.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 2267 OF 1924.
August 27, 1924.
Present:—Mr. Justice C. C. Ghose.
ADVOCATE-GENERAL OF BENGAL
—PLAINTIFF
versus
CAPT. S. WEBB-JOHNSON
AND OTHERS—DEFENDANTS.

Trust—Charitable endowment—Income, surplus of—Cy-pres, doctrine of, applicability of—High Court, power of, to apply surplus to other purposes.

Where the income of a charitable trust fund becomes greater than is necessary for the purposes originally named, the High Court has power to apply the surplus to such other purposes as it may deem proper upon the *cy-pres* principle. [p. 891, col. 1.]

Mr. *B. L. Mitter*, for the Plaintiff.

Mr. *S. M. Bose*, (Sr.), for the Defendants.

JUDGMENT.—This suit has been instituted by the Advocate-General of Bengal for a declaration that the objects of a certain trust known as the Silver Wedding Fund are the education and assistance of children and dependants of Indian officers and soldiers (including non-combatants) who rendered military service under the Crown during the late Great War, or who took part or may hereafter take part in subsequent war like operations and for an order that the defendants as administrators of the Silver Wedding Fund may be directed to give effect to the said objects and apply the income of the said fund towards helping those who come under the said objects.

The facts are as follows :—On the occasion of the anniversary of the Silver Wedding of Their Majesties the King-Emperor and the Queen-Empress in 1918, a large sum of money was subscribed as an offering to Her Majesty the Queen-Empress as a token of loyalty and affection. Her Majesty the Queen-Empress was pleased to accept the gift and to express a desire that the said gift should be devoted to the benefit of His Imperial Majesty's Indian subjects and further that the contributions made should form a fund for promoting the education of the children of Indian soldiers who had fallen in the Great War. The said fund is now vested in the treasurer for charitable endowments. By a vesting order made by the Governor-General in Council under the provisions of the Charitable Endowments Act, 1890, the income of the fund was directed to be devoted and applied to and for the higher education of the children of the Indian soldiers (including non-combatants) who have fallen or been permanently disabled during the War. A scheme was settled for the administration of the said fund and certain administrators were appointed. The defendants are the present administrators.

For some years past, the entirety of the income of the said fund has not been spent on the said objects, it having been found impracticable to do so, with the result that there has been an accumulation of income of the said fund, which has been added to the capital of the said fund. It was, therefore, suggested that the objects of the said trust should be extended so as to include the education and assistance of children and dependants of the Indian officers and soldiers (including non-combatants) who rendered military services under the Crown during the late Great War, or who have taken part or may hereafter take part in subsequent warlike operations. The proposed extension having been brought to the notice of Her Majesty the Queen-Empress, she has been graciously pleased to intimate that she agrees to the objects of the trust being extended in manner suggested.

The plaintiff, as His Majesty's Advocate-General of Bengal at the relation of the Treasurer of Charitable Endowments has now instituted the present suit for obtaining the leave of this Court for the extension of the objects of the said fund in manner indicated above. The defendants, who are

the present administrators of the said fund, are agreeable to the objects of the fund being extended in the way prayed for by the plaintiff.

There is evidence before me that Her Majesty the Queen-Empress, who is the author of the trust, is agreeable to the extension of the objects of the trust, and, therefore, the only question which I have got to determine is whether in the event which has happened, namely, the income of the fund having become greater than is necessary for the purpose originally named, this Court has power to apply the surplus to such other purposes as it may deem proper upon the *cy-pres* principle. In my opinion, there can be no doubt that the Court has power, in the circumstances which have happened, to apply the surplus to such other purposes as it may deem proper upon the *cy-pres* principle. The term *cy-pres* is translated to mean as near as may be. The doctrine of *cy-pres* is, therefore, the doctrine of nearness or approximation and it appears in English Jurisprudence in three separate departments, yet with similar operation and effect; firstly, it is applied in the law of testament; secondly, in the law of private trusts ; and, thirdly, in the law of charitable trusts where gifts have been made for charitable purposes, which either originally or in course of time cannot be literally executed. Story in his Equity of Jurisprudence points out that the doctrine has been borrowed from the Roman Law, for by that law donations for public purposes were sustained and were applied *cy-pres* to other purposes at least one hundred years before Christianity became the religion of the Empire. In the present case there is a surplus which remains after satisfying the prescribed objects and the present case comes within the rule laid down by Lord Selborne, L. C., in the case of *Chamberlayne* v. *Brockett* (1), where he says as follows:—"If the fund should, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if direct compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this Court has power to apply the surplus, or the whole (as the case may be), to such other purposes as it may deem proper, upon what is called the *cy-pres* principle." (See also 4 Halsbury's Laws of England at page 194).

In this view of the matter I am satisfied that the extended objects are such as this Court will approve. Those objects are as near as may be within the meaning of the doctrine referred to above, and I, therefore, make the declaration asked for in the prayer B. of the plaint. There will also be a direction as prayed for in prayer C. of the plaint. The costs of both parties will come out of the fund as between Attorney and client.

Z. K. *Order accordingly.*

(1) (1872) 8 Ch. App. 206 at p. 211; 42 L. J. Ch. 368; 28 L. T. L. 248; 21 W. R. 299.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 353 OF 1923.
September 26, 1924.
Present:—Mr. Justice Marten and Mr. Justice Fawcett.

RATILAL NATHALAL—PLAINTIFF—APPELLANT
versus
MOTILAL SANKALCHAND—DEFENDANT—RESPONDENT.

Hindu Law—Custom—Inheritance—Property inherited by daughter—Death of daughter without issue—Property, whether reverts to father's family or passes to husband—Kadwa kunbi *caste—Proof of custom—Burden of proof—Instances, value of—Appeal, second—Objection to sufficiency of evidence in support of custom, whether can be entertained.*

The onus of proving a custom which is a departure from the ordinary law which would otherwise govern the parties, rests on the person who alleges it. In order to prove such a custom it must be shown to be ancient and invariable, and also to be such that there is nothing unreasonable or contrary to public policy in the Court giving effect to it. A mere general statement by members of the caste, unaccompanied by positive instances in which the alleged custom was actually observed, is by itself insufficient to prove the custom. [p. 892, cols. 1 & 2.]

If the evidence shows that for a certain number of years there have been a number of instances in which the alleged custom has been recognised the presumption arises that the parties concerned have acted in that manner but not from a desire to set up a new custom, because they are acting in accordance with the traditions of immemorial usage. [p. 894 col. 1.]

In a case in which the existence of the custom is sought to be proved, objections based on the ground of an illegal or improper rejection of evidence or as to the evidence taken as a whole amounting to insufficient proof in law of the custom alleged may properly be gone into in second appeal. But whether a specified instance is properly proved or not is a question of fact; the decision of which lies with the Court of first appeal and which the High Court

will not enquire into but will accept as accurate. In second appeal the High Court will not investigate the details of the evidence in support of the various instances, but will merely consider whether taken as a whole they are sufficient in law to support the custom alleged. [p. 894, col. 1; p. 895, col. 1.]

The question whether the facts in any given instance prove the existence of the essential attributes of a custom or usage is a question of law which might be discussed in second appeal, while the question whether such a state of facts has been proved by the evidence is merely a question of fact. [p. 894, cols. 1 & 2.]

Among the *kadwa kunbi* caste when a married woman, who had succeeded to the property of her father in default of male issue, herself dies without issue, the property reverts to her father's family and does not pass to her husband. [p. 892, col. 1.]

Second appeal from a decision of the Assistant Judge at Ahmedabad, in Appeal No. 169 of 1920, confirming that of the Subordinate Judge at Ahmedabad, in Civil Suit No. 616 of 1916.

Mr. *M. P. Amin* (with him Mr. *M. H. Mehta*), for the Appellant.

Mr. *G. N. Thakor* (with him Mr. *H. V. Divatia*), for the Respondent.

JUDGMENT.

Marten, J.—The question in dispute in this second appeal is one of the right of succession to the estate of a Hindu child widow who died at the age of nine years on July 9, 1913, and without issue. She belonged to the *kadwa kunbi* caste and had been married as a child to the plaintiff in the suit. Her father predeceased her leaving no male issue, and consequently she succeeded to his property.

But a question that has arisen on her death is, does this property go to the plaintiff as the heir of his deceased wife Kamla or does the property pass to her own blood relations on her father's side? It is common ground that under ordinary Hindu Law the plaintiff would take as her husband, but a special custom is set up by the defendant who claims to be her heir on her father's side, that in this particular caste where a married woman dies under such circumstances without issue, the property reverts to her father's family and does not pass to her husband. The onus of proving such a custom, being as it is a departure from the ordinary Hindu Law which would otherwise govern the parties, rests clearly on the person who alleges it, *viz.*, the defendant. Moreover, it is equally well-established that in order to prove such a custom, it must be shown to be ancient and invariable, and also be such that there is nothing unreasonable or contrary to public policy in the Court giving effect to it.

Both the Judges in the lower Courts were members of the Hindu community and in the Trial Court the learned Extra Joint Subordinate Judge dealt at great length and with great care with the voluminous evidence that was brought before him. I appreciate to the full the following observation he has made, *viz.* "The evidence is voluminous and rather likely to hypnotise and be tedious and monotonous, as it involves a detailed investigation of the devolution of property in this community which is by no means an insignificant proportion in this Province. There is considerable risk of confusion." I also in similar cases of custom have felt as a Trial Judge the difficulty of giving to others a clear analysis of the evidence put before the Court. But the judgment of the learned Trial Judge appears to me to be particularly lucid in this case. He has given us summaries of the various instances. He has given us certain cross-references to show from which particular town or district the various witnesses come. He has also divided up the evidence into two main portions, *viz.*, one summary which relates to property which the girl inherited from her father and another summary which related to cases where the girl was given presents of ornaments and clothes by her father or relations in her life time and where those ornaments and clothes or some portion of them went on her death not to her husband but to her father or her relations in her father's family.

Then the learned Judge has also analysed the evidence in another way. There was also a large body of general evidence adduced by leading citizens in this particular caste whom the learned Judge particularises and shows to be men whose respectability and reliability cannot be impeached. The witnesses are very numerous and amongst them was one of the learned Judge's own Subordinate Judge. But the Trial Judge has recognised that merely a general statement by members of the caste, unaccompanied by positive instances in which the alleged custom was actually exercised, would be by itself insufficient. Accordingly he has dealt with the instances in the two main divisions I have mentioned, *viz.*, the one where the girl inherited property from her father, and the other

where the property merely consisted of ornaments and clothes which had been given to her by her father or relations.

The former class is naturally much more important, because after all as regards ornaments and clothes, particularly in the case of one who dies as a mere child, it may very well be that the child husband or the adult husband, would not necessarily claim those articles, but might allow the girl's own relatives to retain them But as regards the succession to the property itself, that stands on a different footing. The learned Judge very rightly attaches more importance to that body of evidence than to the corresponding evidence about the ornaments.

As regards the instances under the first branch, the learned Judge found that some seven in all were proved to his satisfaction out of some thirty or forty which were placed before him. Before us, Counsel for the appellant has based his main contention on this, that seven instances are not enough to prove a custom, and, secondly, that the instances given are of too recent a date to justify the Court in arriving at the conclusion that the custom is an ancient one. That of those seven some four were only two to nine years before the date when the suit was brought in 1916, and that only the remaining three are about twenty five years old. In support of that proposition *Bhagvandas Tejmal* v. *Rajmal* (1) was relied on. That was a case of adoption amongst Jains and as to whether a certain custom was or was not proved. The Court, after pointing out that there were no men of learning and no books of the sect in support of the alleged custom, proceeded as follows: "There are, in the whole body of evidence to which our attention has been directed, only four specified instances of such adoption, and of these the most ancient is one which occurred about twenty-two years ago, and one of the four breaks down, inasmuch as the widow of the adoptive father was living when the adoption is alleged to have taken place." That was a case that related to the adoption of an orphan.

It is accordingly said that there are only seven cases here, and, therefore, on the authority of *Bhagvandas Tejmal* v. *Rajmal* (1) the present evidence is insufficient. But it must be borne in mind that in addition to what I will call the general body of evidence in this case there was a large amount of evidence on the second branch of the case, and a large number of instances there were given with reference to the ornaments and clothes. Therefore, quite apart from the fact that the number of instances here were nearly double those in the case cited, we have other instances as regards ornaments and clothes.

Moreover, we have to consider the likelihood of there being any large number of these cases happening. Before it could happen, one must first of all have a father who dies without male issue and his daughter succeeding to his property. Then next you must find that the daughter in her turn dies without issue. We are told that this caste has very largely increased in numbers in recent years, but I think the learned Judges in the Courts below are quite right in saying that these two contingencies which I have mentioned would be contingencies of a comparatively rare occurrence. So when you get the seven clearly proved instances, to say nothing of the numerous instances as regards the ornaments and clothes, that seems to me to be a body of evidence which would in law justify the learned Judges in arriving at the conclusion which they did.

I do not overlook the fact that the learned Appellate Judge differed somewhat in the instances which he held proved. But in the result he arrived at the same number of instances as did the Trial Judge in the lower Court. The following instances were held proved, *viz.*, Nos., 30, 32-A, 11, 46, 47, 83 and 84. One other instance relied on in the Trial Court would seem probably the same as the one already dealt with by the Appellate Court, *viz.*, instances Nos. 78 and 83. So, too, there was one instance which the Appellate Court rejected *viz.*, No. 14, which is the same as instance No. 25. The learned Appellate Judge did not deal with instance No. 15, but that was an instance which the Trial Judge thought was a doubtful one, though he was prepared to accept it.

I have also not overlooked the fact that the lower Appellate Court did not go specifically into the instances relied on by the Trial Court with regard to the ornaments and clothes. But the general nature of the judgment of the lower Appellate Court must, I think, be taken to signify that the Appellate Court saw no reason to differ from the conclusions of the Trial Judge in this respect.

(1) 10 B. H. C. R. 241 at pp. 263, 264.

I should explain that we have not thought it necessary to call upon Counsel for the defendant in the present case. It may be that if we had, he would have been able to urge upon us that in law some instances which were rejected by the lower Court ought to have been really accepted. But as to that I feel strongly the limitations under which we must hear this case in the Appellate Court. Objections based on the ground of insufficient evidence, or improper rejection of evidence, or as to the evidence taken as a whole amounting to insufficient proof in law of local custom, that we may properly go into. But whether a specified instance is properly proved or not, that I take it is a question of fact, the decision of which properly lies with the lower Appellate Court and which at any rate under the normal circumstances governing our work here we should not inquire into but accept as accurate. And in a case with great mass of detail like the present it is plain that if once the Court began investigating the detailed evidence as regards one particular instance, it would be difficult to resist applications to go into evidence in other instances.

The practice in this respect has recently been considered in *Parshotam* v. *Venichand* (2) another case of an adoption amongst Jains. There the Court dealt with the description of evidence which might fairly be accepted in cases of this nature. The Chief Justice said (p. 232*).

"If, then, the evidence shows that for a certain number of years, and some cases appear to lay down as a useful guide a period of twenty years, there have been a number of instances in which the alleged custom has been recognized, the presumption arises that the parties concerned have acted in that manner, not from a desire to set up a new custom, but because they are acting in accordance with the tradition of immemorial usage."

Then at page 235* Mr. Justice Hawcett said :—

"In the case before us the two lower Courts have held the alleged custom permitting the adoption of orphans to be established as a valid one. The main question is whether there is sufficient ground for our interfering with this finding in second appeal. The Privy Council have more than once held that whether a custom is proved is mainly a question of fact...Accordingly in *Kailash Chandra Dutta* v *Padma Kishore Roy* (3) it was held, on a review of all the authorities, that the question whether the facts found in any given instance prove the existance of the essential attributes of the custom or usage is a question of law which might be discussed in second appeal, while the question whether such a state of facts has been proved by the evidence is merely a question of fact"

I respectfully adopt what the learned Judge states there. He then proceeds to deal with the sort of evidence that one might fairly require, and how far back one might reasonably expect it to go. He states at p. 236* :—

"Similarly in the cases of *Manohar Lal* v. *Banarsi Das* (4) and *Asharfi Kunwar* v. *Rup Chand* (5) where the custom of adoption of a married man was held established, the instances adduced do not appear from the judgment to have gone back beyond some thirty to thirty-five years. In *Chiman Lal* v. *Hari Chand* (6) where the adoption of the plaintiff who was an orphan and married was held valid, the evidence is stated in their Lordships' judgment to be 'somewhat limited.' Halsbury's Laws of England, Vol. X, Art. 442, at p. 234 says that as a general rule proof of the existence of the custom, as far back as living witnesses can remember, is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial, and that evidence of the existence of the alleged custom for a period of twenty years may be sufficient to warrant a Court in finding as a fact the existence of the custom from time immemorial. A similar rule was applied to Hindu Usages by Gray, C.J., in a judgment delivered so long ago as 1831."

Then as regards the proper course to take in second appeals, I my refer to *Bai Shirinbai* v. *Kharshedji* (7) which was a case of an alleged child marriage amongst Parsis. There Sir Charles Farran says at p. 437† :—

"The difficulty in this case is to ascertain

(2) 61 Ind. Cas. 492; 23 Bom. L. R. 227; 45 B. 751.

*Pages of 23 Bom. L. R.—[*Ed.*]

(3) 41 Ind. Cas. 959; 45 C 285; 25 C. L. J. 613; 21 C. W. N. 972.

(4) 29 A. 495; A. W. N. (1907) 121; 4 A. L. J. 407.

(5) 30 A. 197; A. W. N. (1908) 79; 5 A. L. J. 200.

(6) 19 Ind. Cas. 669; 40 C. 879; 17 C. W. N. 885; 126 P. W R. 1913; 187 P. L. R. 1913; (1913) M. W. N. 509; 18 C. L. J. 70; 15 Bom. L. R. 646; 14 M. L. T. 83; 102 P. R. 1913; 40 I. A. 156 (P. C.).

(7) 22 B. 430; 11 Ind. Dec. (N. S.) 869.

*Page of 23 Bom. L. R.—[*Ed.*]

†Page of 22 B.—[*Ed.*]

what the Parsi Law on the subject of infant marriage is...In the present case, however, we are met by the finding of the lower Courts that there has grown up in India a custom amongst Parsis which validates and renders binding marriages between Parsis though contracted between children of tender age, and that that custom was in full force as a custom in 1869. Sitting as we are in second appeal we feel that it is not open to us to arrive at an independent finding as to whether the evidence establishes the existence of such a custom, as there is indisputably a large body of evidence upon the record in support of it."

I think the judgment which I have just cited shows what our proper course is, *viz.*, that generally speaking we should not investigate the details of the evidence in support of the various instances, but should merely consider whether taken as a whole it is sufficient in law to support the custom alleged. That indeed is the course which Counsel for the appellant quite properly has adopted before us. Some application was, I think, made to us to go into the details of evidence, but we did not see our way to comply with that request even as regards instances which the lower Appellate Court held to be proved.

Then as regards the question of the number of instances, I have already dealt with one answer that could be made to *Bhagvandas Tejmal* v. *Rajmal* (1), on the present materials as regards the antiquity of the various instances, similar observations to some degree apply. We have at any rate three instances going back over twenty-five years. In this respect I may refer to the *Halai Memon case* [*Khatubai* v. *Mahomed Haji Abu*] (8) which involved a question whether the Halai Memons of Porebunder who were Muhammadan converts had retained on their conversion the Hindu customs of succession, as is the case with the Khojas and Cutchi Memons, or whether, as was undoubtedly the case with the Halai Memons of Bombay, they had acquired the same rights of succession as ordinary Muhammadans. The exact point there turned on whether daughters were entitled to succeed along with their brothers, as is the case under the Koran, or whether as under Hindu Law the daughters took no aliquot share but were only entitled to marriage expenses if still unmarried.

As far as Bombay Halai Memons were concerned, there was documentary evidence in the Probate and other records of this Court going back over hundred years to show that invariably in this city a Halai Memon's succession was an ordinary Muhammadan succession. But there was no documentary evidence like that as regards the Porebunder Memons, who were the subject of the suit. As regards the latter, the number of instances held proved by the Trial Court were I think some sixteen or so out of the fifty tendered in support of a Hindu succession. In the Appellate Court it was held that the number should be increased from sixteen to twenty-five. But the Trial Court was pressed, as we have been pressed here, with the argument that the instances were not of sufficient antiquity to justify proof of the custom and the Trial Judge stated in *Halai Memon case* [*Khatubai* v. *Mahomed Haji Abu*] (8) at p. 310* "I have the following general criticisms to pass on the thirty-seven instances relied on by Mr. Setalvad. In the first place, they are all recent or comparatively recent. Only four of them, *viz.*, Nos. 25, 26, 36 and 39 are shown to be instances of deaths prior to 1900." The date of the trial was 1917, and the evidence was almost entirely commission evidence, and thus there were only four instances shown older than say some seventeen years before the trial of the suit.

Moreover, the community there was a large one, and inasmuch as it was a question of the succession of daughters along with sons, it was a class of cases that must occur with great frequency, *viz.*, in every one of the normal cases where a father leaves both sons and daughters. It was, therefore, a very different class of case from the present case, where the instances can at best be only occasional. In the *Halai Memon case* (8) I confess I was influenced by the argument as to want of antiquity taken with other circumstances, in coming to the conclusion that the custom had not been made out. But that decision was erroneous, for it was differed from in the Appellate Court, and the decision of the Appellate Court was afterwards confirmed by their Lordships of the Privy Council.

So the argument that has been addressed to us by the appellant does not carry with it anything like the same force as it would do if it had come to me as a new point free from any past experience of my own. In

(8) 45 Ind. Cas. 619; 20 Bom. L. R. 289.

*Page of 20 Bom. L. R.—[*Ed.*]

my judgment if the High Court considered that merely four instances older than seventeen years were sufficient in the *Halai Memon case* (8) then the present three instances are amply sufficient in the present case.

Accordingly, in the view I take, the main arguments that have been presented to us by the appellant that the instances were insufficient and that they were not of sufficient antiquity, fall to the ground. Speaking generally, the litigants here have had the advantage of two careful judgments from learned Hindu Judges, who are particulary acquainted with matters affecting the Hindu community. Having read those judgments, I see no reason whatever to arrive at a different conclusion in second appeal from that which the lower Appellate Court has arrived at.

I will only add in conclusion that, quite apart from the custom as to succession which I have dealt with, there was a totally different custom set up in the Trial Court, *viz.*, that the marriage of a child wife was not completed and was not legal until a certain ceremony called *chuda vidhi* had taken place. That custom was advanced by the defendant and if proved would have negatived the right to the plaintiff, for in that case the marriage would not have been validly completed. The learned Trial Judge found that the custom was not proved, and there is no appeal to us as regards that finding. I may express a hope that if this case is reported on the question of the custom of this particular caste, it will not be overlooked that there is a careful and interesting judgment from the Trial Judge on this alleged custom of *chuda vidhi*. In the course of that, he discusses not only the alleged custom but enters at length into the details of the ceremonies of marriage in that caste and to some extent amongst Hindus generally. That particular judgment does not concern me as a Judge in the present case, but as an individual, I have read it and read it with interest, and I hope others who take an interest in these points which are of so great importance to the large communities in this land, and which ought to be definitely and clearly settled will also read it.

In the result, I would dismiss this appeal with costs.

Fawcett, J.—I concur in dismissing the appeal with costs. The learned Judges in the two lower Courts have obviously borne in mind the recognised canons that govern the proof of a special custom, such as that set up in this case, and no error of law has, in my opinion, been established which would justify our interference in second appeal.

I endorse the remarks of my learned brother as regards the great care which the learned Trial Judge has shown in dealing with the voluminous evidence, and it is apparent that he has adopted a proper standard of proof in regard to the instances adduced in support of the alleged custom. It does not necessarily follow that many of these instances, which he holds not satisfactorily proved, have not really occurred; and the mere fact that only seven have survived the tests that he submitted them to, does not involve the necessary consequence that there are only a few instances of the kind alleged which have really happened.

As regards the point that none of these instances go beyond some thirty or forty years, I agree with what my learned brother has said, and think that, in the circumstances which he has referred to, it is unlikely that documentary or other evidence of more ancient instances should be available in cases of this kind. I think the intances show sufficient ground for presuming that this is not a mere custom or practice of recent date, but that it has thus come down from ancient times. It also is a custom that obviously has a large amount of reason to support it. I think that the finding of the lower Appellate Court on this question of custom is one that must be accepted by us in second appeal, and that there is no legal ground for our refusing to do so.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 756 OF 1923.

November 22, 1924.

Present:—Mr. Justice Harrison and Mr. Justice Campbell.

BULAKI MAL AND ANOTHER—APPELLANTS

versus

SHAMBU NATH AND OTHERS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 50—

Letters of Administration—Revocation, application for—Applicant not qualified—Appeal—Objection, whether can be taken.

Where a grant of Letters of Administration is revoked by the Court on the application of a person who is not qualified to make an application for revocation, the respondent having taken no objection to the maintainability of the application, the order revoking the grant cannot be disturbed in appeal unless and until it is shown that on the merits it is wrong. The objection that the applicant was not qualified to make an application for revocation cannot be urged for the first time in appeal.

First appeal from an order of the District Judge, Lahore, dated the 19th February 1923.

Messrs. *Badri Das* and *Tirath Ram*, for the Appellants.

Messrs. *Durga Das* and *Nawal Kishore*, for the Respondents.

JUDGMENT.—One Bulaki Mal representing himself to be a creditor and mortgagee of Nibahu Ram, deceased, applied for Letters of Administration to his estate. He did not implead *Musammat* Ananti, *Musammat* Gian Devi, or Shambu Nath. After the Letters hed been granted these three persons presented an application under s. 50 of Act V of 1881 for the revocation of the Letters of Administration. No objection was taken before the District Judge to the competency of these persons to make the application for revocation, and on the merits, the learned District Judge held that there had been concealment of a material character, which made it necessary that he should accept the application and revoke the grant.

Bulaki Mal now appeals and a cross-appeal has been put in arising out of the proceedings which gave birth to the application for Letters of Administration. Mr. Tirath Ram has urged very vigorously and has supported his contention with ample authority that the petitioners, inasmuch as they did not allege any interest in the property of the deceased Nibahu Ram, were not entitled to present the application in the sense that the Court was not bound to entertain their application and this position is made clear in *Sri Gobind Prasad* v. *Laljhari Kuer* (1), *Gopal Chandra Bose* v. *Asutosh Bose* (2), *Kalajit Singh* v. *Parmeshar Singh* (3), *In the goods of Kamineymoney Bewah* (4). Mr. Tirath Ram has also contended that on the merits the order of the District Judge is not correct.

(1) 2 Ind. Cas. 402; 14 C. W. N. 118.
(2) 20 Ind. Cas. 342.
(3) 39 Ind. Cas. 573; 1 P. L. W. 308.
(4) 21 C. 697; 10 Ind. Dec. (N. S.) 1095.

Now, the first objection was not taken at the earliest stage of the proceedings and as laid down in *Mayho* v. *Williams* (5), an objection of this nature to be sustained must be taken at once.

Whatever may be the position of the Court regarding the application in the sense that it is fully justified in rejecting an application made by a person who has claimed no interest, the question here arises is whether when the Court has failed to realise the situation and has acted on an application, which migat have been dismissed *in limine*, and has found good reasons, and more especially suppression of material facts, which justify it in revoking the grant, that order is to be set aside on the technical ground that, had an objection been taken at the outset, the Court would possibly have rejected the application. We are of opinion that once a Court has functioned, even if the application was made by a person not fully qualified, the order must stand unless it can be shown to be wrong on the merits. It is true that in *Sarat Sundari Barmani* v. *Uma Prosad Roy Chowdhry* (6), it was laid down that the Court must be moved before it can take action under this section and that under no circumstances can the Court take action on its own motion. Be this as it may, what we have to see here is whether the finding come to on an enquiry started on a petition irregularly made and not objected to at the time must be quashed. We think not. We are of opinion that once a Court has functioned on an application of this kind which was, strictly speaking, not competent, or rather which could have been rejected as being made by an unqualified person, that order must stand unless and until it is shown that on the merits it is wrong.

On examining the facts we are of opinion that the applicant clearly misrepresented facts in the sense that he suppressed necessary information and led the Court to come to conclusions which he must have known, it would not reach had it been put in possession of all available material.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Z. K.

(5) (1870) 2 N. W. P. H. C. R. 238.
(6) 31 C. 628; 8 C. W. N. 578.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2390 OF 1924.

March 26, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.

UPENDRA NATH JANA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Srimati SHIBADASI DEBI—PLAINTIFF—RESPONDENT.

Hindu Law — Alienation by widow- Necessity, absence of—Alienation, whether void or voidable.

An alienation by a Hindu widow without legal necessity is voidable and not void and until the reversioners (including in that term the Crown, if there are no reversioners) decide to avoid it or to treat it as a nullity, it stands good. [p. 899, col. 1.]

Collector of Masulipatam v. *Cavaly Vencata Narrainapah*, 8 M. I. A. 529; 2 W. R. P. C. 61; 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631, *Deo Nandan Pershad* v. *Udit Narayan Singh*, 23 Ind. Cas. 298; 18 C. W. N. 940 and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*, 34 C. 329; 5 C. L. J. 334; 11 C. W. N. 424; 9 Bom. L. R. 602; 17 M. L. J. 154; 2 M. L. T. 133; 4 A. L. J. 329; 34 I. A. 87 (P C.), referred to.

Appeal against a decree of the Third Additional District Judge, 24-Perganahs, dated the 17th of November 1924, affirming that of the Munsif, Third Court at Alipur, dated the 8th of November 1922.

Sastri *Brojolal Chakravarti* and Babu *Paresh Chandra Mitra*, for the Appellants.

Messrs. *Amarendra Nath Bose*, *Kshetra Mohan Ghose* and Babu *Mahendra Nath Ghose*, for the Respondent.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued to eject the defendants from a plot of land, 3 *cottas* and 14 *chhataks* in area, on the following allegations. The property in question belonged to one Kedar Nath Banerjee who is now dead and on his death it devolved on his widow Khiroda Sundari Kedar had three daughters, Amritamoyi, Mrinalini and Paribala. On the 5th September 1915 Khiroda sold some 5 *cottas* of land which included the land in suit to her daughter Paribala. Khiroda died in November 1916. Paribala sold the land on the 11th October 1919 to one J. C. Banerjee and he sold the land to the present plaintiff on the 31st August 1920 and now seeks to eject the defendants on the ground that they were on the land without any lease. It will appear that in 1322 this land was let out to Shama Baisnabi the predecessor-in-interest of the defendants for four years. The defence in the case was that Khiroda having a limited estate of a Hindu widow the sale to her daughter Paribala could not extend beyond her own lifetime and that the reversioners Mrinalini and Amritamoyi had given a lease of the property to the defendants and hence the reversioners had avoided the sale to Paribala. The Court of first instance held that the defendants had not proved that they were tenants on the land under Mrinalini and Amritamayi. It also held that no notice to quit was necessary and decreed the plaintiff's suit. Before the lower Appellate Court two points were argued. The first point is with regard to the notice to quit and the second point is regarding the plaintiff's title. The learned District Judge decided both these points against the appellants. He held that no notice to quit was necessary and secondly, that the sale to Paribala was good being voidable and not void and could only be challenged by the reversioners and that the reversioners did not challenge the same: and hence he dismissed the appeal.

On appeal to this Court two points have been argued. The first point is that the learned Judge is wrong in holding that it was only the reversioners who could challenge the validity of the sale by a Hindu widow after her death and in support of this contention the learned Vakil has relied upon the case reported as *Collector of Masulipatam* v. *Cavaly Venkata Narrainapah* (1). The passage on which he relies will be found at the bottom of page 550* of the report where their Lordships stated: "It is admitted on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely wordly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary and logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether

(1) 8 M. I. A. 529; 2 W. R. P. C. 61; 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

*Page of 8 M. I. A.—[*Ed.*].

drops" and from this passage the learned Vakils ask us to hold that the alienation by a widow which is not for legal necessity or for any of the purposes allowed by the Hindu Law is void and can be challenged by a third party. What was decided in that case was that the Crown in default of other heirs was in the position of reversioners and it is not an authority for the proposition that a person who is not a reversioner or in the position of a reversioner can challenge the validity of an alienation by a Hindu widow. On the other side there are a number of decisions directly on the point. I may first refer to the case of *Deo Nandan Pershad* v. *Udit Narayan Singh* (2), where this particular point has been directly decided and where it is held that an alienation without legal necessity is voidable and not void and until the reversioner (including in that term 'Crown' if there is no reversioner) decided to avoid it or to treat it as a nullity, it stands good. In that case the alienation in question was a sale. A reference may also be made to the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (3). Their Lordships therein dealing with the question of estate of a Hindu widow stated that a Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death, but that she may alienate it subject to certain conditions being complied with; that her alienation is not, therefore, absolutely void but it is *prima facie* voidable at the election of the reversionary heir and that he may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court. I am, therefore, of opinion that the law as stated by the learned District Judge is correct.

The next point that the learned Vakil urged is that it was the case of the defendants that they were tenants under the two reversioners and that the Trial Court was of opinion that these two ladies Amritamoyi and Mrinalini were not reversioners and that, therefore, it did not properly consider the question as to whether the defendants had or had not taken the lease from the ladies. No doubt the learned Munsif had apparently held that Amritamoyi and Mrinalini had no title in the suit land and to that extent his decision is not correct. But independently of whether these ladies had or had not a title to the land in suit he had apparently decided that the *kabuliyat* on which the defendants relied was not a genuine document and it does not appear that this finding was challenged in the Court of first appeal. No reference whatever is made to this part of the case in the judgment of the lower Appellate Court.

For these reasons the appeal fails and is dismissed with costs.

The respondent will be entitled to his costs of the preparation of the paper-book.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

(2) 23 Ind. Cas. 293; 18 C. W. N. 940.
(3) 34 C. 329; 5 C. L. J. 334; 11 C. W. N. 424; 9 Bom. L. R. 602; 17 M. L. J. 154; 2 M. L. T. 133; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1138 OF 1923.

April 30, 1925.

Present:—Mr. Justice Sulaiman.

DHUNDE CHAUDHRI—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL BOARD AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Municipalities Act (II of 1916), ss. 178, 180, 318, 321—Notice of intention to erect building—Refusal of sanction—Remedy—Appeal to District Magistrate—Injunction restraining Municipality from interference, suit for, maintainability of.

A refusal by a Municipality to sanction the erection of a building under s. 180 of the U. P. Municipalities Act cannot be held to be *ultra vires*. The only remedy of a person who feels aggrieved by such refusal is to appeal to the District Magistrate under s. 318 of the Act. If the order of the Municipality is illegal the District Magistrate can be asked to refer the point to the High Court. Where, however, the District Magistrate confirms the order of the Municipality the order becomes final and cannot be questioned in any other manner or by any other authority by virtue of the provisions contained in s. 321 of the Act.

A suit, therefore, by a person who has been refused permission by a Municipality to erect a building for an injunction restraining the Municipality from interfering with the plaintiff's construction of the building is not maintainable by virtue of the provisions of s. 321 of the U. P. Municipalities Act.

Second appeal against a decree of the District Judge, Jhansi, dated the 12th of April 1923.

Dr. *N. C. Vaish*, for the Appellant.

Mr. *K. Verma*, for the Respondents.

JUDGMENT.—This is a plaintiff's ap-

peal arising out of a suit for an injunction restraining the Municipal Board of Kunch from interfering with the plaintiff's construction on a certain piece of land. The plaintiff had given notice under s. 178 of the Municipalities Act to the Municipal Board for sanction to build upon it.

The Municipal Board for reasons which are not material to consider refused to grant sanction to build upon this piece of land. The plaintiff feeling himself aggrieved by that order appealed to the Distrist Magistrate who confirmed it.

He then instituted the present suit and alleged that the land on which he wanted to build being his own land and not a street, the Municipal Board had no right to refuse permission or prevent him from building upon it. The Municipal Board took up the position that the land was in fact a street within the meaning of the Act and also that they had full power to refuse the sanction and, therefore, the claim was barred under s. 321 of the Municipalities Act.

The Court of first instance dismissed the suit on the ground that the land is a street within the meaning of the definition of that word given in the Act, and also that in view of s. 321 of the Act the claim was not maintainable. The lower Appellate Court has confirmed that decree on the ground that the land in dispute is a street within the meaning of the Act. It seems to me that it was quite immaterial to consider whether the land belonged to the plaintiff or not and whether it was a street within the meaning of the Act. Under s. 87 of Act 1 of 1900, there was a proviso which limited the power of the Board to refuse to sanction the erection or re erection of a building. That proviso has been cut out from s. 180 of the new Act which corresponds with the old s. 87. A refusal to sanction, therefore, cannot now be said to be *ultra vires*. A notice under s. 178 had been given by the plaintiff. It was nowhere suggested that such a notice was not necessary. Notice under s. 178 having been given, the Municipal Board exercised its discretion under s. 1 0 of the Municipalities Act of 1916 in refusing to sanction the building. The plaintiff's only remedy if he felt aggrieved by that order was to appeal to the District Magistrate under s. 318. If the order of the Municipal Board was illegal he might have asked the District Magistrate to refer the point to the High Court. This was not done. The District Magistrate has confirmed the order of the Board. That order is now final and cannot be questioned in any other manner, or by any other authority. Section 321 is quite clear on this point. The only relief which the plaintiff claimed is a relief for an injunction restraining the Municipal Board from interfering with his construction. It is obvious that in substance he wants the refusal to grant the sanction to be set aside by a Civil Court. A suit of this nature is not maintainable.

I may mention that there was no relief claimed as regards the title to the land or the character of the plaintiff's possession over it. As the suit fails on the preliminary point, all questions of title will, of course, remain open.

The appeal is accordingly dismissed with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS SECOND APPEAL No. 8 OF 1925.

May 7, 1925.

Present:—Mr. Dalal, A. J. C.

JAGAT SINGH—DEFENDANT—APPELLANT

versus

BIKRAM SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Sale by father—Suit by son to challenge sale—Plaint, allegations in—Necessity—Antecedent debt—Burden of proof.

Where a Hindu son sues to set aside a sale of family property by the father on the ground of want of legal necessity or of the payment of an antecedent debt, it is not necessary for him to allege that the debt which has been paid off was contracted by the father for purposes of immorality or was illegal or was of an illusory character. It is for the purchaser to prove that the sale took place for legal necessity or for the payment of an antecedent debt.

Appeal against an order of the Fourth Additional District Judge, Lucknow, dated the 15th November 1924, reversing that of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 27th August 1923.

Mr. *M. L. Khandalwal*, for the Appellant.

Mr. *P. L. Varma*, for the Respondent.

JUDGMENT.—This is an appeal from a remand order of the lower Appellate Court. Unfortunately the remand order was rendered necessary by the terms of

the judgment of the First Court. Hindu sons sued to set aside a sale by the father on the ground of want of legal necessity or of the payment of an antecedent debt. This was quite a correct position to take up. It was not the duty of the Hindu sons to allege that the debt was contracted by the father for the purposes of immorality or was illegel or was of an illusory character. The learned Judge of the Trial Court has mixed up the consideration, of a private sale with those of a public sale under which property passes out of the family on a suit for sale.

The appellant's learned Counsel argued that the Trial Court has considered how the consideration of the sale-deed is made up and held that the items of consideration went to pay antecedent debt. I do not agree. There is no such finding of the Trial Court. The Trial Court did consider the items of consideration but left the matter hanging half way. There is no specific finding that the consideration was made up of items which went to pay antecedent debts. The lower Appellate Court was correct in confining his attention to the one finding of the Trial Court to the following effect :—

"I hold that plaintiffs after admitting that the sale-deed in suit was not contracted for illegal or immoral purposes, and the consideration of the sale was not of an illusory character, cannot maintain this suit as the property was passed to third persons."

This is not a correct view of law when there has been a private sale. It is for the purchaser to prove that the sale took place out of legal necessity or for the payment of antecedent debt.

I desire to make this point clear because the Trial Court must inquire into it over again. If the defendant succeeds in proving that the consideration was made up of items used for the payment of antecedent debt he would be entitled to resist the claim of the plaintiffs. What the lower Appellate Court has done is to set aside the finding quoted by me above and not any other portion of the reasoning of the judgment of the Trial Court. Only Issue No. 6 has been decided though the Trial Court has touched other issues unadvisedly in his judgment. It may be repeated that only Issue No. 6 is decided in favour of the plaintiffs and no other issue.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 155-B OF 1923.
October 9, 1924.

Present :—Mr. Kotval, A. J. C.

CHIMNAJI—PLAINTIFF—APPELLANT
versus
SONAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 3—Limitation Act (IX of 1908), Sch. I, Art. 181—"The day fixed," meaning of—Application for final decree—Period for payment, extension of—Papers ordered to be filed—Fresh application—Limitation.

The words "the day fixed" in sub-r. (2) of r. 3 of O. XXXIV of the C. P. C. refer to the day fixed under the preceding sub-rule and do not include the day to which payment may be postponed under the proviso to the rule. [p. 902, cols. 1 & 2.]

Where an application for a final decree is made within time and it is ordered to be filed as time for payment has been extended, the order cannot be construed as amounting to a dismissal of the application. [p. 902, col. 2.]

Any subsequent application for the making of the decree final on default of payment within the time extended is meant only for the purpose of continuing the proceedings on the original application and is not governed by Art. 181 of Sch. I of the Limitation Act and there is no limitation provided in respect of it. [*ibid.*]

Appeal against a decree of the Additional District Judge, Amraoti, dated the 10th February 1923, in Civil Appeal No. 210 of 1922.

Mr. *M. Gupta*, for the Appellant.
Mr. *R. R. Jaywant*, for the Respondent.

JUDGMENT.—On the 21st November 1914 a preliminary decree for foreclosure was passed in favour of Chimnaji plaintiff-appellant against Sonaji and three others, defendants respondents. On the 8th September 1915 the plaintiff-applied for a final decree. Notice was issued to the defendants and on their application the time for payment was extended till the 7th January 1916. The papers were ordered to be filed. No payment having been made the plaintiff applied again for a final decree on the 9th March 1916 and time was again extended till the 19th November 1916 the papers being again ordered to be filed. On 17th November 1920 the plaintiff again applied for a final decree. The Trial Court dismissed the application as time-barred under Art. 181, First Schedule, Limitation Act, as it was made more than three years after the 19th November 1916. The lower Appellate Court having confirmed the order of dismissal, the plaintiff has filed this second appeal.

Order XXXIV, r. 3, First Schedule, C. P. C, provides:

"(1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree,

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required.

(b) ordering him to transfer the mortgaged property as directed in the said decree, and, also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property:

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

(3) On the passing of a decree under sub-r. (2) the debt secured by the mortgage shall be deemed to be discharged."

The Trial Court's view is that the words "the day fixed" include also the day to which the time for payment has been extended and consequently a fresh application by the plaintiff is necessary after the expiry of the extension. The lower Appellate Court's judgment does not discuss the view. It assumes that if Art. 181, First Schedule, Limitation Act, applies the application is barred.

In this Court the plaintiff's Counsel does not dispute that Art. 181 applies but he contends that even if that Article applies the refusal to pass a final decree on the ground of limitation is not justified. On the defendants' behalf it is urged that the order granting extension till the 19th November, 1916 amounted to a dismissal of the application for final decree and a fresh application within 3 years from the above date was necessary.

The Trial Court's view does not appear to be correct. The words "the day fixed" refer to the day fixed under the preceding rule and if the rule had intended to refer also to the day to which payment was postponed under the proviso which comes later it would have done so expressly.

The plaintiff had applied under O. XXXIV, r. 3 on the 8th September 1915. This application was within the period of limitation prescribed by Art. 181, Unless postponement of the day fixed amounted to dismissal of the application no second application was necessary. Neither the postponement which was an indulgence granted to the defendants nor the filing of the papers should be construed as a dismissal of the application. The application must be deemed to have remained pending for final orders and the Court to have postponed the passing of such orders. No further application for a final decree was necessary and if any subsequent application was required it was only for the purpose of continuing the proceeding on the original application which had been suspended. Such an application is not governed by Art. 181 and there is no limitation in respect of it. It is objected that if that is so the plaintiff can come in an indefinite time after his first application. But this may be avoided by the Court fixing some date falling after the expiry of the extension for further proceeding on the application instead of filing the papers. If the plaintiff then failed to appear and prosecute his application it might be dismissed.

For the above reasons the plaintiff's application is not barred by limitation. The appeal is allowed with costs. The case is remanded to the Trial Court to be disposed of in accordance with law.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 2445 OF 1921.

December 9, 1924.

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

GANGA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat INDI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Ancestral property—Jats of Khurchanpur, Tahsil Ambala—Daughters v. collaterals of 6th degree—Burden of proof.

Amongst *Jats* of village Khurchanpur in the Ambala Tahsil, the burden of proving that collaterals of the 6th degree exclude daughters from succession to ancestral property is on the collaterals.

Amongst *Jats* of the Ambala District, the collaterals of the 6th degree do not exclude daughters from succession to ancestral property.

Second appeal from a decree of the District Judge, Ambala, dated the 17th August 1921, affirming that of the Junior Subordinate Judge, First Class, Ambala, dated the 21st March 1921.

Mr. *Gopal Chand*, for the Appellants.

Syed *Mohsin Shah*, for the Respondents.

JUDGMENT.—This is a second appeal supported by a certificate, the custom involved being whether amongst *Jats* of village Khurchanpur in the Ambala Tahsil daughters exclude collaterals of the 6th degree from succession to ancestral property.

The Trial Court placed the onus upon the collaterals, and the learned District Judge held, that the onus had been rightly placed, and secondly, that it had not been discharged.

Before us both these points have been argued. The entry in the published Customary Law of the Ambala District as a whole is to the effect that "the commonly received custom for all tribes except *Sayads* and some *Rains* is to exclude the daughter wherever collaterals can be traced up to the great-great-grandfather," *i. e.*, that the collaterals in the 4th degree and no further exclude the daughter. It is stated that both *Jats* and *Gujars* were inclined to go still further and to say that the daughters never succeed, the land going to the proprietors of the *patti* rather than to the daughter, but the compiler of the work, Mr. Whitehead, held that while these views represented the feelings of these two communities it was doubtful whether there was any actual custom to this effect.

Counsel for the defendants-appellants relies on an entry in a vernacular document which is described in the heading as a copy of the "*Riwaj-i-am* of Ambala" and no more. There the reply of the *Jats* is shown as being that collaterals up to the 7th degree exclude daughters. A long list of so-called instances follows, every one of which is to the effect that the daughter in the particular case excluded the collaterals.

Counsel for the respondents has put forward the ingenious theory that the instances show that the main entry contains a clerical error and should be to the effect that collaterals of the 7th degree do not exclude daughters.

This is possible, but this vernacular entry, whatever it may represent exactly, is supported by no instances and is opposed to the Customary Law of the district published by Government and complied by the Settlement Officer. It is possible that there may have been some separate vernacular compilations for the different Tahsils, but the document is not shown as referring to any particular Tahsil and nobody has been able to throw any light upon the matter.

Counsel for the appellants urges that this vernacular document must be accepted as against the clear statement in the Customary Law of the district and is sufficient in itself, unsupported by instances or rather supported only by instances which contradict it, to shift the burden of proof from the collaterals to the daughter. We think not, and we are of opinion that the burden was rightly placed upon the collaterals. The evidence produced by these collaterals is not, in our opinion, of any value.

We, therefore, dismiss the appeal with costs, and find that it is not established that collaterals in the 6th degree exclude daughters amongst *Jats* of the Ambala district.

S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 813 OF 1922.

October 24, 1924.

Present:—Mr. Justice Venkatasubba Rao.

AVUGADDI JOGAMMA AND OTHERS—DEFENDANTS—APPELLANTS

versus

LALIAN POTHANNA—PLAINTIFF—RESPONDENT.

Part performance, doctrine of, applicability of—Unregistered agreement for consideration transferring property—Transferee, put in possession—Suit by transferor to recover possession of property, whether maintainable.

In consideration of defendant giving up her claim to certain properties in the possession of the plaintiff, the latter executed an unregistered agreement in favour of the former giving her the land in dispute and put her in possession of it. Some years afterwards plaintiff filed a suit to recover possession of the property from the defendant:

Held, that the doctrine of part performance applied and that the plaintiff was not entitled to recover the property. [p. 905, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, Vizagapattam, in Appeal Suit No 97 of 1921, (A. S. No. 41 of 1921, on the file of the District Court), preferred against the decree of the Court of the District Munsif, Yellamanchilli, in O. S. No. 134 of 1919.

Mr. *P. Somasundaram*, for the Appellants.

Mr. *Y. Suryanarayana*, for the Respondent.

JUDGMENT.—The plaintiff sues for the recovery of certain lands from the possession of the defendants. The 1st defendant is the sister of the plaintiff. She gave her daughter in marriage to him. The plaintiffs' daughter was married to the 3rd defendant, a son of the 1st defendant. The parties are thus very near relations. The immediate occasion for the suit was the death of the plaintiff's daughter, that is the 3rd defendant's wife. The plaintiff lost his mother when he was just an infant. The 1st defendant who was his senior in age by over 20 years came over to her father's house and began to look after and bring up her brother, the plaintiff. Shortly after, the plaintiff lost his father; and throughout the 1st defendant brought him up, and it would seem that he was practically regarded as her child. After the plaintiff grew up, he became the Village Munsif and was unable to manage his own land. The sons of the 1st defendant cultivated the plaintiff's lands and generally had supervision over them. This state of things continued till the plaintiff who was then 40 years of age executed on the 18th April 1910 in favour of the 1st defendant what is termed a '*puroni*' or an agreement (Ex. 1). By this the plaintiff gave away to the 1st defendant the suit lands and since the date of the document she has been in continuous and undisturbed possession. Misunderstandings having arisen, as pointed out, owing to the death of the 3rd defendant's wife, the plaintiff has sued to recover the lands. The question to be decided is can the defendant rely upon Ex. I and resist the plaintiff's suit?

Exhibit I is unregistered. Before dealing with the law on the subject, it is necessary to notice another circumstance. Till 1910 all the parties appear to have lived together. Shortly before the execution of Ex. I, the 1st defendant and her sons laid a claim to a portion of the property in the possession of the plaintiff on the ground that they had contributed by their labour to the acquisition and expansion of the property. In consideration of the defendants waiving their rights to the rest of the property, the plaintiff gave away the lands in dispute to the 1st defendant and executed Ex. I. The facts as I have stated are found by the District Munsif, but on this part of the case the Subordinate Judge has given no finding. Under s. 103 and O. XLI, r. 24 of the C. P. C., I have considered the evidence of the record and satisfied myself that the District Munsif has come to the correct conclusion on the facts. What then is the position of affairs? The 1st defendant and her sons advanced some claims to the property in the possession of the plaintiff. The plaintiff agreed, in consideration of the defendants, giving up these claims, to transfer to the first defendant the lands now in dispute. There was thus a contract supported by consideration. So far as the other antecedent facts are concerned, namely, the looking after of the plaintiff by the 1st defendant, the cultivation of the plaintiff's lands by her sons these and other similar facts to which I have referred, would not in law amount to consideration, as under s. 2 (*b*) *of the Indian Contract Act*, it would be essential that any act done by the promisee should have been so done at the desire of the promisor. There is no proof that acts done by the 1st defendant or her children were done at the desire of the plaintiff, and accordingly so far as these facts are concerned, they would not constitute a valid consideration for the contract. It is not necessary to further dwell on this matter as I have pointed out there was a contract supported by consideration.

Acting on Ex. I the 1st defendant took possession of the property and from 1910 to 1919 when the suit was filed, she was in possession of the property and she still continues to remain in possession. What then would be the effect of the absence of a registered conveyance in favour of the 1st defendant? *Muhammad Musa* v. *Aghore Kumar Ganguli* (1) is a direct

(1) 23 Ind. Cas. 930; 42 I. A. 1; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621 (P. C.).

authority on the point. Their Lordships of the Judicial Committee held that whatever defects of form there might have been in relation to the compromise agreement in question in that suit, were cured by the conduct of the parties in continually acting upon it. At page 6* their Lordships observed thus: "For the points against opening up the transaction are manifold, and are in their Lordships' opinion conclusive. The compromise had been acted upon by all the parties to it, and by their successors-in-title from that date to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajanessa's death in the year 1890, and, indeed, from that date until the present time the property has been managed upon the footing of that division." They observed again "In a suit, said Lord Selborne in *Maddison* v. *Alderson* (2) founded on such part performance the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow." This Court gave effect to this principle in *Vizagapatam Sugar Development Co.* v. *Muthurama Reddi* (3), the learned Judges referring to the fact of the purchaser under the contract of sale being in possession of the property, as part performance of the contract which would take it out of the operation of the Statute.

The point is concluded by authority and as a matter of fact the lower Courts especially the District Munsif would have dismissed the suit but for the circumstance that the then prevailing view so far as this Court was concerned was different.

In the result, the judgment of the learned Subordinate Judge is reversed and the second appeal is allowed and the suit is dismissed with costs throughout.

Appeal allowed.

V. N. V.

Z. K.

(2) (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(3) 76 Ind. Cas. 836; 46 M. 919; 45 M. L. J. 528; (1924) A. I. R. (M.) 271; 33 M. L. T. 53; (1924) M. W. N. 14.

*Page of 42 I. A.—[*Ed.*]

CALCUTTA HIGH COURT.

APPLICATION IN THE MATTER OF THE INDIAN COMPANIES ACT VII OF 1913.

June 11, 1925.

Present:—Mr. Justice C. C. Ghose.

In re BHAGAT BROTHERS, LTD. (IN LIQUIDATION).

Companies Act (VII of 1913), s. 209—Voluntary winding up—Joint liquidator, appointment of, application for—Recommendation of creditors—Discretion of Court—Extension of time—Appointment, whether can be retrospective.

When an application is made under sub-s. (2) of s. 209 of the Companies Act, the Court is not required to register by a formal order the recommendation of the creditors of the Company as to the person to be appointed as joint liquidator. The Court may or may not act under sub-s. (3) of s. 209 on the resolution of the creditors. The matter is entirely discretionary with the Court. Till, however, an order is made appointing a person to act as joint liquidator such person cannot take upon himself the duties of a joint liquidator and the assumption of the duties of joint liquidator on the part of such a person does not give him any rights whatsoever. [p. 907, col. 2.]

In a proper case the Court has power to extend the time for making an application for the appointment of a person as joint liquidator but the Court has no power to make an appointment with retrospective effect. [*ibid.*]

Mr. *W. W. K. Page*, for Khardah Co., Ltd.

Mr. *Pankridge*, for Mr. A. F. P. Allan.

Mr. *Westmacott*, for Mr. S. K. Day.

Mr. *Sushil Sen*, for Messrs. Champalal Gunchandlal.

JUDGMENT.—This is an application on behalf of the Khardah Company Limited for an order that the appointment of A. F. P. Allan as a joint liquidator with Mr. S. K. Day of the Company known as Bhagat Brothers Limited at the same remuneration as the said Mr. S. K. Day is receiving may be confirmed and ratified by this Court with retrospective effect from the 4th July 1921.

The facts shortly stated are as follows. By an extraordinary resolution passed at a meeting of the share-holders of Bhagat Brothers Limited held on the 6th June 1921 it was resolved that the said Company be wound up voluntarily and that Mr. S. K. Day Incorporated Accountant be appointed liquidator. Mr. Day convened a meeting of the creditors of the said Company under the provisions of s. 209 of the Indian Companies Act and it was held on the 4th July 1921 when the following resolution was unanimously passed—"That this meeting is of opinion that Mr. Allan of Messrs. Viney and Thurston be appointed and failing his acceptance Mr. Smith of Messrs.

Norman Hamilton and Co., be appointed co-liquidator with Mr. S K. Day on the same remuneration as Mr. Day." Mr. Allan accepted the appoinment and thereupon entered upon the duties of joint liquidator with Mr. Day of the said Company and since continued so to act. It is stated that by inadvertance on the part of the petitioner and other creditors of the Company no application was made to the Court for the appointment of Mr. Allan as liquidator jointly with Mr. Day of the said Company and that the omission to do so was not discovered till the 5th May 1925. By an order made on the 5th September 1921 on the application of Messrs. Day and Allan as liquidators of the said Company a scheme of arrangement for the sale of the assets of the Company to one Ramkumar Bhagat in consideration of the payment by the said Ram Kumar Bhagat to the liquidator of a sum equivalent to a dividend of ten per cent. on the amount of all admitted claims and dealing with certain other matters was approved of by the Court. It was not then brought to the notice of the Court that no application had been made under the provision of s. 209 sub-cl. (2) of the Indian Companies Act for the appointment of Mr. Allan jointly with Mr. Day as liquidator of the above Company. It appears that the liquidation proceedings have been carried on jointly by Messrs. Allan and Day and that the costs of the liquidation of the Company up to the present time have amounted to a sum of Rs. 40,392-12-11 including a sum of Rs. 23,000 appropriated and paid out of the assets on account of their remuneration by Messrs. Allan and Day as such liquidators, such sum being received by the liquidators in equal shares. Mr. Allan is desirous of retiring from business in India and he and Mr. Day called a meeting of the creditors of the Company on the 14th May 1925 when it was brought to the notice of the creditors that Mr. Allan had not been appointed by the Court as a joint liquidator. At the said meeting a resolution was adopted to the effect that the Khurdah Company Limited be instructed to make the necessary application to the Court to ratify Mr. Allan's appointment as joint liquidator. The Khurdah Company Limited have, therefore, made the present application.

The application is opposed by Mr. Sen on behalf of Messrs. Champalal Gunchandlal who are creditors of the Company and he contends that no application under s. 209 sub-cl. (2) having been made for the appointment of Mr. Allan as liquidator jointly with Mr. Day, the Court has now no jurisdiction to sanction such appointment with retrospective effect.

Formerly voluntary liquidations were sometimes run through by a liquidator nominated by the Directors without regard to the wishes or rights of the creditors and to prevent this state of things happening s. 188 of the English Companies Act which corresponds to s. 209 of the Indian Companies Act was enacted. This section has established a new procedure giving the creditor greatly extended powers in regard to the appointment of a liquidator in a voluntary winding up. By this section every liquidator appointed by the Company in a voluntary winding up must, within 7 days after his appointment "send notice by post to all persons who appear to him to be creditors of the Company" convene a meeting of creditors for a day not less than 21 days nor more than one month after his appointment and specifying the place and hour and must advertise notice of the meeting once in the Official Gazette and once in some local newspaper circulating in the district where the registered office or principal place of business of the Company was situate. At this meeting the creditors are to determine whether an application shall be made to the Court for the appointment of any person in place of or jointly with the liquidator appointed by the Company and if the creditors so resolve an application may be made accordingly to the Court at any time not later than 14 days after the date of the meeting by any creditor appointed for the purpose at the said meeting. Under the Indian Companies Act provision is made that the Court may by order at any time extend the time for making an application such as is hereinbefore referred to for such period as the Court thinks proper. On such an application being made the practice in England is and (in my opinion it is desirable that the same practice should be followed here) to require an affidavit by the liquidator appointed by the Company proving that the meeting of creditors was duly convened and an affidavit by the Chairman of the meeting stating the number of creditors present, the total amount of debts owing to them, the number of creditors voting for or against any resolution and

the total amount of debts owing to them in each case and if a resolution for the appointment of a liquidator has been passed whether there has been any solicitation on behalf of the person nominated.

On the application being heard the Court may remove the liquidator appointed by the Company and appoint another person or may appoint some person to act jointly with the liquidator appointed by the Company or make such other order as having regard to the interests of the creditors and contributories of the Company may seem just.

These being the provisions of the law on the subject, Mr. Page who appears for the Khardah Company Limited has referred me to three cases in support of his application. The first is the case of *In re Indian Zoedone Company* (1) where the Court in a case where there was a question whether the sole voluntary liquidator had been properly appointed confirmed him in the office in order that the question might be quieted. This was a case under sub-s. (2) of s. 141 of the English Companies Act of 1862 which corresponds with sub-s. 8 of s. 207 of the Indian Companies Act. In my opinion looking at the facts of the case referred to it has no bearing upon the present application. The next case upon which reliance was placed by Mr. Page is that of *In re Sunlight Incandescent Gas Lamp Co.* (2) where the facts were as follows: A Company went into voluntary liquidation and two persons *B* and *M* were appointed liquidators. *B* having retired *F* was appointed liquidator in his place to act with *M*. *M* applied for leave to take certain misfeasance proceedings but was opposed by *F* and thereupon the registrar made an order appointing *K* additional liquidator to act jointly with *M* and *F*. Mr. Justice Wright held that s. 141 of the English Companies Act, 1862, was sufficiently wide to give the Court power to appoint *K* in the circumstances set out. In my opinion this case also has no bearing on the present application. Mr. Page's third case was that of *In re Allison, Johnson & Foster Ltd.*, (3) where the facts were as follows: One Birkenshaw was appointed liquidator in a voluntary winding up. The proceedings at which he was appointed liquidator were set aside as invalid, *ab initio* by Mr. Justice Farwell. Birkenshaw thereafter put forward a claim as a creditor for work done and expenses incurred by him while purporting to act as liquidator. The Court (Lord Alverstone, C. J., Wills and Kennedy, JJ.,) held that Birkenshaw was not entitled to be paid anything for services rendered as liquidator but in so far as any work by him had been useful to the Company for business purpose unconnected with the voluntary liquidation or had been used by the official liquidator in the subsequent. Company winding up with full knowledge of the facts he was entitled to claim reasonable remuneration. This case, as I read it, is against Mr. Page's contention and does in no way support the present application. To my mind the decision of the question raised in the present application turns entirely on the provisions of sub-cls. (2) and (3) of s. 209 of the Indian Companies Act. No doubt in a proper case I can extend the time for making an application for the appointment of a person as joint liquidator but I doubt very much whether having regard to the language of the section, I have power to make such an appointment as is prayed for with retrospective effect from the 4th July 1921. In my view when an application is made under sub-cl. (2) of s. 209 of the Indian Companies Act the Court, if I may say so, is not required to register by a formal order the recommendation of the creditors of the Company as to the person to be appointed joint liquidator. The Court may or may not act under sub cl. (3) of s. 209 on the resolution of the creditors. The matter is entirely discretionery with the Court and in England no appeal is allowed against the order which the Court may make on such an application (s. 188 of the English Companies Act.) It follows, therefore, that till an order is made appointing a person to act as joint liquidator such person cannot take upon himself the duties of a joint liquidator, and, therefore, the assumption of the duties of a joint liquidator on the part of such a person does not give him any rights whatsoever. The fact that the Court made an order on the 5th September 1921 approving a scheme of arrangement for the sale of the assets of the Company on the application of Messrs. Day and Allan in ignorance of the fact that Mr. Allan had not been ap-

(1) (1884) 26 Ch. D. 70; 53 L. J. Ch. 468; 50 L. T. 547; 32 W. R. 481.
(2) (1900) 2 Ch. 728; 69 L. J. Ch. 873; 83 L. T. 406.
(3) (1904) 2 K. B. 327; 73 L. J. K. B. 763; 91 L. T. 66; 20 T. L. R. 493; 53 W. R. 285.

pointed liquidator cannot affect the determination of the question raised on the present application. The proviso to sub-cl. (2) does not in any view enable me to make the order prayed for.

The conclusion to which I have come is that I have no jurisdiction to make an appointment such as is prayed for with retrospective effect from the 4th July 1921.

I do not propose to deal with the matters relating to question of remuneration etc., raised in the affidvait on behalf of Champalal Gunchandlal for in my opinion they do not arise at the present stage.

The result, therefore, is that the application must stand dismissed with costs.

Z. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 2 OF 1925.

May 8, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice.

HAR BHAJAN LAL—PLAINTIFF—APPLICANT

versus

HAR CHARAN LAL AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 2—Contract—Proposal and acceptance—Reward offered to person fulfilling certain conditions—Person fulfilling conditions, whether entitled to recover.

A young boy of 13 or 14 years of age ran away from his father's home and the father issued a hand-bill offering a certain amount as a reward to anybody who found the boy and brought him home. Plaintiff found the missing boy and brought him to his father. The father refused to pay the reward and plaintiff brought a suit to recover the amount of the reward:

Held, that the hand-bill was an offer open to the whole world which could be accepted by any person who fulfilled the conditions contained therein, and that the plaintiff having fulfilled the conditions of the hand-bill was entitled to recover the amount of the reward offered.

Civil revision from an order of the Judge of the Court of Small Causes at Bareilly, dated the 9th October 1924.

Dr. *K. N. Katju*, for the Applicant.

Mr. *Hazari Lal Kapoor*, for the Opposite Parties.

JUDGMENT.—This application in revision must be allowed, the decision of the learned Judge of the Court of Small Causes, Bareilly, set aside, and judgment entered for the plaintiff for Rs. 500. It is a curious case. A young boy of 13 or 14 years, Ram Kishen, ran away from his father's home at Baheri on the 9th of June 1924. The father eventually issued a pamphlet, offering a reward in these terms:—"Anybody who finds trace of the boy and brings him home, he will get Rs. 500." That is the translation that has been put to me as the correct translation, and there seems to be no substantial difference about the matter. It happened that one of these hand-bills came into the possession of the plaintiff, and the plaintiff undoubtedly had the boy's name in his memory. On the 19th of July the plaintiff was at the *dharamsala* of the Bareilly Junction Railway Station. There he saw a boy, overheard part of a conversation, realized that the boy was the missing Ram Kishen and promptly took him to the Railway Police Station, where he made a report and sent a telegram to the boy's father saying that he had found his son. The question is whether he had not substantially fulfilled the terms offered. The hand-bill was an offer open to the whole world and capable of acceptance by any person who fulfilled the condition. The real condition of the promise in the hand-bill was "I will pay Rs. 500 to any one who finds my son and brings him home." I am of opinion that the plaintiff substantially performed the condition and that the judgment of the Small Cause Court is extremely artificial. In these circumstances that decision must be reversed and there must be a decree in favour of the plaintiff for Rs. 500 with costs and fees on the higher scale.

Z. K. *Application allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 140 OF 1924.

June 12, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Sulaiman.

NAGESHWAR RAI—DEFENDANT—APPELLANT

versus

NAND LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 63—Mortgage—Grove planted by mortgagee, whether accession—Consent of mortgagor, absence of—Redemption—Mortgagor, whether entitled to grove—Compensation, whether payable.

A grove planted by a mortgagee in possession of the mortgaged land forms an accession to the mortgaged property within the meaning of s. 63 of the Transfer of Property Act. The accession is the grove as it stands and not merely the timber of the trees constituting the grove. The grove as it stands cannot be enjoyed separately from the land, or at least it cannot be so enjoyed without detriment to the land itself. Therefore, unless the grove has been planted with the consent of the mortgagor or was planted for the preservation of the land from destruction, forfeiture or sale, the mortgagor is entitled to the grove on redemption of the land without payment of compensation to the mortgagee.

Letters Patent appeal against a judgment of Mr. Justice Daniels, dated the 25th June 1924.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *A. P. Pandey*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for redemption. The only point in dispute that remains for our consideration is as regards the grove which was planted by the mortgagee on the land during the continuance of the mortgage. The Courts below have held that no consent of the mortgagor for the planting of this grove was established and a learned Judge of this Court has declined to go behind that finding of fact. We agree that in second appeal that finding cannot be challenged.

The only other point that has been argued is that the mortgagee is entitled to cut away the timber and clear the ground of all trees. It is contended that the case falls under the second portion of s. 63 of the Transfer of Property Act and that this is a case where there has been an accession to the mortgaged property which is partly capable of separate possession or enjoyment without detriment to the principal property. This argument is based on the contention that a grove is capable of two uses. It may be used as a grove and the produce of it may be appropriated, or the trees may be cut down and its timber may be appropriated. It is, therefore, argued that inasmuch as the mortgagee can cut down the trees and appropriate the timber independently of the land, he is entitled to do so under the second portion of s. 63. A learned Judge of this Court has not acceded to this contention on the ground that the cutting of the trees would be detrimental to the principal property within the meaning of that section and also that the enjoyment for which the appellant contends would not be an enjoyment of the accession as it now exists, but of the trees in a mutilated condition.

It is true that from the point of view of the mortgagee the grove may be capable of enjoyment in these two ways and if the option were to rest with him entirely he may say that he would cut away the trees and appropriate the timber; but from the point of view of the mortgagor, the grove as it stands cannot be enjoyed separately from the land. The accession to the mortgaged property is the grove as it stands, and not only the timber. If this accession is not capable of separate possession or enjoyment the mortgagor would be entitled to have it, unless the mortgagee establishes that this grove was planted for the preservation of the principal property from destruction, forfeiture or sale or was made with the consent of the mortgagor. These exceptions have not been established in this case. Furthermore, we are of opinion that even if the trees of the grove after they were cut down are to be treated as an accession capable of separate possession or enjoyment, they cannot be so possessed or enjoyed without detriment to the principal property. About 110 large mango trees over thirty years of age stand on an area of 1 *bigha* 8 *biswas* of land. If the mortgagee were merely to cut away the trunks of the trees, the land would not be restored to its former condition. Unless the whole place is dug up so that all the roots are completely removed, which does not appear to be practicable, there would remain a permanent detriment to the land owing to the existence of the deep roots. If it is not practicable to remove all the roots, the accession cannot be separately possessed and enjoyed without detriment to the principal property.

We, theresore, hold on both these grounds that the mortgagor is entitled to have the grove without paying any compensation inasmuch as it was planted without his consent. The appeal is accordingly dismissed with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 39 OF 1924.

December 12, 1924.

Present:—Mr. Justice Young and Mr. Justice Brown.

T. HUSSAIN—APPELLANT

versus

CHIN CHONG—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145—Surety bond, construction of—Operative part and recitals, conflict between—Rule, applicable.

Where both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.

The respondent became surety for the production of the judgment-debtor before the Court on a particular date or at any time when he was called on to do so. The bond executed by him contained a recital that the bond was required for the appearance of the judgment-debtor at the execution proceedings on the date mentioned or for further orders. Respondent produced the judgment-debtor before the Court on the date mentioned in the bond and no order was made for his further appearance:

Held, that the respondent had fulfilled the condition of the bond by producing the judgment-debtor on the date mentioned in the bond and that the mention of execution proceedings or for further orders in the recitals of the bond did not lay any further obligation upon the surety than that which was described in the operative part.

Civil miscellaneous appeal from a decree of the Rangoon High Court on the Original Side in Civil Regular No. 241 of 1923.

Mr. *N. C. Sen*, for the Appellant.

Mr. *Doctor*, for the Respondent.

JUDGMENT.—In our opinion the learned Judge on the Original Side was perfectly right in holding the condition of the bond to be fulfilled.

The condition was to produce the judgment-debtor before the Court on the 14th of December 1923 or at any time that he was called on to do so. If he did that it was provided that the obligation should be void. The sureties did produce the judgment-debtor before the Court and no order was made for his further appearance. The condition of the bond was, therefore, fulfilled.

The recital, however, provided as follows: "Whereas.....it was directed by this Court that the execution of the decree should be further stayed for three weeks upon the defendant getting two sureties to enter into a bond for the decretal amount and costs for the appearance of the said defendant at the execution proceedings on the 14th of December 1923 or for further orders."

But the law is that if both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred (Norton on Deeds, page 181). Where the operative part of the deed uses language which admits of no doubt, it cannot be controlled by the recital [per Leach, M. R., *Bailey* v. *Lloyd* (1)]. When the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals [per Pattison, J., *Walsh* v. *Trevanion* (2)]. Here the operative part of the deed was perfectly clear and unambiguous—that he should appear before this Court on the 14th December 1923 or at any time he was called on to do so.

It said nothing about his appearance at execution proceeding or for further orders. The Court did not call upon him to appear again at a subsequent date and we are of opinion that the sureties discharged the condition of their bond and must dismiss this appeal with costs—four gold *mohurs*.

Z. K. *Appeal dismissed.*

(1) (1829) 5 Rus. 330; 7 L. J. Ch. 98; 38 E. R. 1051; 29 R. R. 30.

(2) (1850) 15 Q. B. 733; 19 L. J. Q. B. 458; 14 Jur. 1134; 117 E. R. 636; 81 R. R. 775.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 12 OF 1924.

December 16, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

SADASOOK KOTHARI—PLAINTIFF—APPELLANT

versus

CHAITRAM RAMBILASH—DEFENDANT—RESPONDENT.

Sale of goods—Construction of document—Contract specifying place of delivery—Goods destroyed after shipment but before delivery—Property, whether passes to buyer—Liability of buyer for price of goods—Shipment of portion of goods contracted to be sold, whether performance of contract.

Plaintiff contracted to sell one thousand bales of jute to the defendant, shipment to take place during certain months. The goods were to be delivered at "Buyer's Mill-ghat or Press-house by Rail or Steamer and/or Flat." The plaintiff shipped five hundred bales of jute on board a certain Flat and the Bill of Lading was made out in the name of the defendant as consignee. The Bill of Lading was presented to the defendant in accordance with the terms of the contract but payment was delayed by the defendant and in the meantime the Flat on which the goods had been shipped caught fire before arrival at the plaint-

iff's Mill-ghat or Press-house and the goods were destroyed. In a suit by the plaintiff to recover the price of the goods:

Held, (1) that under the contract the property in the goods was not to pass to the defendant until the goods were delivered at the defendant's Mill-ghat or Press-house and that consequently the defendant was not liable for the price of the goods inasmuch as the goods had been destroyed before delivery and property in the goods had not passed to the defendant; [p. 914, col. 1.]

(2) that the contract for the delivery of one thousand bales of jute was one indivisible contract and was not performed by shipment of five hundred bales and that for this reason also the plaintiff was not entitled to recover. [p. 915, col. 1.]

Appeal from a judgment of Mr. Justice Buckland, dated the 4th December 1923.

Mr. *S. R. Das*, Advocate-General, Messrs. *C. Bagram*, *S. N. Banerji* and *S. C. Bose*, for the Appellant.

Sir *B. C. Mitter*, and Messrs. *S. M. Bose*, and *A. C. Ghose*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiff in the suit from a judgment of Mr. Justice Buckland, dated the 4th of December, 1923, dismissing the plaintiff's suit. The facts which I shall shortly state are as follows: By a contract dated the 31st July 1919, to the terms of which I shall presently refer, the plaintiff, who is the appellant before us, sold, and the defendants, the respondents before us, purchased 1,000 bales of Naraingunge jute. According to the terms of the contract shipment was to take place during August and/or September 1919. On the 23rd September 1919 in pursuance of the contract the plaintiff shipped 500 bales of jute on board the Flat *Dwarka*. The Bill of Lading in respect of these bales was made out in the name of the defendants as consignees. On the 25th September 1919, according to the case for the appellant, the usual documents were presented through the International Banking Corporation to the defendants for payment of 90 per cent. of the value in terms of the contract. Some dispute has taken place as to whether the Bill of Lading was with the documents that were presented and this is one of the points which I shall deal with later. The defendants put off payment of the 90 per cent. on the 25th September on the ground—so the appellant alleges—that there was no policy of insurance in respect of the 500 bales. On the same date, namely, 25th September, the Flat *Dwarka* caught fire and the jute was destroyed and the suit out of which this appeal arises was brought by the present appellant to recover the value of the goods, namely, Rs. 42,499-6-0. The contention of the appellant is that the property in the goods passed to the respondents when they were shipped on board the Flat *Dwarka*. The respondents on the other hand contend that all the terms and conditions of the contract were not fulfilled merely by the shipping of the bales of jute on board the Flat *Dwarka* and that accordingly on the 25th September when the fire took place the property in the bales of jute had not passed to them but they were still the property of and at the risk of the plaintiff and they say that if the shipping of the bales of jute amounted to appropriation it was merely a conditional appropriation which did not have the effect of passing the property in the jute until the other conditions in the contract were fulfilled. I now turn to the contract itself. It is, as I have stated, dated the 31st July 1919. It is signed by the brokers and addressed to Sadasook Kothari, the appellant. Thereby one thousand bales of Naraingunge jute, each bale weighing about 3½ maunds, were sold at rupees twenty and annas eight per Calcutta Bazar maund delivered free "at Buyer's Mill-ghat or Press-house by Rail or Steamer and/or Flat." Then follows a provision with regard to the weight which was guaranteed at the buyer's Mill-ghat or Press-house. The shipment, as I have already stated, was to take place during August and/or September 1919 and the costs of cartage were to be deduced from the seller's Margin Bill. So far as the payment is concerned the contract provides that 90 per cent. of the value of the goods was to be paid against the Railway receipts and the balance 10 per cent., on Press-house receipt. Then follows an arbitration clause to which I need not refer and in the margin of the contract these words are found: "1,000 bales at Rs. 20-8-0 per Calcutta Bazar maund. Delivered at Strand Bank Press, Cossipore." Now, the whole question in this suit turns upon the construction of the contract of the 31st July 1919 and in my opinion it is idle to discuss whether the law with regard to the sale of goods is similar in India to that in England or the incidents of C. I. F. contracts or to cite cases dealing with sale of goods in other countries, because the real question that we have got to decide is what upon the true construction of the contract before us was the arrangement of the parties, namely, whether the

contention of the appellant is correct that the property in the goods passed at the time when the goods were placed on board the Flat *Dwarka* or whether the contention of the respondents is correct that the property had not passed at the time of the fire on the 25th September because upon the true construction of the contract there were other terms still to be performed and until such terms were fulfilled the property in the goods remained with the seller, the appellant, and did not pass to the buyers, the respondents. Now, the appellant contends before us that the words in the first clause of the contract in the printed copy before me, namely, the word, "Delivered free at Buyer's Mill-ghat or Press-house by Rail and/or Steamer and/or Flat," do not mean that the contract was not performed until delivery took place at the Mill-ghat or Press-house but that the reference to the Mill-ghat or Press-house merely means that the delivery there was to be free so far as the buyers were concerned, and that there was no obligation on the appellant to deliver these goods there, that is to say, it really comes to this that the appellant says that his obligations under the contract were performed when he had placed the bales of jute on a steamer or flat whose destination was the Press-house of the respondents, namely, Strand Bank Press at Cossipore. Then so far as the words in the margin are concerned, namely, "Delivered at Strand Bank Press, Cossipore," the appellant contends that these words do not import a condition that the contract was not completed so far as the appellant was concerned until the goods had reached the Strand Bank Press at Cossipore but that they merely mean that the price of the goods at this place was Rs. 20-8-0 per maund. The appellant complains that the learned Judge in the First Court has wrongly relied upon certain English decisions which are referred to in his judgment and contends that upon his construction of the contract the case is covered by the provisions of the Indian Contract Act, namely, ss. 83 and 91. Section 83 provides that where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement and that appropriation is assented to by the other, the goods have been ascertained and the sale is complete. Section 91 provides that a delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods. There is no doubt, I think, if the construction put upon the contract by the appellant is correct, that by the joint operation of ss. 83 and 91 of the Indian Contract Act the property in the bales of jute passed to the respondents when the bales were put on board the Flat *Dwarka* whose destination was the Strand Bank Press at Cossipore. The appellant further relies on certain indications in the contract as bearing out the construction which he seeks to put upon it, namely, that the contract was one made in Calcutta and that 90 per cent. of the value of the goods was payable in Calcutta against the Railway receipts and that the balance also was payable in Calcutta against the Press-house receipt. Numerous cases were cited to us in the course of the argument and we were especially pressed on behalf of the appellant with two cases to which we think we should refer. The first of these is the case of *Tregelles* v. *Sewell* (1). In that case the contract was for 300 tons old Bridge rails at a certain price delivered at Harburgh: cost, freight and insurance; payment by net cash in London, less freight, upon handing Bill of Lading and policy of insurance; a Dock Company's weighment note or Captain's signature for weighment to be taken by buyers as a voucher for the quantity shipped. The head note states that it was held that according to the true construction of the contract there was no undertaking by the defendant in that case to deliver the iron at Harburgh but that his obligation was performed when he had put the iron on board a ship which was bound for Harburgh and had handed to the plaintiff the policy of insurance and other documents whereon his liability ceased and the goods were at the risk of the purchaser. We have had read to us the judgment of the learned Judges in that case and I have again perused those judgments since the conclusion of the hearing last afternoon and I think myself that the head-note

(1) (1862) 7 H. & N. 574; 158 E. R. 600; 126 R. R. 558.

correctly states the reasons of the decision, namely, that the decision was arrived at upon the construction of that particular contract. I understand that this case was cited to us as an authority for the proposition that notwithstanding the fact that the actual destination of the goods was stated in the contract, the property in the goods passed when the seller had put the goods on board a ship whose destination was at Harburgh where the goods were to be delivered. It is noticeable in that case that the terms of the contract specifically provided that payment should be made for the goods upon the production of certain documents and upon the goods being placed on board a ship and upon the weight of the goods so shipped being established as indicated in the contract. In my opinion that case cannot be taken as laying down any general rule but must be taken as a decision upon a particular contract which was before the Court upon which they held that the seller had performed all his obligations and was entitled to payment when he had placed the goods on board a ship destined for Harburgh and that, it was immaterial so far as he was concerned whether the goods subsequently reached their destination or not. The other case to which we were referred was the well-known case of *Badische Anilin Und Soda Fabrik* v. *Basle Chemical Works, Bindschedler* (2). In that case a trader in England had sent an order to the Basle Chemical Works in Switzerland for certain goods and asked that these should be sent by post at once. The manufacturer in Switzerland handed the goods to a forwarding agent instructing the agent to wait for further directions from London. The forwarding agent without waiting for such instructions posted the goods and the question that arose was whether the goods when posted were at the risk of the purchaser in England or whether they remained at the risk of the seller, the Basle Chemical Works, until they reached London. It is not necessary, I think, to refer to the actual point upon which the suit was brought, namely, that what had happened amounted to an infringement of Letters Patent, but for our present purpose it is sufficient to consider what conclusion was arrived at with regard to the passing of the goods. In that contract the London trader had asked that the goods should be sent by post and accordingly it was held that directly the goods were placed in the post, it did not matter whether by the forwarding agent or by the seller of the goods, the property in the goods no longer remained in the seller but passed at once to the buyer and that the goods in transit were at his own risk. That decision again really seems to me to depend upon the construction of the contract which was before the Court, and we think that it cannot be taken as laying down any general proposition. I have stated the contention of the appellant upon the construction of the contract before us and I now turn to the contentions of the respondents. What they say is that according to the true construction of the contract it was a contract for delivery of 1,000 bales of jute at the Press-house of the buyers and that until the goods had arrived at the Press-house by steamer or flat the carriers were the agents of the sellers and not of the buyers, that is to say, that no property in the goods passed merely by placing the goods on the steamer or flat but that the property in the goods did not pass until they reached their destination, namely, Strand Bank Press at Cossipore. The contention was put succinctly by the learned Counsel for the respondents and I will read his own words. His contention was this, that where in a contract the place of delivery is indicated the delivery to a carrier does not amount to fulfilment of the contract at all and that in such a case, that is, where the destination is indicated, the carrier is the agent of the seller and not of the buyer; but that where no place is indicated, if you perform all the terms that you are bound to perform, all the terms incumbent on the seller have been performed and the carrier is the agent of the buyer and not of the seller. Stress was further laid by the learned Counsel for the respondents on the fact that the contract in suit was not a C. I. F. contract in which the tender of the Bill of Lading, together with a policy of insurance without an actual tender of the goods, is sufficient performance of the seller's part under the contract, but that this not being a C. I. F. contract the goods themselves must be tendered and that the mere tender of the documents is not sufficient. This is only another way of putting the respondents' contention upon the con-

(2) (1898) App. Cas. 200; 67 L. J. Ch. 141; 77 L. T. 573; 14 T. L. R. 82; 14 R. P. C. 919; 46 W. R. 255.

struction of the contract, namely, that if you read the contract in its natural meaning it means that the contract was not performed so far as the seller was concerned until the goods had reached their destination named in the contract, namely, Strand Bank Press at Cossipore. We have stated the two contentions on the construction of the contract urged respectively by the appellant and respondents and the conclusion we have come to is that the decision of the learned Judge is correct and that upon the true construction of the contract the property in the goods did not pass when they were placed upon the Flat *Dwarka* for conveyance to the Strand Bank Press at Cossipore, but that something remained to be done, namely, actual delivery of the goods themselves at the Strand Bank Press at Cossipore. This is the main point which was argued before the learned Judge in the Court below and which was argued before us. But there are two other points that were raised and it is necessary to deal with them.

The second point is the contention put forward on behalf of the respondents that the Bill of Lading in respect of the goods did not accompany the other documents when the demand for payment was made by the International Banking Corporation. The learned Judge has come to a conclusion against respondents on this point and he states that the usual documents were presented to the defendants on the demand for payment of 90 per cent. to the Bank. It is stated on behalf of the respondents that this conclusion is wrong and we were referred to various passages in the evidence as showing that the learned Judge's conclusion on this point was not correct. The first passage to which we were referred is contained in the evidence of Ramdutt Upadhayay who was a Bill-Collecting *jamadar* of the International Bank. In his answer to question (16) he states that he presented the bills and asked the respondents to pay and that he was asked by the respondents' cashier to come some other time. He states that he went there again an hour after and represented the bill to one Mulchand, who asked him whether he had the Bill of Lading with him and that he replied that he had not the Bill of Lading but he had the bill which the Cashier Babu had given him He again in his answer to question (23) states: "So far as I remember the Bill of Lading was missing, but it is impossible for me to remember the nature of the paper," and later on in answer to question (26) he states that he thinks that the document which was missing was a paper for realising the goods. Then again there is a passage which was relied on by the respondents in the evidence of Mohendra Nath Mukerjee who is employed in the Bill Department of the International Bank. There is no doubt considerable force in what was urged on behalf of the respondents having regard to the answers given by the Bill-Collecting *jamadar* of the International Bank, but it is noticeable that this point was never taken in the written statement filed by the respondents and the learned Judge who saw the witnesses came to the conclusion that the document alleged to be missing was not the Bill of Lading but the policy of insurance, and notwithstanding the evidence to which we have referred we think, having regard to the omission of any statement of this kind in the written statement, we should accept the learned Judge's finding on this point and hold that the Bill of Lading was presented to the respondents on the 25th September 1919. This being so, there is no substance in this point.

The third point urged was also urged on behalf of the respondents and this was that in any case, even if the contention of the appellant as to the passing of the property was correct, the contract was not performed until the whole of the 1,000 bales had been shipped to the respondents. This point was urged before the learned Judge and he came to the conclusion, relying on the case to which he refers in his judgment, that the contract was divisible and that under the terms of the contract it was open to the appellant to ship the goods by different shipments so long, of course, as they were shipped during August and September and that there was no force in the contention of the respondents that the contract was not completed until the whole of the 1,000 bales had been handed over to the carrier. This question again depends upon the construction of the contract itself. The leading case on matters of this kind is the well known case of *Mersey Steel and Iron Company, Limited* v. *Naylor, Benzon and Company* (3). The contract in that case was for the supply of 5,000 tons of steel to be delivered 1,000 tons monthly and the question that was debated before the House

(3) (1884) 9 A. C. 434; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.

of Lords was whether the failure to deliver one of the monthly shipments of 1,000 tons justified the repudiation of the contract. The learned Judges in the House of Lords came to the conclusion that upon the true construction of that contract the contract was divisible and that the mere failure to deliver one of the monthly instalments did not justify the repudiation of the contract but was a claim founding in damages. Lord Blackburn in his speech reported at p. 444* states that he repeatedly asked Mr. Cohen, one of the Counsel engaged in the case, whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract and Lord Blackburn states that the learned Counsel failed to produce any such authority. Lord Blackburn says that there are many cases in which the breach may do so; and that it depends upon the construction of the contract. Accordingly for the decision of this question we cannot rely upon any case cited to us, however high the authority may be, for we have to go to look at the contract itself and to say whether upon the true construction of the contract delivery in instalments was contemplated. I confess myself that I have felt considerable difficulty so far as this question is concerned but the conclusion I have come to is, that upon the true construction of this contract the contract was one and indivisible and that the contract was not performed until 1,000 bales of Naraingunge jute were delivered at the Strand Bank Press at Cossipore.

There is a minor point to which also I ought to refer, namely, the terms of the Bill of Lading itself. If we are wrong in our construction of the contract and upon the true construction thereof the property in the goods passed upon their being placed on board the Steamer *Dwarka*, then it is contended that the last portion of s. 91 of the Indian Contract Act has not been complied with and that the plaintiff's suit must fail on this ground. I have already referred to s. 91 and it is unnecessary to read it again but the portion to which I desire to refer is the latter portion, namely, that a delivery to be a good delivery must be a delivery which enables the buyer to hold the wharfinger or the carrier responsible for the safe custody or delivery of the goods In the Bill of Lading before us there is a provision that the shipment is to be on account of and at the risk of the shipper, that is to say, the appellant before us and there is one clause, cl. (5) of the contract, relating to the liability of the carrier for loss or damage and it is accordingly urged that if the construction of the contract contended for by the appellant is correct, having regard to this provision in the Bill of Lading to which I have referred, the seller is not in a position to hold the carrier responsible for safe custody or delivery of the goods. This is a minor point and was not really pressed before us, but we only mention it because it was raised in the argument by the learned Counsel for the respondents; but in the view we take upon the main issues in the case it is not, I think, necessary to come to any decision on this point.

The result is that we think that the learned Judge's reading of the contract was correct, and in this view the appeal fails and is dismissed with costs.

Chakravarti, J.—I agree.

The whole question turns upon the construction of the contract before us. As I agree with my learned brother in the view that he has taken of the contract I do not think it necessary to add anything further.

Z. K. *Appeal dismissed.*

*Page of (1884) 9 A. C. 434—[*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 790 OF 1923.

May 15, 1925.

Present:—Mr. Justice Boys and Mr. Justice Ashworth.

BHIKKI MAL—DEFENDANT—APPELLANT

versus

Lala RAGHUBIR SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 76 (d) —Hundi, *suit on—Non-presentment—Damage to drawer, absence of—Burden of proof.*

The burden lies heavily on a person suing on the basis of a *hundi* to prove that the drawer could not have suffered any damage owing to non-presentment of the *hundi* for payment. It will only be held in very exceptional circumstances that the drawer could not have suffered any damage owing to non-presentment.

Second appeal from a decree of the Additional Judge, Meerut, dated the 2nd of February 1923.

Dr. *K. N. Katju*, for the Appellant.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This is a defendant's appeal. The suit was one to recover money on a *hundi* drawn in favour of the payee, the plaintiff, at Muzaffarnagar. It was drawn on the 5th of May 1920 and was payable at sight on Dina Nath-Jasraj of Delhi.

Both the Courts below have held, as a matter of fact, that there was no presentation, in fact. This under s. 64 of the Negotiable Instruments Act would have sufficed by itself for a dismissal of the suit. The lower Appellate Court, however, added "I am nevertheless of opinion, that the plaintiffs are equitably entitled to recover their money. Admittedly the defendant-appellant had taken back his money from the firm of Dina Nath-Jasraj and he could not, therefore, suffer damage for want of presentation." The learned Judge was presumably referring to s. 76 (*d*) of the Negotiable Instruments Act. We think that he is wholly wrong in assuming that the defendant *could not* have suffered any damage merely because many months afterwards he withdrew his money from the firm of Dina Nath-Jasraj. It is clear that the burden of proof lies heavily on the plaintiff and we agree that the circumstances will be very exceptional in which he could prove that the drawer could not possibly have suffered any damage. The burden is, however, on him and that burden is certainly not discharged by the oral admission of the defendant drawer that sometime or other subsequently he got back his money. If it were necessary even to illustrate this, it is clear that the defendant might say "my money for such and such a period was tied up in the hands of the drawee because I knew I had this *hundi* out against me. I was unable to employ that money profitably in certain ventures which offered themselves to me." There is no evidence to this effect but it is obvious that such considerations might arise and it is for the plaintiff payee to establish conclusively that they could not. As he failed to do this, his suit must fail. The appeal is allowed, the decree of the lower Appellate Court is set aside and the decree of the Court of first instance dismissing the suit is restored. The appellant will have his costs throughout including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 17 OF 1922.

January 30, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Billaram, A. J. C.

NARAINDAS AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

KHATANMAL AND OTHERS—PLAINTIFFS NOS. 1 TO 3 AND DEFENDANT NO. 1—RESPONDENTS.

Hindu Law—Joint family—Alienation by managing co-parcener—Legal necessity—Consent of other co-parceners, whether necessary—Burden of proof.

The *de facto* managing co-parcener in a joint Hindu family, whether he is the *karta* or not, is competent to alienate joint family property for legal necessity, and it is not obligatory for him to obtain the express consent of the other adult co-parceners and their consent may be implied from the existence of legal necessity. An alienation so made by him is binding on all the co-parceners including minor co-parceners. [p. 917 col. 2.]

Suraj Bunsi Koer v. *Sheo Persad Singh*, 6 I. A. 88; 5 C. 148; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome's L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.), referred to.

Miller v. *Ranga Nath Moulick*, 12 C. 389; 10 Ind. Jur. 376; 6 Ind. Dec. (N. S.) 264, *Chhotiram* v. *Narayandas*, 11 B. 605; 6 Ind. Dec. (N. S.) 399, *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), *Inder Chand* v. *Bidyadhar Pandey*, 60 Ind. Cas. 282; 5 P. L. J. 749; 2 P. L. T. 111; (1921) Pat. 107, *Dhanukdhari Singh* v. *Rambirich Singh*, 70 Ind. Cas. 391; 1 Pat. 171; (1922) A. I. R. (Pat.) 553, *Brij Narain Rai* v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 51 I. A. 129; 21 A. L. J. 931; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 63; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.), relied upon.

Balwant Singh v. *Rev. Rockwell Clancy*, 14 Ind. Cas. 62 ; 34 A. 296; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.), distinguished.

The burden is on the alienee in such a case to prove legal necessity. He may prove as a fact that there was such necessity or prove that he honestly did all that was reasonable to satisfy himself that the required necessity existed. The quantum of proof which is required in any particular case is not capable of a general and inflexible definition and depends on the circumstances of each particular case. [p. 918, col. 2.]

Appeal against the judgment and decree of the First Class, Sub-Judge, Sukkur, dated the 13th February 1922, in Suit No. 28 of 1920.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Srikrishondas H. Lulla*, for Respondents Nos. 1 and 3.

Mr. *T. G. Elphinston*, for Respondent No. 2.

JUDGMENT.—In this case the First Class Sub-Judge, Sukkur, has found that the mortgage-deed, dated 23rd June 1913 and executed by the two brothers Ramdas (respondent No. 4) and Naraindas (appellant No. 1, as managers of the joint family consisting of themselves and their eldest brother Kewalram (appellant No. 2) who was then absent at Adhyar in favour of Khatanmal (respondent No. 1), was for legal necessity, and though Naraindas was a minor seventeen years old on that date, the interest of all the three brothers in the joint family property was liable for the debt.

Naraindas and Kewalram have filed this appeal.

In the lower Court an attempt was made by the brothers to prove that the joint family tie between them was dissolved, long before the date of the mortgage, and that Ramdas could not, therefore, mortgage the property on behalf of the family. In view, however, of the absurdity and false nature of the evidence led in the lower Court which was disbelieved by the Trying Judge, the learned Pleader for the appellants has very discreetly not referred to this point, though it is raised in the memo. of appeal. The first point urged by him is that as Ramdas was not the eldest member of the co-parcenery, he could not mortgage the family property for legal necessity and that, at any rate, he could not do so without the express consent of the adult co-parcener Kewalram. There is nothing in the Hindu Texts to limit the power of alienation for necessity to the "*karta*" or to the eldest co-parcener. Mitakshara, para. 27, Ch. I, s. 1, prohibits in general terms even the father of the family to alienate immoveable property of the co-parcenary. Paragraph 28 refers to the exception to this rule as laid down by Vrihaspati in the following words :—

"28. An exception to it follows :—"Even a single individual may conclude a donation, mortgage, or sale, of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes."

In para 29 Vijnaneshwara expounds this Text as meaning :—"that even one person who is capable may conclude a gift, hypothecation or sale of immoveable property, if a clamity affecting the whole family require it or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

The law of Mitakshara generally applies to this Province. This Law in express terms recognizes the right of a junior co-parcener to alienate property, the touchstone of the validity of such alienation being, however, family necessity.

Ordinarily the *karta* or the recognized head of the family, be he the father or the eldest co parcener, manages the family affairs. He is both the *de jure* and the *de facto* manager. He deals with the property. Circumstances do often exist when on account of his incapacity, or temporary or permanent absence, or as in the case of a trading concern on account of a junior member being more competent to look after such affairs, a junior member is required to act as the *de facto* manager, and to deal with the family property. He then acts as the accredited agent of the family and may deal with the family property in the same way and subject to the same limitations as the "*karta*." The power of the managing co-parcener to alienate family property for legal necessity so as to bind the interests not only of the minors, but of adult co-parcener without the express consent of such adult co-parcener has received a tardy recognition in our Courts In *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), the Judicial Committee observed that it was not clearly settled whether an alienation by the manager for legal necessity but without the express consent of the adult co-parceners the alienation is binding on them.

In *Miller* v. *Runga Nath Moulick* (2), after examining the prior authorities, Mitter, J., held that such consent may be either express or implied, and added that "in cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation. A general consent of this nature may be deducible in case of urgent necessity, from the very fact of the manager being entrusted with the management of the family...and that the latter in entrusting the management of the family affairs in the hands of the manager must be presumed to have

(1) 6 I. A. 88; 5 C. 148; 4 Sar P. C. J. 1; 3 Suth P. C. J. 589; 4 C. L. R. 225; 2 Shome's L. R. 212; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 12 C. 389; 10 Ind. Jur. 376; 6 Ind. Dec. (N. S.) 261.

delegated...the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of the efficient management of the estate to consult them and obtain their consent before pledging such credit." In *Chhotiram* v *Narayandas* (3), where one of the brothers had absented from his native place for a number of years, and during his absence the other brothers alienated a part of the family property to defray the marriage expenses of a sister, Sargeant, C. J., observed that the circumstances of his absence leaving his brothers to manage the family affairs raised a presumption that he intended that his brother should act as the *de facto* and *de jure* manager of the family.

In *Sahu Ram Chandra* v. *Bhup Singh* (4), their Lordships observed as follows:—

"In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction.....For where estate or family necessity exists, the necessity rests upon the co-parceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded" This passage would imply that the consent on behalf of all, whether minors or adults may be presumed, in the case of necessity. In *Inder Chand* v. *Bidyadhar Pandey* (5), where the family consisted of two branches, a mortgage by a member of one branch of the family for legal necessity was held to be binding on both the branches. In *Dhanukdhari Singh* v. *Rambirich Singh* (6), the right of the junior members of the family to deal with the property during the absence of the "*karta*" in jail, was held to bind the whole property. In the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (7), their Lordships of the Privy Council in summing up the propositions as to the power of alienation of co-parcenery property as the result of authorities have laid down that a managing co-parcener cannot alienate or burden the estate *qua* manager except for legal necessity, but have not qualified the proposition further by providing that it is obligatory for him to obtain the express consent of the adult co parcener, and it may well be assumed that such consent is not necessary.

It would, therefore, appear that if Ramdas was left to manage the family affairs during the absence of Kewalram in Russian Territory, he was competent to burden the family property without the express consent of Kewalram.

The second point urged by Mr. Kimatrai is that as Naraindas joined in the deed as a co-executant, and as it has been held that he was a minor at that time, his interest in the property cannot be made liable. Reliance has been placed on the case of *Balwant Singh* v. *Rev. Rockwell Clancy* (8). But in that case as observed by their Lordships the mortgage was not made by the co-executant of the minor co-parcener as the manager of the family or as representing the minor, and it could not, therefore, bind him. In the present case, Ramdas has purported to execute the deed as manager of the family and for family necessity. Naraindas' interest in the property can, therefore, be made liable provided the mortgage is for legal necessity.

The third point urged by the learned Pleader is as to the onus of proof. It is well settled that it is for the mortgagee to prove legal necessity. He may either prove as a fact that there was such necessity or prove that he honestly did all that was reasonable to satisfy himself that the required necessity existed. The quantum of proof which is required in any particular case is not capable of a general and inflexible answar and depends on the circumstances of that particular case. In the present case the mortgagee avers that he has given proof not only that legal necessity existed in fact, but that he satisfied himself by reasonable inquiries as to its existence. The lower Court has found in his favour and we are not prepared to hold to the contrary.

(3) 11 B. 605; 6 Ind. Dec. (N. S.) 399.

(4) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C L. J. 1; 33 M. L. J 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(5) 60 Ind. Cas. 282; 5 P. L. J. 744; 2 Pat. L. T. 111; (1921) Pat. 107.

(6) 70 Ind. Cas. 391; 1 Pat. 171; (1922) A. I. R. (Pat.) 553.

(7) 77 Ind. Cas. 689; 51 I. A. 129; 21 A. L J. 934; 46 M L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

(8) 14 Ind. Cas. 629; 34 A. 296; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.).

Ramdas and Tulsidas the grandfather and father of the appellants carried on joint family business at Adhijan in Russian Territory. Both of them died in 1910 within six months of one another. The chief asset of the joint family property was this Russian business which is valued at Rs. 40,000 by Naraindas himself. The family possessed some immoveable properties at Shikarpur but very little or no cash. In Febuary 1911 Kewalram and Ramdas joined together in borrowing money on *hundis* to enable them to pay for the purchase money of certain mortgage claims which they got assigned to themselves. Two or three months later Kewalram went to Adhijan to look after the family business. He returned back after eight years. The business had resulted in a loss, and all that Kewalram could get out of it, was his expenses of the outward journey. During his absence Ramdas worked after the family affairs at Shikarpur. He had to maintain Kewalram's wife, his mother, his grandmother, his own family and the minor Naraindas. His own personal income and the income of the Shikarpur estate was insufficient for their maintenance.

In August 1911, he acting on behalf of himself and his minor son and his minor brother Naraindas mortgaged two-thirds share in Shikarpur property for Rs. 5,500 with one Lilaram. This deed recites that Rs. 3,200 were required to pay off one Deomal in respect of a loan borrowed by him on the pledge of ornaments to defray the expenses of the death ceremonies of Rochaldas, and the balance for the maintenance and education of the minors.

On 26th June, 1913, Ramdas and Naraindas joined together to borrow Rs. 8,000 from the present mortgagee to pay off this prior mortgage loan and to utilize the balance for family expenses. They have purported to mortgage the whole property and not only two-thirds share. Naraindas was then just under eighteen years, though he is described as twenty years old and the Sub-Registrar treated him as an adult.

In December 1913 Naraindas was married and certain further sums were borrowed by Ramdas on *hundis* to meet the marriage expenses. The *hundis* were drawn in favour of Godhumal the maternal uncle of the three brothers and purchased by the present mortgagee.

In 1914 the creditor who had advanced a loan on *hundis* to Kewalram and Ramdas obtained a decree against both in Suit No. 100 of 1914, but appears not to have been able to get anything out of the estate. None of the other debts were discharged till the institution of this suit. The mortgagee states that he was kept in hopes and requested to wait till the return of Kewalram from Adhijan. There is no doubt on the evidence that the family was in chronic need of money and that their chief Russian asset failed them probably on account of this gigantic world war which ruined several Shikarpur merchants.

The deed of 1911 recites that Rs. 3,200 were required to pay off the debt incurred for the death ceremonies of Ramdas. That a sum of Rs. 3,000 was spent on such ceremonies is not disputed and if it was spent by borrowing money, Ramdas would be well within his rights to mortgage family property to pay off this debt. In order to show that there was no need to borrow money either for the death ceremonies of Rochaldas or the education and maintenance of the minors and females, the appellants contended that Rochaldas had left Rs. 10,000 in cash with instructions to pay Rs. 5,000 to his wife for her maintenance, to spend Rs. 3,000 on his obsequies and Rs. 3,000 on the marriage of Naraindas. There is no proof that he left any cash, or that it was so utilized. His books which were the best evidence have not been produced and no independent witness called to corroborate the statement of the interested parties. It was also asserted that during Kewalram's absence his wife was maintained by her father and that Naraindas was maintained by his father-in-law, even prior to his marriage. This evidence has been rightly disbelieved by the learned Judge. It is also clear from the evidence of the mortgagee that he made such reasonable inquiries as he was expected to do under the circumstances. He was approached at first by Godumal the maternal uncle of the appellants. He was told of the chronic need of the family and of the prior mortgage, and though the prior mortgagee was not prepared to part with the deed till he was paid up, the scribe had inspection of it and knew of its contents. The present mortgagee was told that the money

was required for paying the debts chiefly incurred on the death ceremonies of Rochaldas, and for the marriage expenses of defendant No. 2. The mortgagee does not only rely on the recitals in the two deeds but the representations made to him and the evidence of the chronic need of the family for funds.

Ramdas has kept himself out of the box, and so has Godumal, the maternal uncle. We think that, under the circumstances, it may fairly be presumed that the mortgagee is speaking the truth when he says that he made *bona fide* and reasonable inquiries to satisfy himself.

We accordingly dismiss this appeal with costs. There will be one set of costs for the sons and the legal representatives of the mortgagee who are represented by different Pleaders. The cross objections have not been pressed and are disallowed with no order as to costs.

P. B. A. *Appeal dismissed.*

Z. K.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 189 OF 1922.

March 24, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice LeRossignol.

SUNDAR SINGH—PLAINTIFF—APPELLANT

versus

NIGHAIYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105, O. IX, r. 13—Ex parte *decree, order setting aside—Appeal—Order, whether can be questioned.*

The erroneous order referred to in s. 105 of the C. P. C., must be an order affecting the decision of the case on its merits. [p. 920, col. 2; p. 921, col. 1.]

Case-law referred to.

An erroneous order accepting an application to set aside an *ex parte* decree cannot be challenged in an appeal from the final decree passed in the suit, except in so far as it has affected the decision of the case on the merits. [p. 921, col. 1.]

Letters Patent Appeal against a judgment of Mr. Justice Harrison, dated the 30th June 1922, in Second Civil Appeal No. 2006 of 1921, and reported as 72 Ind. Cas. 410.

Mr. *Kahan Chand*, for the Appellant.

Mr. *Jai Gopal Sethi*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was first decreed *ex parte* on the 20th of April 1914. Some two months after an application for setting aside the *ex parte* decree was made and was accepted by the Trial Court which proceeded to decide the suit on the merits and eventually dismissed it with costs. The plaintiff appealed to the District Judge and urged among other grounds that the Trial Court's action in setting aside the *ex parte* decree was unjustifiable inasmuch as the application to set it aside was made long after the period prescribed by law, but the learned District Judge held that the Trial Court had an inherent power to set aside the *ex parte* decree. The plaintiff in second appeal again agitated this question but the learned Judge in Chambers has dismissed his appeal on the ground that the correctness of an order setting aside an *ex parte* decree cannot be questioned in second appeal for if the order restoring the case to a hearing be erroneous such an error is not one affecting the decision of the case within the meaning of s 105 of the C. P. C.

Before this Court it is contended on behalf of the appellant that the orders referred to in s. 105 of the Code refer to any erroneous order which affects the decision of a case whether on the merits or otherwise and he has referred us to the following authorities in support of his view:—*Nand Ram* v. *Bhopal Singh* (1), *Gopala Chetti* v. *Subbier* (2), *Hassan Ali Shah* v. *Salig Ram* (3), *Jagannatha Mudaliar* v. *Vathyar Appasawmy Mudaliar* (4) and *Motilal Kashibhai* v. *Nana* (5). An examination of these authorities will show that only the Madras ruling is strictly in point. The others are orders passed in revision. They do not discuss the point now before us and their general conclusion is that a revision in those cases should not be allowed because the petitioner would have an opportunity of securing redress at the time of appeal. The Allahabad decision does not refer to the ruling in *Tasadduq Husain* v. *Hayat-un-nissa* (6) and the Madras ruling devotes only a few words to the subject.

For the respondents' contention that the erroneous order referred to in s. 105 of the

(1) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.
(2) 26 M. 604; 13 M. L. J. 308.
(3) 125 P. R. 1892.
(4) 24 Ind. Cas. 782; 1 L. W. 233.
(5) 18 B. 35; 9 Ind. Dec. (N. S.) 532.
(6) 25 A. 280; A. W. N. (1903) 39.

Code must be an order affecting the decision of the case on its merits the balance of authority is overwhelming. The Punjab authority *Hassan Ali Shah* v. *Salig Ram* (3) has been overruled in *Pandit Rama Kant* v. *Pandit Kagdeo* (7) and *Mahtab Rai* v. *Kaman Lal* (8) whilst *Fazal* v. *Hashmati* (9) follows *Tasadduq Husain* v. *Hayat-un-nissa* (6). Then *Chintamony Dassi* v. *Raghoonath Sahoo* (10) has been followed in *Kariman* v. *Forbes* (11), and in *Krishna Chandra* v. *Goldar Mohesh Chandra Saha* (12). The authority of *Tasaduq Husain* v. *Hayat-un-nissa* (6) has been followed in *Nidaha Lal* v. *Collector of Buland Shahr* (13).

Apart from authority we are moved by general considerations to hold that the point urged for the appellant is unsound. It will be observed that an order refusing to set aside an *ex parte* decree is appealable under O. XLIII, r. 1 (*d*), but no appeal is granted from an order accepting an application to set aside an *ex parte* decree and we cannot think it was the intention of the Legislature that an erroneous order accepting an application to set aside the *ex parte* decree should be assailable in appeal except in so far as it affected the decision of the case on the merits. The reason for this discrimination between an unsuccessful and a successful application is obvious, for an unsuccessful application precludes a thorough exploration of the merits of the case whereas a successful application enables the points in litigation to be decided on the merits, the ideal goal of all litigation.

For these reasons we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(7) 60 P. R. 1897.
(8) 51 P. R. 1899.
(9) 31 Ind. Cas. 914; 40 P. R. 1916; 113 P. W. R. 1916.
(10) 22 C. 981; 11 Ind. Dec. (N. S.) 651.
(11) 8 C. L. J. 303.
(12) 9 C. W. N. 584.
(13) 35 Ind. Cas. 209; 14 A. L. J. 610.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 435 OF 1924 AND 20 OF 1922.

February 16, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

RASH BEHARI MONDAL AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

HEMANTA KUMAR GHOSE AND OTHERS—DECREE HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Decree for delivery of possession—Execution issued—Appeal against decree—Review, power of—Trial Court, jurisdiction of—Possession, delivery of, effect of.

After a writ for delivery of possession of property under a decree had been issued by the Court, the judgment-debtor applied for stay of the writ, stating that he had preferred an appeal against the decree. The Court made an order re-calling the writ. Possession was, however, delivered to the decree-holder before the second order could be conveyed to the peon delivering possession:

Held, (1) that the Court had jurisdiction to review its previous order and re-call the writ; [p. 922, col. 2.]

(2) that the writ having been re-called before delivery of possession, possession delivered under it was of no effect. [*ibid.*]

Mianjan v. *Man Singh*, 2 A. 686; 5 Ind. Jur. 323; 1 Ind. Dec. (N. S.) 1017, relied on.

Appeals against the orders of the Subordinate Judge, Khulna, dated the 6th of December 1924.

Mr. *Sarat Chandra Roy Choudhury* and Babu *Saraj Kumar Chatterjee*, for the Appellants.

Mr *Basak* and Babu *Bepin Chandra Bose*, for the Respondents.

JUDGMENT.—It will be convenient to deal with Appeal No. 20 of 1925, first of all.

This is an appeal by the decree-holders against an order of the Subordinate Judge of the 6th of December 1924 quashing a previous order that he made for possession by the decree-holders of certain land. On the 15th of May 1914 certain *patni* tenures were put up to sale under the *Patni* Regulation. Plaintiff No. 1 bought the *patni* at a sale and mutation was effected. On the 20th April 1921 the plaintiffs sought to eject from the land which they had purchased some 400 tenants who, it is stated, were in occupation of the land as sub-tenure-holders and cultivating tenants. On the 27th September 1924 a decree for ejectment was passed in favour of the plaintiffs against all the 400 tenants and the decree became final on the 12th of November 1924. On the 14th of No-

vember the decree-holders applied for delivery of possession of the land and a writ for delivery of possession was issued on that date. This being an *ex parte* application no notice of it was necessary to the tenants defendants. On the 17th of November 1924 four of the judgment-debtors, defendants Nos. 93, 97, 98 and 171 in the original suit prayed for a stay of delivery of possession as they stated that they had filed an appeal to this Court against the decree. Thereupon the learned Subordinate Judge made an order recalling the writ of delivery of possession which had already been issued and he directed that if the peon had already started the *Nazir* was to re-call the peon by a special messenger. It appears that the peon had started previous to the passing of this order on the 17th November and on that date between 4 and 5 in the evening he gave or purported to give possession of the land to the decree-holders. This was done before the special peon who had been deputed to stop him had been able to find him. On the 26th November the Subordinate Judge made this further order after reading the special peon's report, namely, he allowed time to the judgment-debtors to deposit the decretal amount or bring an order of stay from the High Court and he stated in his order that after this was done he would quash the delivery of possession. On the 1st December, the judgment-debtors filed a petition asking for a hearing of their petition which they had filed on the 25th November but the learned Subordinate Judge rejected this application as frivolous and *mala fide*. On the 2nd December the learned Subordinate Judge allowed the judgment-debtors three days' time to get a stay order from the High Court or to deposit the decretal amount. On the 5th December a Rule was obtained from this Court by the judgment-debtors for stay of proceedings. The Rule was made returnable on the 22nd December and an *ad interim* stay was granted until the 7th of January. Inspite of this the learned Subordinate Judge proceeded to pass the order of the 6th of December 1924 against which this appeal is directed, namely, to quash his previous order for delivery of possession to the appellants before us. The order of the 6th of December 1924 was I think clearly a wrong order in view of the stay order of this Court of the 5th of December 1924 to which I have already referred, as the Subordinate Judge had on that date no jurisdiction to further deal with the matter and, consequently, the appeal must succeed so far as the order of the 6th December 1924 is concerned. But this does not dispose of the matter because a further question is raised by reason of the other appeal which is before us numbered 435 of 1924 and the point, shortly, is this, namely, whether the Subordinate Judge having passed his order for the issue of the writ for delivery of possession on the 14th of November could subsequently make a further order which he has done re-calling the writ for delivery of possession which he had issued. The conclusion to which we have come is that it was open to the learned Judge to review his order of the 14th November 1924 by his order of the 17th November of the same year and to re-call the writ for delivery of possession which had already been issued. Consequently, it seems to us that if in fact the peon gave delivery, as it is urged he did, then the delivery was of no effect because the order for delivery of possession which the Judge had passed on the 14th of November had subsequently been revoked by him on the 17th of the same month and as I have stated I think that it was open to the Subordinate Judge to review his order as he has done, and to pass the order of the 17th November which he did.

The result, therefore, is that we think that there was in effect no valid delivery of possession on the 17th of November. We were referred in the course of the argument to the case of *Mianjan* v. *Man Singh* (1), where the sale of certain immoveable property had been fixed for a certain date which was subsequently postponed by the Court. The sale, however, took place before the order postponing the sale had been communicated and under the circumstances it was held by the two learned Judges who decided the case that the sale could not be legally held by virtue of the order and that it made no difference if before this order had been communicated the sale had taken place. We think that the decision has some bearing on the point before us and that in the conclusion we have arrived at we are following the same principles as were followed

(1) 2 A. 686; 5 Ind Jur. 323; 1 Ind. Dec. (N. S.) 1017.

in that case. We think that the best course now will be that the application of the 14th of November 1924 for possession be re-heard in the presence of the defendants who have appealed to this Court and it will be open to the Subordinate Judge on that application to make what order he thinks fit either for delivery of possession or if he thinks that possession should not be delivered on terms of security from the tenants. This order, however, does not affect those tenants who have not appealed and so far as they are concerned the order for delivery of possession stands and we are not disturbing it.

The fair order as regards costs will, we think, be that there will be no order as to costs in this appeal.

This judgment will also govern the other appeal and having regard to the decision we have arrived at no order as to costs will be necessary in this appeal also.

Let the record be sent down at once.

Mukerjee, J.—I agree.

N. H. *Record sent.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 185 OF 1924.

March 5, 1925.

Present:—Justice Sir B. K. Mullick, Kt., and Mr. Justice Ross.

HARI SANKAR RAI—APPELLANT

versus

Musammat TAPAI KUER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Maintenance decree declaring charge upon certain properties—Execution of decree—Properties charged, whether can be sold.

It is not necessary that in every case where it is sought to enforce a charge upon immoveable property the person for whose benefit the charge was created must resort to the procedure for enforcement of claims under a mortgage laid down in O. XXXIV of the C. P. C. [p. 924, cols. 1 & 2.]

Plaintiff obtained a decree declaring that she was entitled to a certain maintenance allowance from the defendant and that certain properties belonging to the defendant were charged with the payment of the allowance. In execution of this decree the plaintiff made an application for the recovery of a certain sum on account of arrears of maintenance and sought to sell the properties charged under the decree in order to enforce payment of the amount due to her:

Held, (1) that although the decree obtained by the plaintiff was declaratory in form it was capable of execution the object of the decree being that maintenance should be recoverable by the plaintiff without her having to bring a fresh suit for the purpose; [p. 924, col. 2.]

(2) that the decree obtained by the plaintiff being a money-decree the interest of the judgment-debtor in the properties charged with the payment of the maintenance allowance could be sold in execution of the decree, and that the provisions of r. 14 of O. XXXIV of the C. P. C., were not applicable to the case. [*ibid.*]

Appeal from an order of the District Judge, Saran, dated the 19th May 1924, reversing that of the Subordinate Judge, Second Court, Chapra, dated the 16th February 1924.

Mr. *Jadubans Sahay*, for the Appellant.

Mr. *R. B. Saran*, for the Respondent.

JUDGMENT.

Mullick, J.—The decree-holder sued for maintenance and obtained a declaration that she was entitled to an allowance of Rs. 5 per month from the defendant and that certain properties belonging to the defendant were charged with the payment thereof. It is admitted that the decree created a charge within the meaning of s. 100 of the Transfer of Property Act. Thereupon the plaintiff made an application in execution for the recovery of a total sum of Rs. 31-10-0 on account of her allowance for six months and some odd days.

The Munsif dismissed the application and held that the plaintiff-decree-holder must bring a separate suit.

In appeal the District Judge has taken a contrary view and directed that the properties charged should be sold in execution.

In second appeal the first point taken is that the decree being declaratory cannot be executed and that the only remedy of the decree-holder is to bring a separate suit. Now, although the decree is declaratory it clearly means that the maintenance allowance shall be recovered from the property charged; and the question simply is what is the proper procedure for the enforcement of the relief. In my opinion there is no reason why recovery should not be made by the agency of the Execution Court. Although neither the original decree nor a copy of it has been filed, it is clear from the recitals in the judgments of the Courts below that it is a decree which was intended to be executed and that it was not the intention of the Trial Court to subject the decree-holder to the expense of a separate suit. *Raja Braja*

Sunder Deb v. *Sarat Kumari* (1) is clear authority in favour of this view.

Then it is urged that even if the decree can be executed the plaintiff cannot bring the property to sale in the present execution and that he must first sue under the provisions of s. 67 of the Transfer of Property Act. The reply to this again is that *Raja Braja Sunder's case*(1) is authority which binds us. On the other hand we have been referred to *Gokul Nath Jha* v. *Pran Mal Marwari* (2) as authority for the view that the execution cannot proceed and that a decree for the enforcement of a mortgage must be first obtained. It does not appear that the particular point before us was directly raised in that case. In that case there was a mortgage bond in respect of the property charged and the Court held that as there was a separate bond which was capable of being enforced it was not open to the decree-holder to resort to the procedure of the Execution Court. There may have been observations in that case to suggest that the compromise decree could not be enforced otherwise than by a suit; but these observations were not necessary for the decision itself.

We have also been referred to *Abhoyessury Debee* v. *Gouri Sunkur Pandey* (3). There also a consent decree was sought to be executed and the properties secured were advertised for sale in the Execution Court. It was held in second appeal that the proper procedure was to obtain a decree for sale as in a mortgage suit and that the execution could not proceed. Now, in the first place this case is not binding upon us in the face of the decision in *Raja Braja Sunder Deb* v. *Sarat Kumari* (1). In the second place with the greatest respect it seems to me that the claim now before us is not one which arises under any mortgage and that, therefore, the provisions of r. 14 of O. XXXIV, C. P. C., which prohibit the enforcement of a mortgage except in the manner provided in the Code do not apply here. It does not follow that in every case where it is sought to enforce a charge the person for whose benefit the charge is created must resort to the procedure for enforcement of claims under a mortgage. Section 99 of the Transfer of Property Act of 1882 has been repealed, and as the claim here arises out of a money decree there is no reason why the interest of the judgment-debtor should not be sold without a suit for sale. The provisions of r. 15, O. XXXIV, are not in any way material to the discussion.

The result, therefore, is that the appeal is dismissed with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 38 Ind. Cas. 791; 2 P. L. J. 55; (1917) Pat. 67; 3 P. L. W. 202.

(2) 37 Ind. Cas. 397; 1 P. L. W. 69; (1917) Pat. 371.

(3) 22 C. 859; 11 Ind. Dec. (N. S.) 568.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 683 OF 1922.

October 7, 1924.

Present:—Mr. Justice Devadoss.

M. RAMA RAO—PLAINTIFF—APPELLANT

versus

APPU AND OTHERS—DEFENDANTS—RESPONDENTS.

South Kanara—Kumki *land*— Warg *land*—*Lease by* wargdor—Darkhast—*Grant by Government of* kumki *land to* wargdor—*Subsequent possession of lessee*—*Prescription*—*Landlord and tenant*—*Improvements*—*Making land fit for cultivation*—*Appeal, second*—*Finding of fact*—*Misconstruction of document.*

Where *kumki* land attached to *warg* land in South Kanara is granted on *darkhast* by the Government, any right previously created by the *wargdor* in favour of a tenant or a mortgagee as regards the *kumki* land comes to an end. [p. 925, col. 2.]

Kodi Sankara Bhatta v. *Moidin*, 49 Ind. Cas. 147; 35 M. L. J. 120; 8 L. W. 120, *Swaminatha Mudali* v. *Saravana Mudali*, 40 Ind. Cas. 581; 33 M. L. J. 370 and *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib*, 27 Ind. Cas. 785; 28 M. L. J. 44, followed.

Where a lessee of such *kumki* land who is let into possession for a limited term continues in possession of the land for the statutory period after the date of his lease and subsequent to the grant of the land on *darkhast* to the *wargdor* himself, he acquires a title as lessee by prescription and is entitled to continue in possession as lessee under the terms of his lease. [p. 923, col. 2.]

Secretary of State for India v. *Krishnamoni Gupta*, 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.), relied on.

The High Court is not justified in interfering with a pure question of fact in second appeal. Where, however, a document has been wrongly read or misconstrued by the lower Appellate Court, the High Court would consider whether the misconstruction has in any way vitiated the finding. [p. 926, col. 2.]

Where a tenant wastes money by doing useless things on the land the landlord would not be bound to pay the amount spent on such fruitless labour; but where the tenant removes stones or levels the ground so as to make it ready for cultivation, it cannot be said that all his labour is wasted and the land is not improved. [p. 927, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, South Kanara, in Appeal Suit No. 155 of 1921, preferred against that of the Court of the Additional District Munsif, Kasaragad, in Original Suit No. 226 of 1920, (O. S. No. 1013 of 1919, on the file of the Principal District Munsif).

Mr. *B. Sitarama Rao*, for the Appellants.

Messrs. *C. V. Anantakrishna Iyer* and *T. Ananda Rao*, for the Respondents.

JUDGMENT.—The first point raised in this second appeal is that Ex. I is a lease for 70 years and not for 100 years. Mr. Sitarama Rao for the appellant relies upon the wording of the lease and contends that it must be taken to mean that the rent was payable at a certain rate for the first ten years, at a certain other rate for the next ten years and at a third rate for 70 years from the date of Ex. I. The Subordinate Judge has interpreted the deed to mean that for the first ten years the rent payable was at a certain rate, for 20 years thereafter the rent was to be at a certain other rate and for 70 years thereafter the rent was to be at another rate. If the language is clear that the rent for the first ten years was to be at a certain rate for the next ten years at a certain other rate and for the 70 years thereafter at another rate, there would be no difficulty in interpreting this document. But in the document no word meaning 'for' has been used. The Subordinate Judge has interpreted the document as meaning, for the first ten years so much, for the next 20 years, so much and for 70 years thereafter at a certain rate. Considering the view that the Subordinate Judge has taken of the language of the document, I am not prepared to say that he has gone wrong.

Mr. Sitarama Rao relies upon Ex. II, series and says that Ex. II series were not considered by the Judge and that, if they had been considered, they would have shown that the language used in the document supported his contention. In a matter like this where it cannot be said that the lower Court has gone wrong, it would not be right for this Court to interfere with the interpretation of the document placed upon it by the lower Appellate Court. I disallow this contention of the appellant.

A portion of the land covered by Ex. I was given on *darkhast* to the predecessor-in-title of the plaintiff in 1870 under Ex. F. What this portion of the land in dispute is has not been stated by either party. The contention of the appellant is that inasmuch as the land was granted on *darkhast* by the Government, any right derived from the grantee before the grant came to an end on Government granting it on *darkhast*. In the case of lands in South Kanara it is usual for *pattadars* to occupy lands adjoining their *patta* lands for the purpose of convenient enjoyment of their own holdings under *patta*, or for purposes of cultivation, etc. The Government generally grants such land known as '*kumki*' land on *darkhast* to the *pattadars*. When the land is *kumki* granted on *darkast*, any right previously granted by the *wargdor* in favour of a tenant as regards the '*kumki*' land comes to an end, and even if there is a mortgage right on the land created by the *wargdor*, it comes to an end, as soon as the grant is made by the Government to the *wargdar* or any other person. *Kodi Sankara Bhatta* v. *Moidin* (1). In that case the plaintiff owned a *warg* land and there was a mortgage on the land *kumki* to it, and the land was subsequently granted by the Government on *darkhast* to the plaintiff it was held that the mortgage right came to an end as soon as the land was granted on *darkhast*. This decision followed a number of previous decisions on the point *vide Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2) and *Swaminatha Mudali* v. *Saravana Mudali* (3).

Mr. Anantakrishna Iyer is prepared to contend that the decision in *Kodi Sankara Bhatta* v. *Moidin* (1) is not sound. But sitting as a Single Judge I am not prepared to listen to that argument for I cannot refer the matter to a Full Bench even if Mr. Anantakrishna Iyer is able to persuade me, that *Kodi Sankara Bhatta* v. *Moidin* (1) is wrong. The answer to the contention of the appellant is that the defendant continued to be in possession under the lease granted by Ex. I, that the landlord collected rent due under Ex. I and that the defendant was in possession of the land for more than 12 years from 1870. Mr. Anantakrishna Iyer's contention is that he has prescribed for a lessee's title

(1) 49 Ind. Cas. 147; 35 M. L. J. 120; 8 L. W. 100.
(2) 27 Ind. Cas. 785; 28 M. L. J. 44.
(3) 40 Ind. Cas. 581; 33 M. L. J. 370.

under Ex. I in as much as he continued in possession for more than 12 years paying rent as provided for in Ex. I. It appears from Ex. II series that the landlord collected a few annas more than that provided for in Ex. I from the defendant. Mr. Sitarama Rao argues that the defendant had no right to continue on the old terms when new terms were imposed. But such a contention was not put forward in the Courts below, and if the plaintiff wanted to rely upon such a contention I think it should have been put forward in the Court of first instance. Seeing that Ex. II series were produced by the defendant and that he relied upon the fact that he continued in possession from the year 1846 under Ex. I, I think it was the duty of the plaintiff, if he relied upon any subsequent agreement, to have set up such agreement and to prove it. In the absence of such a contention in the Courts below it is not proper to infer from the mere fact that a few annas more were collected from the tenant, than that mentioned in Ex I that a new agreement was entered into between the landlord and the tenant subsequent to 1870. Mr. Anantakrishna Iyer's explanation for the difference is that the nine annas were added to five rupees due under Ex. I when the Government levied assessment at four annas per acre. The extent being 2¼ acres the tax on the land came to nine annas. It may be that his explanation is correct. But, whether it is correct or not, I do not think that this is a sufficient circumstance to make the Court consider that a new arrangement was entered into after the year 1870. Some indication is given as to the conduct of the parties in the order Ex. F. The Subordinate Judge has made a mistake in reading the order as giving the lessee the right to remain in possession in spite of the landlord. In para. 5 he says that the grant was made to the lessor on the express understanding that the lessee's right should continue. He is clearly wrong as regards the interpretation of Ex. F. But it contains some indication that at the time the grant was made it was made to the plaintiff's predecessor-in-title on the ground that if it was granted to a third person the lessee's right might be lost, but if it was granted to the plaintiff's predecessor-in-title, as he was a party to Ex. I, the lessee would have asserted his right in a Civil Court himself against the grantee. This view of the Revenue Authorities may be wrong, but this is a circumstance to show that the parties did not wish to disturb the arrangement entered into so far back as 1870 and evidenced by Ex. I, but continued to respect that agreement and acted up to its terms. I do not think the plaintiff can disturb the possession of the lessee who has been in possession after the date of the document for at least 49 years. Following the principle of the decision in *Secretary of State for India* v. *Krishnamoni Gupta* (4), I hold that the defendant has prescribed for the title as lessee under Ex. I, I disallow this contention of the appellant.

The third contention is that the defendant is not entitled to the value of the spontaneous growth. Finding that the amount given for the trees on the land is less than Rs. 3. Mr. Sitarama Rao thinks it right not to press this point.

The next point is that the land not included in the lease has been treated by the Courts below as being included in the lease. The contention of Mr. Sitarama Rao is that the Subordinate Judge has erred in treating certain Kaithodu as existing at the time of the preparation of the plan and in taking as the southern boundary of the plot. No doubt there was no Kaithodu in existence at the time of the preparation of the plan. But the Subordinate Judge does not merely rely upon that circumstance but applies another test and he says that the western boundary was given as a line drawn from a certain quarry to the house of one Ambu. If this is so, plot No. 14 is included in the lease. No doubt the southern boundary is not quite clear, but seeing that both the Courts have treated this land as being included in Ex. I and both Courts having given reasons for their findings, I do not think this Court would be justified in interfering with a pure question of fact. No doubt if a document has been wrongly read or misconstrued this Court would consider whether the misconstruction has in any way vitiated the finding. But in this case it cannot be said that the Subordinate Judge has relied entirely upon the existence of the Kaithodu but has applied according to his own statement other test for the purpose of finding out

(4) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.).

what was included in Ex. I, I disallow this contention of the appellant.

The next contention is as regards the improvements. Mr. Sitarama Rao contends that the Courts below have not applied the proper principle as regards improvements. His argument is that though the defendant spent a considerable sum of money upon the land yet what he has done cannot be called an improvement, for the land is not yet fit for cultivation. No doubt if the tenant wastes money by doing useless things the landlord would not be bound to pay the amount spent on such fruitless labour; but where the tenant removes stones or levels the ground so as to make it ready for cultivation, it cannot be said that all his labour is wasted and the land is not improved. The plaintiff has not chosen to adduce any evidence to show that the land is not more valuable now than it was when the tenant began to improve it. In the absence of any specific evidence on this point I should consider that what was spent for the purpose of improving the land was really spent for its improvement. Mr Sitarama Rao wants to rely upon the report of the Second Commissioner who is considered by the District Munsif as not being fair to the defendant and whose report is not relied upon by the Subordinate Judge. In this case three Commissioners were sent to value the improvements Commissioners 1 and 2 seem to be agreed. It is only the Second Commissioner who has sent a report which is not relied upon by the District Munsif as well as by the Subordinate Judge. I do not think that the Subordinate Judge has gone wrong on this point and it cannot be said that the land has not been improved by the tenants.

In this connection it has been urged that considerable improvement was made before 1907 when the land was given on *darkhast*. At that time it is contended that the land was fit for cultivation. Reliance was placed upon Ex. J-2. Exhibit J-2 is a statement by the Shanbhogue, and that Shanbhogue has not been examined. There is no guarantee that what he stated was correct. Mr. Sitarama Rao wants to build a case upon the statement of a person who is not called as a witness. I do not think that Ex. J-2 would furnish sufficient basis for contention that all this land had been improved before 1907. The owner of the land at the time, the grantee of the lease in 1907 was not examined by the plaintiff or the defendant. It is urged by Mr. Sitarama Rao that if the defendant claims the value of the improvements, it is his duty to show that he made improvements. There is evidence to show that the defendant was in possession of the Items 15 series for a very long time. Whether for 30 years or 40 years it is not quite clear, and when he has proved that he has made improvements. I think the onus is on the other side to show that the improvements were made before 1907. Such evidence has not been produced on the side of the plaintiff; and I do not think he is now entitled to set up a case which was not set up in the pleadings.

Then the last question is as regards rent for Items No 15 series. In the plaint the plaintiff asked only for 50 *mudis* of paddy as mesne profits. That is only as regards the land covered by Ex. I. He did not specifically claim mesne profits in respect of lands, Items 15 series. If he had adduced some evidence to show what the income of these items was, no doubt he would he entitled to get mesne profits. But he was on the horns of a dilemma. His case was that 15 series were not improved and that they were not fit for cultivation. If they were not fit for cultivation he could not have said that they were capable of yielding any income. That being so I do not think the plaintiff can be given mesne profits in respect of 15 series.

In the result the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 54 OF 1923.
April 20, 1925.
Present:—Mr. Justice Stuart and Mr. Justice Daniels.

SHANKAR KUNBI—DEFENDANT—APPELLANT
versus
Nawab Iqbal-ul-Daula Mirza MOHAMMAD MOQIM ALI KHAN—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Agra Tenancy Act (II of 1901), s. 161—Suit for determina-

tion of rent in Revenue Court—Finding that defendants held under a third person and not under plaintiff Suit against third person for recovery of possession—Res judicata.

Plaintiff brought a suit in the Revenue Court for the determination of the amount of rent to be paid by certain persons on the allegation that they were ex-proprietary tenants under the plaintiff. The defence was that they did not hold under the plaintiff but under one *S.* who was a perpetual lessee of the land from the plaintiff. *S.* was impleaded as a party to the suit and the Court arrived at the finding that the defendants held under *S.* and not under the plaintiff. In a subsequent suit in the Civil Court by the plaintiff to recover possession of the land from *S* on the allegation that *S.* was a *benamidar* for the plaintiff and that the real lessee was the plaintiff himself :

Held, that the question whether *S.* was the *benamidar* of the plaintiff had not been decided by the Revenue Court in the previous suit and that the decision of the Revenue Court did not operate as *res judicata* between the parties.

Second appeal against a decree of the District Judge, Benares, dated the 26th September 1922.

Messrs. *P. L. Banerji* and *N. Upadia*, for the Appellant.

Messrs. *K. Verma* and *S. Hyder Mehdi*, for the Respondents.

JUDGMENT.

Stuart, J.—The three main arguments advanced in support of this appeal are first that the plaintiff was debarred from bringing the suit out of which this appeal has arisen, because it had been decided finally as between him and the appellant Shankar Kurmi in a Revenue Court of competent jurisdiction by a decision of 12th April 1915 subsequently affirmed on appeal, that in respect of the property in dispute in the present proceedings the plaintiff was a *zemindar* and the appellant, Shankar Kurmi, his perpetual lessee. The second point argued was that the Court should not enforce the agreement which it was asked to enforce by the plaintiff-respondent as such an agreement was fraudulent and intended to defeat the provisions of the Tenancy Act. The third point was that the suit was barred by limitation.

In respect of the first point, I find that there can be no question of *res judicata*, because on the view I hold the Revenue Court did not decide that the plaintiff-respondent was the *zemindar* and that the appellant, Shankar, was his lessee of the property now in dispute. The suit before the Revenue Court was a suit brought by the plaintiff respondent for the determinaiton of the amount of rent to be paid by third parties on the allegation that these third parties were his ex-proprietary tenants. They replied that they did not base their tenancy upon an agreement with the plaintiff respondent, but that they were holding from Shankar, who was a tenant of the plaintiff-respondent. Shankar intervened and took the same position. Now, it was not necessary for the purpose of the decision of that suit to determine whether the lease which it is now asserted was a *benami* transaction (the plaintiff-respondent being the actual lessee and Shankar having been put forward to represent him) was or was not such a transaction, for, if the plaintiff-respondent had then established that the lease was really in his own favour, though nominally in favour of Shankar, he would not have advanced his case against the persons against whom he wished to have ex-proprietary rents fixed, because it would have been obvious that, if he had put forward Shankar as representing him, Shankar had a perfect right to lease to the then defendants. I do not consider that the question now before this Court was before the Revenue Court, and could have been before the Revenue Court. This is a very different matter from laying down that the Revenue Court is not competent to decide matters falling within its cognizance under the provisions of s. 167 of the Tenancy Act. My point here is that the Revenue Court did not decide anything bearing upon this particular point.

In respect of the second point as to the suit being barred, because the arrangement was fraudulent, it is not open to Shankar to raise that plea and I would accordingly repel it.

In respect of the third point, the suit appears to me to be cleary a suit by a person out of possession for possession. The real remedy sought is to recover the property from the *benamidar*, who, after having agreed to hold it on behalf of the actual owner, is asserting a contrary title and refusing to give the actual owner the benefit of the property. I would, therefore, dismiss this appeal with costs including in this Court fees on the higher scale.

Daniels, J.—I concur. I would prefer to rest my decision on the second plea on the ground taken by this Court in its decision on a case arising out of a similar lease, namely, that no fraud was actually committed. The vendors never

claimed their ex-proprietary rights, and consequently these rights lapsed.

By the Court.—The appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL CIVIL SUIT No. 1215 OF 1924.

December 15, 1924.

Present:—Mr. Justice Page.

BHOWANIDAS RAMGOBIND —PLAINTIFF—OPPOSITE PARTY

versus

PANNACHAND LUCHMIPAT AND ANOTHER—DEFENDANTS—APPLICANTS.

Civil Procedure Code (Act V of 1908), O. V, r. 17—Service of summons—Duty of plaintiff—Personal service, mode of—Substituted service, when can be permitted—Arbitration Act (IX of 1898), s. 19—Step in proceedings, what amounts to—Application for copy of plaint—Application for leave to enter appearance.

A plaintiff must use reasonable diligence to ascertain the whereabouts of the defendant in order to effect personal service of summonses upon him, and where, according to the plaintiff himself, the defendant resides at more places than one the plaintiff cannot be held to have used reasonable diligence to discover the defendant's whereabouts if he has not made enquiries for the defendant at every one of such places. The fact that the plaintiff has called more than once at one of such places and has failed to find the defendant will not entitle him to take advantage of the provisions for substituted service. [p. 930, col. 1.]

Where a defendant refuses to accept service it is not sufficient compliance with the provisions of O. V, r. 17, of the C. P. C., to affix a copy of the summons on the outer door of the premises in which the defendant happens to be at the time, unless the premises are such that the defendant ordinarily resides or carries on business or personally works for gain in the premises. [p. 930, col. 1.]

A step in the proceedings within the meaning of s. 19 of the Arbitration Act means something in the nature of an application to the Court, and not mere talk between solicitors or solicitor's clerks nor the writing of letters, but the taking of some step, such as the taking out of summons or something of the kind, which is in the technical sense a step in the proceedings. To apply for a copy of a plaint is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. In so doing the defendant does not and is not to be deemed to indicate his acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which has arisen, for until he is made aware of the plaintiff's cause of action he is not in a position to elect whether he will proceed by way of arbitration or will assent to the litigation which has been commenced against him. [p. 931, cols. 1 & 2.]

Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, would be a step in the proceedings within the meaning of s. 19 of the Arbitration Act. The intention of the party is to be gathered from the nature of the application which is made, and if having regard to the form of the application the Court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party desired that the matters in dispute should be referred to arbitration. [p. 932, cols. 1 & 2.]

A defendant's application for leave to enter an appearance is not a step in the proceedings within the meaning of s. 19 of the Arbitration Act. It is a reasonable deduction from such conduct that the defendant intends to resist the suit on the merits. It is equally reasonable to infer therefrom that he intends thereafter to make a preliminary objection to the matter being made the subject of litigation at all. [p. 932, col. 2.]

Application by Pannachand Luchmipat Defendant No. 1.

Mr. *A. K. Roy*, for the Defendant.

Mr. *K. P. Khaitan*, for the Plaintiff.

JUDGMENT.—This is an application by the first defendant for leave to enter an appearance and for a stay of the proceedings pending a reference to arbitration of the matters in dispute in this suit. In the plaint this defendant is described as "Pannachand Luchmipat, a mercantile firm carrying on business at 33, Armenian Street, in the town of Calcutta as well as at 2, Turner Road, Chitpore." The defendant alleges that this firm has never been served with a writ of summons in the suit. The onus of proving the service is upon the plaintiff. The plaintiff alleges that the summons was duly served on two occasions by substituted service. As regards the first alleged service there is evidence that in June 1924 the plaintiff's *gomashta* went with the Sheriff's peon to No. 33, Armenian Street, in order to serve the defendant there that he failed to effect personal service, and that after calling upon the defendant three times to accept service a copy of the summons was affixed to the outer-door of 33, Armenian Street, by the Sheriff's peon. In my opinion, such a mode of service does not comply with the requirements of O. V, r. 17. I had occasion recently to state what, in my opinion, those requirements were, and I need not repeat them; *Baldeodas Lohia* v. *Subkarandas Goenka* (1). It was not enough in the circumstances that the plaintiff, in order to become entitled to take advantage of the provision for substituted service, should have called once, twice or any number of

(1) 88 Ind. Cas. 508; 52 C. 179; (1925) A. I. R. (C) 627.

times at 33, Armenian Street. A plaintiff must use reasonable diligence to ascertain the whereabouts of the defendant, and where, as in this case the defendant, according to the plaintiff, resided both at 33, Armenian Street, and at 2, Turner Road, Chitpore, the plaintiff cannot be held to have used reasonable diligence to discover the defendant's whereabouts if he did not make enquiries for the defendant at both of these places. No attempt, however, has been made at any time to serve the defendant at 2, Turner Road, Chitpore, and, in my opinion, the first alleged service does not constitute a valid service of the writ of summons. As regards the second alleged service, that is, at 102, Clive Street, it is stated that Atmaram, the plaintiff's *gomasta*, on the 16th September in company with the Sheriff's peon attempted to serve the writ of summons upon the defendant personally at 102, Clive Street. The defendant does not dispute that 102, Clive Street is a place where Pannachand Luchmipat was sometimes to be found or that the offices of the Jute Balers' Association of which he is a member were there located. Assuming, however, against the defendant's contention that the defendant was in fact found at 102, Clive Street, by Atmaram and the peon on that day, and that the writ of summons was then and there offered to him for acceptance, and also that he refused the service thereof, in my opinion, the second alleged service is inadequate because, after the defendant had refused to accept service, all that was done was that the peon affixed a copy of the summons on the outer door of 102, Clive Street Mr. Khaitan contended that to affix a copy of the summons on the outer door of premises in which a defendant is found, and where the defendant has refused to accept service is a sufficient compliance with the provisions of O. V, r. 17 but it is to be observed that in order duly to effect substituted service it is necessary for 'the proper officer to affix the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain." and except for a statement by the Sheriff's peon (who I am satisfied was not in a position to know the fact) to the effect that "102, Clive Street is where the said firm is located," there is no evidence that 102, Clive Street was where the defendant ordinarily resided or carried on business or personally worked for gain. Further, not only does it appear from two memoranda annexed to Atmaram's affidavit that this defendant purported to carry on business at 33, Armenian Street, with a head office at 2, Turner Road, Chitpore, but an application having been made on the 9th July 1924 by the plaintiff for leave to effect substituted service the plaintiff stated that "for greater safety your petitioners have been informed that the defendant firm was carrying on business at 2, Turner Road, in Chitpore in the suburbs of Calcutta in the jurisdiction of the District Judge's Court, Alipore and that your petitioners submit that a fresh summons be issued under the seal of the Hon'ble Court." No attempt has been made, however, as I have said, to effect personal service at this address. In these circumstances I hold that the necessary preliminary steps were not taken to justify the plaintiff in effecting service by a mode of substituted service. I, therefore, granted the defendant leave to enter an appearance. The defendant thereupon filed his warrant of attorney and entered an appearance, and on the plaintiff consenting that the second part of the plaintiff's motion should be heard forthwith the defendant applied that all further proceedings in the suit should be stayed pending a reference of the matters in controversy therein. The suit is brought to recover damages for the alleged failure of this defendant to deliver a large quantity of hessian cloth pursuant to two contracts of sale dated 15th September 1923 and the 5th October 1923. It was a term of each of the said contracts that any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision and such decision shall be accepted as final and binding on both parties to these contracts. The award may, at the instance of either party and without notice to either of them, be made a rule of the High Court of Judicature at Fort William in Bengal." Admittedly the claim in this suit is within the ambit of the arbitration clause but the plaintiff resists the defendant's application that the proceedings herein should be stayed on the ground that the defendant has taken a step in the proceedings, and, having regard to s. 19 of the Arbitration Act (IX of 1899) the Court has no jurisdic-

tion to stay the suit. By s. 19 it is provided that "where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceeeings apply to the Court to stay the proceedings; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." The defendant not having been served did not enter an appearance as directed in the summons and the suit was placed in the undefended list. On the 1st December the defendant's Attorney wrote to the plaintiff's Attorney :

Dear Sir,

An order has this day been made directing our client to make an application for leave to enter an appearance herein. We shall be obliged if you will send us a copy of the plaint, and the affidavit of service at once on the usual terms.

Yours faithfully,
A. N. MITTER & BASU.

The plaintiff contends that the defendant has taken a step in the proceedings (*i*) by applying for a copy of the plaint and (*ii*) by making an application for leave to enter an appearance. With respect to the first alleged step it is enough to state that I agree with the view expressed by Lindley, L. J., as to the meaning of s. 4 of the English Arbitration Act, 1889, which is couched in language almost identical with that to be found in s. 19 of the Indian Arbitration Act. His Lordship observed that "The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings": *Ives and Barker* v. *Willans* (2). Moreover, to apply for a copy of the plaint is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. In so doing the defendant does not, and is not to be deemed to, indicate his acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which has arisen, for until he is made aware of the plaintiff's cause of action he is not in a position to elect whether he will proceed by way of arbitration or will assent to the litigation which has been commenced against him. As regards the second ground which the plaintiff urges in support of his contention it is well to bear in mind that an agreement to refer a dispute to arbitration does not oust the jurisdiction of the Court. Notwithstanding such an agreement at Common Law the parties or any of them are at liberty to invoke the assistance of the Court to settle the controversy which has arisen, and the Court is bound to entertain the suit. The only remedy at Common Law open to a party to the agreement is to seek damages for the breach of the agreement to refer the matter to arbitration. But this remedy would usually be found to be nugatory for under the circumstances the plaintiff would not be able to prove more than nominal damages. Of course, the parties to such an agreement either before or after action brought are at liberty to settle the dispute by submitting the subject matter thereof to arbitration and obtaining an award thereon But in the absence of such an award the Common Law right of the parties or any of them to have recourse to the Court for the purpose of settling the dispute remains unaffected by an agreement to refer the matter to arbitration :—see *Doleman* v. *Ossett Corporation* (3). Under s. 19 of the Arbitration Act, however, upon the fulfilment of the conditions therein provided, the Court in its discretion may stay the proceedings in the suit pending a reference to arbitration. Now, I am satisfied that the defendant is and at all material times has been, ready and willing to refer to arbitration the matters in dispute in the suit, and, in my opinion, there is no sufficient reason why the matters should not be referred in

(2) (1894) 2 Ch. 478 at p. 484; 63 L. J. Ch. 521; 7 R. 243; 70 L. T. 674; 42 W. R. 483.
(3) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

accordance with the submission. But in order to conform to the provisions of s. 19 the defendant must apply to the Court "after appearance and before filing a witten statement or taking any other step in the proceedings". Now, in my opinion, to move the Court for leave to enter an appearance is for certain purposes to take a step in the proceedings. For example, a party taking such a step would be deemed to have waived any irregularity in the service of the writ to which he applies for leave to appear: see *Fry* v. *Moore* (4) *In re Orr Ewing, Orr Ewing* v. *Orr Ewing* (5) *Harris* v. *Taylor* (6). The question which I have to determine is whether such an application is step in the proceedings within s. 19 of the Arbitration Act. Now, I apprehend that the intention of the Legislature in enacting s. 19 was that in a proper case the Court should give effect to the agreement for arbitration into which the parties had entered. It was not, however, intended that a party should lie by and after having wasted time and money in litigation should apply for a stay of the proceedings in order that the dispute should be settled by arbitration. "The intention of the Legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, was that they should at once, and before any further proceedings were taken, specify the *terminus a quo* and that if an application to stay proceedings was made under those circumstances, then that the Court should enforce the contractual obligation to go to arbitration....That seems to me a very wise provision: that costs should not be thrown away in beginning to litigate," per Lord Halsbury, Lord Chancellor, *Ford's Hotel Co.* v. *Bartlett* (7). Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings within s. 19 of the Indian Arbitration Act. The intention of the party is to be gathered from the nature of the application which is made, and if, having regard to the form of the application, the Court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention or that the application is coupled with a protest that the party desires that the matters in dispute should be referred to arbitration; see *Lucas Ralli* v. *Noor Mahomed* (8), *Sarat Kumar Roy* v. *Corporation of Calcutta* (9), *Austin & Whiteley, Ltd.* v. *Bouly (s.) & Sons* (10) Applying this test to the motion before the Court I am clearly of opinion that the defendant's application for leave to enter an appearance was not a step in the proceedings within s. 19 of the Arbitration Act. It is not a reasonable deduction from such conduct that the defendant intends to resist the suit on the merits. It is equally reasonable to infer therefrom that he intends thereafter to make a preliminary objection to the matter being made the subject of litigation at all. Nay more, the language used in the section leads me to the same conclusion, for it is therein expressly provided that the party making an application under the section for a stay of the proceedings must before so doing have entered an appearance. It is not reasonable to suppose that the Legislature intended that a party should be held to have taken a step in the proceedings within s. 19 of the Arbitration Act merely because he has made an application which, if granted, will place him *en train* for fulfilling a condition precedent to an application to stay being duly made in accordance with the provisions of the section. In my opinion, the defendant's application must succeed, and the proceedings in the suit will be stayed in order that the matters in dispute therein may be referred to arbitration pursuant to the agreement entered into between the parties. Liberty to apply. The defendants are to have their taxed costs of this motion in any event.

Z. K. *Application allowed.*

(4) (1889) 23 Q. B. D. 395; 58 L. J. Q. B. 382; 61 L. T. 545; 37 W. R. 565.

(5) (1883) 22 Ch. D. 456.

(6) (1915) 2 K. B. 580; 84 L. J. K. B. 1839; 113 L. T. 221.

(7) (1896) A. C. 1 at p. 5; 65 L. J. Q. B. 166; 73 L. T. 665; 44 W. R. 241.

(8) 31 B. 236; 8 Bom. L. R. 955

(9) 34 C. 443; 11 C. W. N. 306

(10) (1913) 108 L. T. 921.

RANGOON HIGH COURT.

CIVIL REVISION No. 163 OF 1924.

November 24, 1924.

Present:—Mr. Justice Godfrey.

KOLAI SAI—APPLICANT

versus

BALAI HAJAM—NON-APPLICANT.

Stamp Act (II of 1899), s. 12—Stamp on pro-note, cancellation of—Cross-mark, whether operates as effectual cancellation.

Under s 12 of the Stamp Act it is not essential that in order to cancel a stamp a person must go the length of either writing his name or his initials thereon. So long as he makes it obviously apparent on the face of the stamp that it has once been used, it appears he has done all that could reasonably be expected of him and all that is in fact required by the section.

Defendant who was illiterate and used a cross-mark as the ordinary method of his acknowledgment executed a pro-note and made a cross-mark on the stamp affixed to the pro-note:

Held, that the cross-mark effectually cancelled the stamp within the meaning of s. 12 of the Stamp Act.

Ralli v. *Caramalli Fazal*, 14 B. 102; 7 Ind. Dec. (N. S.) 526, *Virbhadrapa* v. *Bhimaji*, 28 B. 432; 6 Bom. L. R. 436; and *McMullen* v. *Sir Alfred Hickman Steamship Company Ltd.*, (1902) 71 L. J. Ch. 766; 18 T. L. P. 650, referred to.

Civil revision from a decree of the Small Cause Court, Rangoon, in Civil Regular No. 7634 of 1923.

Mr. *Vertannes*, for the Applicant.

JUDGMENT.—In this case the applicant seeks to revise the judgment and decree of the Third Judge, Rangoon Small Cause Court, decreeing a suit upon a promissory-note for Rs. 81 against him on the ground that the stamp on the promissory-note having been duly cancelled in conformity with the provisions of s. 1 of the Stamp Act, the promissory-note must be deemed to have been unstamped in accordance with that section, and was, therefore, inadmissible in evidence, and should have been rejected and the suit dismissed.

This objection does not appear to have been taken at the trial of the suit, nor was it definitely raised in the petition first filed in revision in this Court; but it seems to have been argued, when the application was fixed for admission, and amended grounds have since been filed by leave; which make it, in effect, the only real ground put forward.

It appears that the applicant, who was the defendant in the suit, is illiterate and cannot even sign his name. His petitions, therefore, bear his X mark, and the summons, with which he is said to have been served in the suit was similarly marked with a X. The stamp on the promissory-note in suit has likewise a X mark on it; and it is contended that this is not an effectual cancellation of the stamp within the meaning of the section.

That section provides *inter alia* that the person executing any instrument on any paper bearing an adhesive stamp shall cancel the same "so that it cannot be used again"; and sub-s. (3) provides that a person so required to cancel an adhesive stamp "may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing or in any other effectual manner."

The short question for disposal, therefore, is whether a X mark made on an adhesive stamp cancels it in an effectual manner, that is to say, so that it cannot be used again. And, for the purpose of arriving at a decision in the matter, a comparison may be made with the methods given as examples.

I have been referred to two cases, upon which reliance is placed, as showing that a X mark is an ineffectual method of cancellation. The one, *Ralli* v. *Caramalli Fazal* (1), where the only mark of cancellation on the stamp was a line on a minute portion of it forming the first portion of the first letter of the defendant's signature (see page 105). which was held to be ineffectual; and the other, *Virbhadrapa* v. *Bhimaji* (2), which followed that case and went samewhat further, holding that two parallel lines drawn across the stamp did not effectually cancel it, the learned Judges being of opinion that there was no difference between "a small ink line" and "two lines."

With the greatest respect to the learned Judges, who constituted the Bench in the last-mentioned case, it seems to me that it is a question of degree, and that it is not essential that a person should go the length of either writing his name or initials. So long as he makes it obviously apparent, on the face of the stamp, that it has once been used, it appears to me that he has done all that can reasonably be expected of him, and all that is, in fact required by the section of ths Act. And this would seem to have been the *ratio decidendi* adopted by the Court in *McMullen* v. *Sir Alfred Hickman*

(1) 14 B. 102; 7 Ind. Dec. (N. S.) 526.
(2) 28 B. 432; 6 Bom. L. R. 436.

Steamship Company, Ltd., (3), where, in some, cases, the stamps were cancelled by a cross, or other marks drawn across them.

In the particular case before me, it is obvious that a cross-mark is the petitioner's ordinary method of indicating his acknowledgment, as he, like very many others to whom money is lent upon promissory-notes in Rangoon, cannot sign his name. And, if his cross-mark does not constitute an effectual cancellation of the stamp, it is difficult to see what else such a person could do.

In my opinion, therefore, the stamp in question was effectually cancelled within the meaning of the Act, and the promissory-note properly admitted in evidence. And it, therefore, follows that this application fails, and it is accordingly dismissed.

Z. K. *Application dismissed.*

(3) (1902) 71 L. J. Ch. 766; 18 T. L. R. 650.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 232 OF 1924.

January 7, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

THE OFFICIAL RECEIVER OF COIMBATORE—PETITIONER—APPELLANT

versus

PALANISWAMI CHETTI *alias* PONNUSWAMI CHETTIAR AND ANOTHER—RESPONDENTS Nos. 1 AND 2—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 2 (a), 21, 28, 53—"Creditor" in s. 28 (a), meaning of—"Realise" in s. 28 (6), meaning of—Insolvency Court, power of, to stay proceedings pending against insolvent—Mortgage suit, whether affected by order of adjudication—Application under s. 53 to avoid transfer, whether ousts jurisdiction of Civil Court to proceed with mortgage suit—Jurisdiction.

There is no provision in the Provincial Insolvency Act empowering an insolvency Court to stay proceedings pending against an insolvent before that Court or in another Court subject to the superintendence of that Court. Section 29 of the Act, however, gives power to the Court before which a suit or other proceeding is pending against a debtor to stay the proceeding or to continue it on such terms as the Court may impose on proof that an order of adjudication has been made against the debtor. [p. 935, col. 2.]

The word "creditor" in cl. (2) of s. 28 of the Provincial Insolvency Act means only a creditor as defined in s. 2 *(a)* of the Act and does not include a secured creditor. [p. 936, col. 1.]

The word "realise" in cl. (6) of s. 28 of the Provincial Insolvency Act must be understood in the ordinary sense of a secured creditor realising his security by suit. [p. 936, col. 1.]

The right of a secured creditor either to commence a suit on his mortgage or to proceed with such suit and after he has obtained a decree to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency petition, or by the adjudication of the mortgagor as an insolvent. [p. 936, col. 2.]

An Insolvency Court is the proper Court for considering whether a transaction is bad under s. 53 of the Provincial Insolvency Act. An ordinary Civil Court would have power to declare a mortgage void under s. 53 of the Transfer of Property Act, but it cannot make such a declaration under s. 53 of the Provincial Insolvency Act. [p. 937, col. 1.]

It does not follow that because a transaction is void under s. 53 of the Provincial Insolvency Act, therefore, the mortgagee has no remedy against the mortgagor. The transaction under s. 53 is only voidable and not void, and until it is set aside it is good against the mortgagor. It is only in the interests of the general body of creditors that a transaction which is good against the mortgagor is set aside under s. 53 of the Provincial Insolvency Act. The jurisdiction to set aside a transaction which is good against the mortgagor but not good against the general body of creditors is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of a Civil Court to proceed with the mortgagee's suit to decree. [p. 937, cols 1& 2.]

A mortgage which is voidable under s. 53 of the Provincial Insolvency Act is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. [p. 937, col. 2.]

No Court has power to sell the property of an insolvent if it is vested in the Official Receiver except the Official Receiver himself. [*ibid.*]

The Official Receiver's right to proceed under s. 53 is not taken away either by the institution of a suit by the mortgagee or the passing of a decree in his favour or even by his realising the amount due to him by the sale of the property, for the Official Receiver could apply to the Insolvency Court for a declaration that the transaction is void and if he succeeds, the property of the insolvent would vest in him before sale in execution of the mortgage-decree. If the property is sold to a *bona fide* purchaser for value, before the Insolvency Court passes an order under s. 53, the Official Receiver would be entitled to proceed against the amount realised by the mortgagee in execution of his mortgage-decree. [p. 937, col. 2; p. 938, col. 1.]

Under s. 4 of the Provincial Insolvency Act, the Court is given wide powers to try all questions which it may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. Though the Insolvency Court has such wide powers, neither s. 4 nor any other section of the Insolvency Act takes away the jurisdiction of the ordinary Civil Court to try a suit instituted by a mortgagee against the insolvent. The scheme of the Act is to exempt the secured creditors from its operation unless they choose to come in under s. 47. This does not mean that a mortgage cannot be set aside as being void under s. 53. Similarly, the jurisdiction given to an Insolvency Court under ss. 53 and 54 cannot take away the jurisdiction of the ordinary Civil Court to entertain a suit at the instance of a mortgagee, or proceed with such a suit already

instituted by reason of the pendency of the insolvency proceedings [p. 938, cols. 1 & 2.]

Per *Wallace, J.*—Where the secured creditor of an insolvent brings a suit against the insolvent to realise his security and the Official Receiver is made a party to that suit as representing the insolvent he does not carry into that representation his character as representative of the creditors. The decree in the mortgage suit, if in favour of the mortgagee, will still be enforceable except so far as the proceedings under s. 53 have debarred him from recovering the whole of the proceeds for himself, and if, for example, in the proceedings under s. 53 the Court finds the alienation good to any extent, and upholds it to that extent, or rather does not challenge the mortgage right to that extent, then the mortgagee will become a creditor of the insolvent estate on the foot of his mortgagee to that extent. If the mortgagee's suit is dismissed, then the property vests in the Official Receiver who is on record in his suit as representative of the mortgagor. Similarly, if the proceedings under s. 53 are dismissed, the mortgage suit is unaffected; if they are upheld, the mortgagee's rights against his mortgagor are subject to the result of the order against him under s. 53. The two Courts are in fact deciding different questions in relation to different parties and there is, therefore, no question of concurrent or conflicting jurisdiction on the same point. [p. 940, col. 2; p. 941, col. 1.]

Appeal against an order of the District Judge, Coimbatore, dated the 3rd April 1924, in I. A No. 161 of 1924, in I. P. No. 102 of 1921.

Mr. *A. C. Sampath Iyengar*, for the Appellant.

Mr. *T. M. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.

Devadoss, J.—This appeal is by the Official Receiver of Coimbatore against the order of the District Judge refusing to stay proceedings in O. S. No. 11 of 1924 on the file of the Principal Sub-Court, Coimbatore, pending the disposal of I. A. No. 161 of 1924. The respondents who are secured creditors filed O. S. No. 11 of 1924, in the Principal Sub-Court of Coimbatore against the insolvent. The Official Receiver was added as a party inasmuch as the defendant had been adjudicated an insolvent in I. P. No. 102 of 1921. The Official Receiver who had information that the mortgage in favour of the respondents was a voidable transaction under s. 53 of the Privincial Insolvency Act moved the District Court for declaring that the mortgage was void against him. Pending the disposal of his application, he moved the District Court under s. 10 of the C. P. C. for stay of the proceedings in O. S. No. 11 of 1924. The District Judge held that s. 10 did not apply to the application and dismissed it. The application was made in the insolveney petition and, therefore, it was made to the District Court exercising insolvency jurisdiction. There is no provision in the Provincial Insolvency Act corresponding to s. 18 of the Presidency Towns Insolvency Act empowering the Insolvency Court to stay proceedings pending against the insolvency before that Court or any other Court subject to the superintendence of that Court. Section 29 of the Provincial Insolvency Act gives power to the Court before which a suit or other proceeding is pending against a debtor, to stay the proceeding or to continue it on such terms as the Court may impose on proof that an order of adjudication has been made against the debtor. It is open to the Sub-Court of Coimbatore to stay the proceedings in O. S. No. 11 of 1924 pending the disposal of the application to the District Court by the Official Receiver under s. 53 of the Act. The order of the District Judge, therefore, is right.

It is contended on behalf of the appellant that on the making of the application by the Official Receiver under s. 53 of the Provincial Insolvency Act, the Civil Court in which the suit is pending against the insolvent ceases to have jurisdiction over the suit, in other words, the jurisdiction of the Civil Court to try the suit is taken away the moment an application is made by the Official Receiver for a declaration under s. 53 of the Provincial Insolvency Act. The contention of the appellant is that s. 28 is subject to the provisions of s. 53 of the Act. Under s. 28, cl. 6, a secured creditor is exempted from the operation of s. 28. It is contended for the appellant that this must be read subject to the provisions of s. 53. This contention is on the face of it untenable. Under s. 28, cl. (2) "on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided and,..... no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose." In the case of a creditor he cannot commence or prosecute in respect of his debt without the leave of

the Court. But cl. (6) is clear in its terms "Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." It would be imputing absurdity to the Legislature to hold that cl. 6 of s. 28, which is so clear in its terms should be read as meaning that the secured creditor could not file a suit for recovering the amount secured on the property of the insolvent. The word "creditor" in cl. 2 means only creditor as defined in s. 2 (*a*) of the Act and does not include secured creditor.

Mr. Sampath Iyengar's contention is that under cl. 6 of s. 28 a creditor can only realise his security by private sale or transfer of the security to some other person, and he cannot file a suit for recovering the amount secured. This contention is on the face of it untenable for under s. 69 of the Transfer of Property Act, the right of private sale can be given to mortgagee, where the mortgage is an English mortgage to which transaction neither a Hindu, Muhammadan, or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the Local Official Gazette is a party; where the mortgagee is the Secretary of State for India in Council and where the mortgaged property or any portion thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, the power of private sale of the mortgage can be exercised by the mortgagee, and in no other case can the power of sale in a mortgage be exercised by the mortgogee; in other words, the provisions of s 69, do not apply to mortgages in the *mofussil* except in the case of an English mortgage as above described and except in the case of a mortgage in favour of the Secretary of State for India in Council. It, therefore, follows that s. 28, cl. (6), which is applicable only to the *mofussil*, could not be said to refer to the right of a mortgagee to effect private sale of the property. The word "realise" must be understood in the ordinary sense of a secured creditor realising his security by a suit. The right of a secured creditor to institute a suit or to proceed with the suit already commenced is not taken away by s. 21 by reason of the adjudication of the mortgagor as an insolvent. Section 51 of the Act throws light upon this question. Section 51, cl. (1) is "where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition." Clause (2) says: "Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed." It, therefore, follows that in the case of an ordinary creditor, he will be entitled to the assets realised in execution of his decree if the assets are realised before the admission of the insolvency petition. But, in the case of a secured creditor, he could proceed with the execution of his mortgage-decree even after the admission of the insolvency petition and will be entitled to the sale proceeds of the mortgaged property notwithstanding the pendency of the insolvency proceedings. It is not necessary that the executing creditor in order to get the fruits of the execution proceedings should have sold the property before the admission of the insolvency petition. His right to proceed with execution till he realises the amount due to him is not taken away by the admission of an insolveney petition. It is, therefore, clear that the right of a secured creditor either to commence a suit or to proceed with the suit and to proceed with the execution of his mortgage-decree is not taken away by the admission of an insolvency petition, or by the adjudication of the mortgagor, as an insolvent.

The contention for the appellant is that the proper *forum* for the determination of the questions arising under s. 53 is the Insolvency Court, and, therefore, the Civil Court cannot proceed with the mortgagee's suit against the insolvent. For the determination of questions arising under ss. 53 and 54, no doubt the proper *forum* is the Insolvency Court. In a suit on a mortgage in the Civil Court questions arising under ss. 53 and 54 would be out of place The ordinary Civil Court is only concerned with the question whether the mortgage document was executed by the mortgagor and whether the whole or portion of the consideration passed; and if the Court finds that the mortgage-deed was executed by the mortgagor and the consideration

passed, it will pass a decree in favour of the mortgagee for the amount of consideration which is proved to have passed; and the onus of proving want of consideration in such cases is upon the mortgagor. In the case of s. 53, if the mortgage is within two years of the adjudication of the mortgagor as an insolvent the onus of proving good faith and valuable consideration is on the mortgagee. The Insolvency Court, therefore, is the proper Court for considering whether the transaction is bad under s. 53 of the Act. *Vide Mariappa Pillai* v. *Raman Chettiar* (1).

The question for determination is whether the jurisdiction of the Civil Court to try a mortgage suit is taken away on the presentation of an application to the Insolvency Court under s. 53 of the Act. There is nothing in the Insolvency Act itself to support the contention that the jurisdiction of the Civil Court to try the mortgage suit is taken away. The principal Sub-Court of Coimbatore being seized of O S. No. 11 of 1924 has jurisdiction to try the suit. It is urged that if it passed a decree in favour of the plaintiffs, and if afterwards the District Court holds that the transaction in favour of the respondents is void under s. 53, there will be a conflict of decisions. The Principal Sub-Court could pass a decree in favour of the plaintiffs if the defendant fails to prove want of consideration. If it finds that the mortgage was executed by the defendant, it is not open to that Court to consider whether the transaction is bad under s. 53 of the Provincial Insolvency Act; and the Official Receiver would not be able to put forward such a contention in that Court. No doubt, the ordinary Civil Court would have power to declare a mortgage void under s. 53 of the Transfer of Property Act. But it cannot do so under s. 53 of the Provincial Insolvency Act. It is urged for the appellant that in order to avoid a conflict, it must be held that the ordinary Civil Court ceases to have jurisdiction to entertain a suit on a mortgage or to continue the suit the moment an application is made under s. 53 of the Provincial Insolvency Act for a declaration that the transaction is void against the Official Receiver. It does not follow that because a transaction is void under s. 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under s. 53 is only voidable and not void. It is well settled that till the transaction is set aside it is good against the mortgagor. It is only in the interests of the general body of creditors that a transaction which is good against the mortgagor is set aside under s. 53. The jurisdiction to set aside a transaction which is good against the mortgagor but not good against the general body of creditors is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit to decree. If the mortgaged property is of considerable value and if the transaction is bad under s. 53, it is voidable only to the extent of the debts which the mortgagor has to pay. The mortgagee will be entitled to proceed against the mortgaged property after it has satisfied all the creditors of the insolvent; in other words, a mortgage which is voidable under s. 53 is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. That being so, it is difficult to understand how the Civil Court is deprived of its jurisdiction by reason of an application under s. 53 of the Provincial Insolvency Act. If a declaration is given by the Insolvency Court in favour of the Official Receiver, the property would vest in the Official Receiver and he could dispose of it for the general body of creditors, and the mortgagee could not bring the property to sale on the strength of his mortgage, for the moment the transaction is declared void under s. 53, the property vests in the Official Receiver and he is entitled to deal with it for the general body of creditors. No Court has power to sell the property of an insolvent if it is vested in the Official Receiver excepting the Official Receiver himself. *Vide Kochu Mahomed Asan Tharagan* v. *Sankaralinga Mudaliar* (2). But till such a declaration is made by the Insolvency Court under s. 53, the transaction is good and the mortgagee could proceed with the suit or with the execution of his decree against the insolvent's property. The Official Receiver's right to proceed under s. 53 is not taken away either by the institution of a suit by the mortgagee or the passing of a decree in his favour or even by his realising the amount due to him by the sale of the property, for the Official Receiver could

(1) 52 Ind. Cas. 519; 42 M. 322; 10 L. W. 59.

(2) 62 Ind. Cas. 495; 44 M. 524; 40 M. L. J. 219; (1921) M. W. N. 236; 14 L. W. 505.

apply to the Insolvency Court for a declaration that the transaction is void and if he succeeds, the property of the insolvent would vest in him before sale in execution of the mortgage decree. If the property is sold to a *bona fide* purchaser for value, before the Insolvency Court passes an order under s. 53, the Official Receiver would be entitled to proceed against the amount realised by the mortgagee in execution of his mortgage-decree.

The right of the Official Receiver to proceed against the property of the insolvent is not taken away by reason of any decree of Court. If he could prove that the transfer is without consideration, or is only *benami* for the insolvent, he could recover the property. In the case of s 54, if payment is made to a creditor which payment is bad as being a fraudulent preference, or if a decree is passed, or if a transfer is made which comes within the mischief of s. 54, the Official Receiver is entitled to proceed against such person who has obtained the benefit, and his right is not taken away by the mere fact of a decree having been passed. In the case of a mortgage, therefore, there is no reason to hold that the passing of a decree would stand in the way of the Insolvency Court passing an order under s. 53. The order of the Insolvency Court under s. 53 would be binding upon the parties and the ordinary Civil Court would, therefore, not be able to execute the mortgage decree passed by it. The proper course, in cases where a civil suit is pending on a mortgage and where the Official Receiver applied to the Insolvency Court for a declaration that the mortgage is bad under s. 53 would be to have the proceedings in the suit stayed till the disposal of his application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under s. 53. But the application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. There is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under s. 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor.

Under s. 4 of the Provincial Insolvency Act, the Court is given wide powers to try all questions which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. Though the Insolvency Court has such wide powers, neither s. 4 nor any other section of the Insolvency Act takes away the jurisdiction of the ordinary Civil Court to try a suit instituted by a mortgagee against the insolvent. The scheme of the Act is to exempt the secured creditors from the operation of the Act unless they choose to come in under s. 47. This does not mean that a mortgage cannot be set aside as being void under s. 53. Similarly the jurisdiction given to an Insolvency Court under ss. 53 and 54 cannot take away the jurisdiction of the ordinary Civil Court to entertain a suit at the instance of a mortgagee, or proceed with such a suit already instituted by reason of the pendency of the insolvency proceedings.

In the result the appeal fails and is dismissed with costs.

Wallace, J.—The point in this case is whether, when a mortgage has been attacked by the Official Receiver in insolvency proceedings under s. 53 of the Provincial Insolvency Act as a voidable transfer, the Civil Court in which the mortgagee is suing his insolvent mortgagor presented by the Official Receiver to enforce that mortgage must or should stay proceedings therein and hold that suit as subject to the decision which will be given in the insolvency enquiry. Before us the appellant went so far as to contend that the Civil Court lost jurisdiction to continue the civil suit whenever the Official Receiver had initiated proceedings in the Insolvency Court, which would imply that the proper order is not so much a stay of trial as a dismissal of the suit since, if the Civil Court lost jurisdiction to go on with the trial, it equally lost jurisdiction to pronounce a judgment in the suit. On the other side it was contended that the scope of the two proceedings is so essentially different that the Civil Court does not lose jurisdiction and that there is no reasonable ground for staying its hand.

The theory that a Court may *pendente lite* be deprived of jurisdiction by some proceedings in some other Court, is somewhat startling and would require very strong reasons for support. The appellant appeals to s. 28, sub-s. (2) of the Provincial Insolvency Act, which says "On the making of an order of adjudication.....no

creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose." To begin with, this does not in terms prohibit a continuation of a suit already begun, and if the sub-section is to be applied to such a case, then such a continuation must come under the general head of remedy, against the property of the insolvent. This I doubt very much. It has been held that the leave here contemplated must be obtained before the suit is filed and cannot be granted after the suit is filed. [See *In re Dwarkadoss Tejbhandas* (3).] If so, then leave cannot be given to continue a suit already filed. But assuming without deciding that the general policy of the Act will support such an interpretation, the creditor who is estoppted by the sub-section is one whose debt is probable under the Act, and the sub-section is subject to sub s. (6) "Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." Do these two clauses prohibit or permit the secured creditor to continue or commence a suit on his security during the pendency of the insolvency proceedings? As I have said, the point should not be found against the *bona fide* litigant unless it was obviously the intention of the Statute to deprive him of his ordinary civil remedies.

It will be noted first that the prohibition announced is not absolute but discretionary with the Court. Therefore, the leave of the Court may be given to a mortgagee to commence or continue his mortgage suit *pari passu* with the proceedings under s. 53 of the Act, which clearly implies that there can be no inherent conflict of jurisdictions. It would be absurd to lay down that the Court may give leave to conduct a proceeding wholly without jurisdiction. The terms of sub-s. (6) are quite general and there is no reason to conclude that the section as a whole was intended to deprive a secured creditor from enforcing his security. The general policy of the Act does not deal with the secured creditor. He may or may not choose to come on the schedule of creditors. He has the option (see s. 47) of coming in or enforcing his security, and the Official Receiver is in the case of a *bona fide* mortgage bound by it, apart from the insolvency proceedings altogether, because none of the mortgagees's interest really vests in him, at all, and the Official Receiver is bound to discharge a *bona fide* mortgage debt even when the mortgagee has not come on the schedule. [See *Shridharnarayan* v. *Atmaram Govind* (4), *Shridharnarayan* v. *Krishnaji Vitoji* (5), *Sheoraj Singh* v. *Gauri Sahai* (6) and *Haro Pria Dabia* v. *Shams Charan Sen* (7).] In the last case it was held that a judgment-creditor holding a decree for sale on a mortgage is entitled to enforce that decree whether or not his debt is on the schedule. This is wholly opposed to the appellant's theory that s. 28 would bar a secured creditor from such a remedy. The case in *Gauri Dutt* v. *Shankar Lal* (8) is not in point as it was not a case of a secured creditor. It is hardly likely that the Legislature would intend to prohibit a judgment-creditor from enforcing a right which binds the insolvent and, therefore, the Official Receiver and all the other creditors.

If, therefore, s. 28 does not prohibit a *bona fide* mortgagee enforcing his mortgage right during the pendency of the insolvency proceedings, it is difficult to see why the mere fact that the Official Receiver is attacking the *bona fides* of the mortgage should bring s. 28 into operation. Section 28 itself draws no such distinction. If in terms it does not apply to a *bona fide* mortgagee, it does not apply to any mortgagee. I hold, therefore, that s. 28 (2) is subject to sub-s. (6) and that sub-s. (2) does not in any way affect the right of a secured creditor to proceed with his suit to enforce his security.

Section 4 of the Provincial Insolvency Act does not help the appellant It is a section chiefly to settle questions of title to property between the debtor and a

(3) 31 Ind. Cas. 948; 17 Bom. L. R. 925; 40 B. 235.

(4) 7 B. 455; 4 Ind. Dec. (N. S.) 306.

(5) 12 B. 272; 6 Ind. Dec. (N. S.) 667.

(6) 21 A. 227; A. W. N. (1899) 45; 9 Ind. Dec. (N. S.) 854.

(7) 16 C. 592; 8 Ind. Dec. (N. S.) 391.

(8) 14 A. 358; A. W. N. (1892) 36; 7 Ind. Dec. (N. S.) 597.

third party. Nor does s. 41 of the Indian Evidence Act assist in view of the limited nature of the enquiry under s. 53. The decision in *Mariappa Pillai* v. *Raman Chettiar* (1) also does not really help the appellant. I do not think that that decision laid down anything more than that the Civil Court has no jurisdiction to decide a matter which falls to be decided under s 53 of the Provincial Insolvency Act, that is, it cannot annul in favour of creditors a transfer of the nature set out in that section The case in *Official Receiver Tinnevely* v. *Sankaralingam Mudaliar* (2) was not a case of secured creditor, as specifically found at page 530.* It was decided on the footing that the vesting order of the Insolvency Court placed the property of the insolvent at once in the hands of the Official Receiver and prohibited any other Court than the Insolvency Court from dealing with it in any way. This has no application to the present case of a secured debt.

The matter will be made clear by considering the nature of the proceedings under s. 53 which has been ably put before us by Mr T. M. Krishnaswami Iyer to whom I am much indebted. Section 53 implies an attack by the Official Receiver on behalf of the general body of creditors, and the remedy which he is entitled to get on proving his case is that the transfer is viodable against him and may be annulled by the Court; that is, in the case of a mortgage the property mortgaged will be available as the property of the insolvent for the general body of creditors, who are entitled to be re-paid their debts out of it. It does not really affect the relationship of the transferor and transferee as mortgagor and mortgagee. For example, if the property is sold by the Official Receiver and the creditors and costs are fully paid out of the proceeds and there is a surplus remaining, that surplus belongs *prima facie* to the transferee and not to the transferor, and is his unless the transferor has by appropriate proceedings established his right to it. The proceedings under s. 53 will not establish that right. Clearly in these proceedings the Official Receiver cannot represent the debtor. Otherwise he would have to admit the transfer unless the debtor could challenge it extraneously on some ground as fraud or undue unfluences. The relationship between the mortgagor and mortgagee remains unaffected by any proceedings under s. 53, and the mortgagee is entitled, therefore, to enforce his mortgage against the mortgagor except so far as proceedings under s. 53 may have held the property mortgaged as assets of the mortgagor at the disposal of the general body of creditors.

There is nothing, therefore, in these proceedings to interfere with the ordinary suit of the mortgagee to enforce his mortgage. Such a suit only declares and enables him to enforce his right against his mortgagor and has nothing to do with that mortgagor's creditors who are not and could not be proper parties to such a suit. It is in fact not open to the Official Receiver, in the mortgage suit, as the representative of the judgment-debtor, to challenge the validity of the mortgage on any ground which the judgment-debtor himself could not have put forward. He is not brought on in such a suit as representative of the creditors at all. Obviously, for example, he could not challenge the passing of the consideration as that is not a point relevant to that suit, and the frame and scope of the suit cannot have been altered merely because the Official Receiver has been brought on as representative of the judgment-debtor. The Official Receiver does not carry into that representation his character as representative of the creditors. The decree in the mortgage suit, if in favour of the mortgagee, will still be enforceable except so far as the proceedings under s. 53 have debarred him from recovering the whole of the proceeds for himself, and if, for example, in the proceedings under s. 53 the Court finds the alienation good to any extent, and upholds it to that extent, or rather does not challenge the mortgage right to that extent, then the mortgagee will become a creditor of the insolvent estate on the foot of his mortgagee to that extent. If the mortgagee's suit is dismissed, then the property vests in the Official Receiver who is on record in his suit as representative of the mortgagor. Similarly, if the proceedings under s. 53 are dismissed, the mortgage suit is unaffected; if they are upheld, the mortgagee's rights against his mortgagor are subject to the result of the order against him under s. 53. The two Courts are in fact deciding different questions in relation to

*Page of 44 M.—[*Ed.*]

different parties and there is, therefore, no question of concurrent or conflicting jurisdiction on the same point.

There is no reason, therefore, why the mortgagee's suit should be stayed because proceedings under s. 53 are filed or pending. The result of such proceedings would affect only the execution of the decree in the mortgage suit, since the mortgagee cannot be permitted to sell the property for himself if there is an adverse order under s. 53. The real conflict in the two proceedings does not materialise until the question arises, who is to sell the property? Then the decision in the proceedings under s. 53 will bind the mortgage by force of s. 4 of the Provincial Insolvency Act and the sale will be by the Official Receiver and the proceeds must be primarily held at the disposal of the Official Receiver. The Official Receiver is already a party *ex hypothesi* to the mortgage suit, there will be no trouble about that. It would be the duty of the Court executing the mortgage-decree to give effect under s. 4 of the Provincial Insolvency Act to the decision in the insolvency enquiry. The principle that the interest of the particular creditor must give way to that of the general body of creditors is thus not in danger.

I agree, therefore, with my learned brother that there is no reason shown for stay of the civil suit and agree in the order proposed by him.

Appeal dismissed.

V. N. V.
Z. K.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 221 OF 1924.

March 25, 1925.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

NAGINDAS DAHYABHAI—PETITIONER

versus

GORDHANDAS DAHYABHAI—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 53—Voluntary transfer—Application to avoid transfer—Period of two years, computation of, from date of adjudication or date of petition.

A person is adjudged insolvent within the meaning of s. 53 of the Provincial Insolvency Act on the day on which the order of adjudication is made, though the effect of the order on the insolvent's property relates back under s. 28 (7) of the Act to an earlier date. Therefore, the point of time from which the two years mentioned in s. 53 are to be calculated, is the date when the transferor is adjudged insolvent and not the date of the presentation of the petition for insolvency. [p. 943, col. 2.]

Appeal against a decision of the District Judge, Surat, in Miscellaneous Appeal No. 1 of 1924, confirming that of the First Class Subordinate Judge at Surat, in Insolvency Application No. 16 of 1922.

Mr. *G. N. Thakor* (with him Mr. *M. B. Dave*), for the Petitioner.

Mr. *B. D. Mehta*, for Respondent No. 1.

JUDGMENT.—This is an application under s. 75 of the Provincial Insolvency Act V of 1920. One Thakor Girdhar had filed a petition to be adjudicated insolvent on July 17, 1922. The order of adjudication was made on November 11, 1922. An application was made to the Subordinate Judge on which notice was issued to Nagindas Dayabhai to show cause why the transfer dated November 2, 1920, by the insolvent in his favour should not be annulled under s. 53 of the Provincial Insolvency Act V of 1920. The following issues were raised:—

1. Whether the transfer to the opponent dated November 2, 1920, is or is not in good faith and for valuable consideration?

2. Whether the application is barred by limitation?

3. Whether the present applicant can apply under s. 53 of the Insolvency Act?

The Judge found that the transfer was not in good faith or for valuable consideration; that the application was not barred by limitation; and that the present applicant could apply under s. 53 of the Act.

That section runs as follows:—

"Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the Receiver and may be annulled by the Court."

The transfer was made more than two years before the date of the adjudication order, but the Judge considered that the adjucation order related back to the date of the presentation of the petition under s. 28 (7) of Act V of 1920, and, therefore, held that the period of two years men-

tioned in s. 53 should be the two years before the presentation of the insolvency petition. An order was made accordingly that the transfer dated November 2, 1920, was annulled and the Receiver should take possession of the house in dispute.

An appeal was filed to the District Court. The District Judge said:—

"There is a conflict of authority on the question whether in order to attract the applicability of the section the transfer must have been made within two years preceding the date of the adjudication or whether it is sufficient if it was made within two years preceding the date of the presentation of the insolvency petition. The weight of authority and the better opinion, however, appear to be in favour of the view that the effect of s. 28 (7) of the Act on the interpretation of the words 'if the transferor is adjudged insolvent within two years after the date of the transfer' in s. 53 is to put back that point of time to the date of the presentation of the insolvency petition."

The question was decided in that way in *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (1). Their Lordships said (page 991)*:—

"It is contended on behalf of the appellant that the transfer in the present case having been made more than two years before the date of the adjudication order, is not void against the Receiver.

Section 16 (6) of the Provincial Insolvency Act [the proceedings were under Act III of 1907], however, lays down that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made.

It is contended that s. 16 (6) of the Act does not affect any transfer made two years before the order of adjudication, but that the relation back has reference to other matters.

We are of opinion, however, that an order of adjudication relates back to, and takes effect from, the date of the presentation of the petition for the purpose of making the properties of the insolvent liable to the claims of the creditors. Under the English Law, an order of adjudication relates back to, and takes effect from, the date of an act of insolvency but under the Indian Law [s. 16 (6) of the Provincial Insolvency Act], an order of adjudication operates only from the day when the petition of insolvency is presented to the Court. It follows that from that time the property of the debtor is made available for payment of the debts. If the contention of the appellant were accepted, the provisions of the Act might be defeated in some cases. After the petition for insolvency is made, the order of adjudication may be delayed in some cases for more than two years, for instance where the matter goes up to the Privy Council on appeal, and in such a case any transfer made by the insolvent within two years before the date of presentation of the petition of insolvency, but more than two years before the order of adjudication would become valid. We do not think that such a result was contemplated, and we are of opinion that the provisions of s. 36 are to be read with s. 16 (6) of the Act."

Section 28 (7) of Act V of 1920 corresponds to s. 16 (6) of Act III of 1907. It would not be quite correct to say that under the English Law the order of adjudication relates back to the date of the presentation of the petition on which it was made. That is not the scheme of the English Act on which the doctrine of "relation back" in the Provincial Insolvency Act is based.

Under s. 37 of the English Bankruptcy Act of 1914, "the bankruptcy of a debtor, whether it takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him." So that although the adjudication order can only be dated as of the day on which it is made, the commencement of the bankruptcy is determined by the date of the act of bankruptcy. Under s 42 of the English Act:—

"Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy."

The words "becomes bankrupt" also appeared in s. 47 of the English Bankruptcy Act of 1883, and in *Ex parte Clough; In re*

(1) 52 Ind. Cas. 747; 46 C. 991; 24 C. W. N. 172.

*Page of 46 C.—[Ed.

Reis (2) were construed as meaning "commits an available act of bankruptcy." The bankrupt committed an act of bankruptcy on May 26, 1903, and was adjudicated in July. On June 10, he transferred a house and furniture to his settlement trustees. It was held that he must be deemed to have become bankrupt on May 26, and that the house and furniture not having been actually transferred before that date the deed was void against the trustee in bankruptcy, so far as necessary to pay his debts in bankruptcy, under s. 47 of the Bankruptcy Act of 1883, which enacted that any covenant made in consideration of marriage for the future settlement of a property on or for the settlor's wife and children wherein he had not at the date of the marriage any estate or interest shall on his "becoming bankrupt" before the property has been actually transferred be void against the trustee in bankruptcy. Wright J., said, (page 455)*:—

"What is the meaning of 'becoming bankrupt'? There is, apparently, no authority to guide me. Strong reasons are urged for the view that the words 'commencement of the bankruptcy' would have been used if that had been intended. On the other hand, it is said that, if the date of adjudication had been intended, the use of the words 'adjudicated bankrupt' would have been more natural than 'becoming bankrupt.' It seems to me that I must construe 'becoming bankrupt' in s. 47 by the light of s. 43. which says...'the bankruptcy of a debtor shall be deemed to commence at the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition.' Now if that is so, the bankruptcy here must be deemed to have commenced as from May 26, and I think that the bankrupt must be deemed to have become bankrupt on that date."

I doubt very much whether the decision would have been the same if the words 'is adjudicated bankrupt' had been used in the section instead of 'becomes bankrupt.'

So also under s. 51 of the Presidency Towns Insolvency Act:—

"The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at—(*a*) the time of the commission of the act of insolvency on which an order of adjudication is made against him."

Then under s. 55 of the same Act:—

'Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the official assignee."

That section is practically in the same words as s. 36 of Act III of 1907.

Section 36 of the same Act deals with fraudulent preferences, and under that section:—

"Every transfer of property, etc., in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee."

In the same way by s. 54 of the Provincial Insolvency Act V of 1920:—

"Every transfer of property, etc., in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Receiver, and shall be annulled by the Court."

It cannot be denied that a person is adjudged insolvent on the day on which the order is made, though the effect of the order on the insolvent's property relates back to an earlier date.

Therefore, in our opinion, if it had been intended that a voluntary transfer should be voidable if made within two years from the date of the presentation of the petition on which the adjudication order is made, there was no reason why that should not have been as clearly stated in s. 53 as it is in s. 54, and we do not think that the doctrine of "relation back" can be imported into the former section, so as to make it appear that the point of time from which the two years are to be calculated, is the date of the presentation of the petition, and not the date when the transferor is adjudged insolvent. The mere probability that in some cases a voluntary transfer can-

(2) (1904) 1 K. B. 451.

*Page of (1904) 1 K. B.—[*Ed.*]

not be defeated on account of the delay in making the adjudication order after the presentation of the petition, cannot provide sufficient ground for interpreting the words in s. 53 otherwise than according to their clear meaning.

We think, therefore, that the decision of the Court below was wrong, and that the Rule must be made absolute with costs throughout.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 19 OF 1924.

April 23, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

NIADAR—CREDITOR—APPELLANT

versus

RAMJI LAL—APPLICANT AND BALDEO—INSOLVENT—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 75 (2)—Attachment of crops at instance of creditor—Order releasing crops—Appeal—Creditor, whether person aggrieved by order.

Certain crops were attached by a Receiver in insolvency at the instance of a creditor of the estate of the insolvent. The crops were claimed by the respondent and the District Judge decided on evidence that they were sown by the respondent and belonged to him and he directed that the crops should be released. On appeal by the creditor:

Held, that the creditor was a person aggrieved by the decision of the District Judge within the meaning of s. 75 of the Provincial Insolvency Act and was entitled to maintain the appeal.

First appeal from an order of the District Judge, Meerut, dated the 27th October 1923.

Mr. *Panna Lal*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGEMNT.—This appeal arises out of an insolvency proceeding. The crops in suit were attached by the Receiver in insolvency at the instance of the appellant Niadar who is a creditor of the estate. The insolvent Baldeo is the brother of *Musammat* Kesar the recorded proprietor of the property, but it appears that they are not at present on good terms as there has been a criminal case between them. The crops are claimed by the respondent Ramji Lal and the District Judge has decided on the evidence that they were sown by him and belonged to him.

A preliminary objection is taken that no appeal lies on the ground that a creditor is not a person aggrieved and, therefore, has no right of appeal. The respondent relies on the decision of this Court in *Jhabba Lal* v. *Shib Charan* (1). This was a decision under the Act of 1907. Under that Act there was a difference of opinion between this Court and the Madras High Court. This Court held that the Receiver was the only person who could appeal in such cases whereas the Madras High Court in *Thiruvenkatchariar* v. *Thangayi Ammal* (2) held that an individual creditor was a person aggrieved and was entitled to appeal. This conflict of opinion has been set at rest by an alteration in the language of the present Insolvency Act. Section 46 of Act III of 1907 gave a right of appeal to "any person aggrieved by an order made in the exercise of insolvency jurisdiction". In s. 75 of Act V of 1920 these words have been changed to "the debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction". In sub-s. (2) under which the present appeal is preferred, these words are summed up as "any such person aggrieved by any such decision". In our opinion the alteration in the language of the present Act indicates an acceptance of the Madras view that a creditor is a person aggrieved by the decision in a case of this kind. The decision clearly is adverse to his interest for it reduces the amount of property out of which he is entitled to claim a dividend.

On the facts however we see no reason to differ from the view of the Court below. It is common ground that this land was cultivated by a tenant named Mare who was given a lease by *Musammat* Kesar The evidence which the learned Judge has accepted goes to show that when Mare gave up the land it was let to the respondent Ramji Lal who sowed the crops in it. It is true that the *patwari* supports the case of the appellant but the learned Judge has given reasons for not accepting his evidence in preference to that tendered on the other side. We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 37 Ind. Cas. 76; 39 A. 152; 15 A. L. J. 1.

(2) 29 Ind. Cas. 294; 39 M. 479; 17 M. L. T. 432; 29 M. L. J. 755.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 217 OF 1923.
February 6, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice and Mr. Justice LeRossignol.

KAURA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Redemption of Mortgages Act (II of 1913), s. 12—Limitation Act (IX of 1908), Sch. I, Art. 14—Application to redeem mortgage—Collector, order of, whether conclusive—Suit to redeem mortgage brought more than one year after Collector's order, whether maintainable.

A litigant merely by attaching a label to his suit cannot bring it under a different Article of the Limitation Act from that under which it would come on a true interpretation of the nature of the suit. What has to be regarded is the true effect of the suit, not its formal or verbal description. [p. 946, col. 1.]

An individual who takes advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits. [p. 946, col. 2.]

A mortgagor who does not take advantage of the summary procedure provided for redemption of mortgages by the Punjab Redemption of Mortgages Act may bring a suit within the ordinary period of limitation; but if he does take advantage of the summary procedure provided by the Act he must, if unsuccessful, bring a suit to establish his rights within the comparatively short period of one year from the date of the order under Art. 14, Sch. I to the Limitation Act. [*ibid.*]

The suit referred to in s. 12 of the Punjab Redemption of Mortgages Act is a suit to satisfy an order of the Collector. The cause of action for such a suit is not the original contract between the parties but the order of the Collector which aggrieves the party suing. That order unless it be set aside is conclusive and if a suit is not brought within the period of limitation provided by Art. 14 of Sch. I to the Limitation Act to set aside the order, a suit to redeem the mortgage is out of time. [p. 946, cols. 1 & 2]

Letters Patent Appeal against the judgment of Mr. Justice Moti Sagar, in Second Civil Appeal No. 2822 of 1922, dated the 16th June 1923 and reported in 75 Ind. Cas. 885.

Mr. *Har Gopal*, for the Appellants.

Mr. *Mukund Lal*, for the Respondents.

JUDGMENT.—This Letters Patent Appeal arises out of a suit to redeem two mortgages, one granted in 1827, the other in 1903. The suit has been decreed in respect of the mortgage of 1903 and with it we have no concern. With regard to the mortgage of 1827 the suit has been dismissed, by the learned Judge in Chambers, on the ground that it is barred by time, and it is from that portion of his judgment only that this Letters Patent Appeal has been preferred.

Now, the facts found are that in 1913 the predecessor-in-title of the present appellant made an application to the Collector under the Redemption of Mortgages Act (Punjab Act, No. II of 1913) for redemption of this mortgage, but the application was dismissed on the ground that the mortgage had ceased to exist and redemption was barred. Inasmuch as no suit to set aside that order of the Collector was brought within one year of its date the learned Judge holds that the present suit to redeem is barred under Art. 14 of the Indian Limitation Act although, contrary to the Collector, he finds that the mortgage of 1827 was replaced by a fresh mortgage in 1878, *i. e.*, less than 60 years before suit. Consequently the question which we have to decide is whether, a mortgagor's right to redeem, which would otherwise be within limitation, is barred if the action is brought later than a year of the date of an order passed to the plaintiff's detriment by the Collector on an application under the Punjab Act No. II of 1913.

Now, Act II of 1913 is a special Act providing a summary procedure for the redemption of certain mortgages of land in the Punjab. It is a miniature Code in itself. It provides for enquiry by the Collector who is empowered to transfer possession from the mortgagee to the mortgagor. provision is also made for the setting aside of *ex parte* orders and orders of dismissal. Finally, s. 12 provides expressly that the Collector's order shall be conclusive subject to the result of a suit which any party aggrieved by an order made under the Act may institute to establish his rights in respect of the mortgage. Many authorities have been cited to us at the Bar to establish the proposition that, when an order passed under a special Act is declared by that Act to be conclusive, it cannot be ignored and no relief is open to the aggrieved party unless that order be set aside. On that point we require no authority, for the Act itself is quite clear on the subject. In our view the crux of the case lies in the words "a suit to establish his rights in respect of the mortgage" and whether such a suit is one which falls within Art. 14 of the Indian Limitation Act which runs as follows:—

"To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for,"

It has been argued that a suit does not fall under any given Article of the Limitation Act unless it corresponds to the exact verbal description of the cause as given in the Article, and in this case the argument on behalf of the appellant before us has been that the suit referred to in s. 12 of Act II of 1913 is "a suit to establish his rights in respect of the mortgage", whereas Art. 14 of the Limitation Act refers to "a suit to set aside any order of an officer of Government." It is noteworthly that the expression "a suit to establish his rights" as used in the C. P. C. does describe the relief open to any person who considers himself aggrieved by orders passed in execution proceedings, of O. XXI, rr. 63 and 103, and the limitation for such suits is provided in Arts. 11 and 11-A of the Limitation Act. A suit under Art. 11 would normally be a suit for a declaration, and a suit under Art. 11-A would normally be a suit for possession. Similarly the relief claimed in a suit under Art. 14, apparently would vary according to the terms of the Collector's order impeached. For these reasons it would appear to us that the phrase used in s. 12 of the Act "a suit to establish his rights in respect of the mortgage" was borrowed from the Code and does not bear the narrow meaning attributed to it by the appellant.

Now, a litigant merely by attaching a label to his suit cannot bring it under a different Article of the Limitation Act from that under which it would come on a true interpretation of the nature of the suit. In *Phul Kumari* v. *Ghanshyam Misra* (1), it was pointed out that what has to be regarded is the true effect of the suit, not its formal or verbal description. In that case it was held that the suit was one brought by a party against an order under s. 282 of the Code to establish the right which he claimed and such a suit was held by their Lordships to fall within that Article of the Court Fees Act which ran as follows:

"To alter or set aside a summary decision or order of a Civil Court."

Applying these principles to the case before us we find that the suit referred to in s. 12 of the Act is a suit to set aside an order of the Collecter. From the very wording of that section it is clear that the cause of action for such a suit is not the original contract but the order of the Collector which aggrieves the party suing. It is a suit to establish the erroneous nature of the order.

On general considerations also we cannot believe that it was the intention of the Legislature that a dispute which had been focussed and decided by the proceedings before the Collector should remain in suspense for a period which might extend to another 60 years. It has also been objected that this interpretation operates to reduce the normal period of limitation; but when a dispute has been established we do not think that that in itself is an unfortunate circumstance. However, that may be, an individual who takes advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits. To refer again to the summary procedure provided by the Code in O. XXI, we find there the same results. A person who does not take advantage of the summary procedure may bring a suit within the ordinary period of limitation; but if he does take advantage of the summary procedure he must, if unsuccessful, bring his suit to establish his rights within the comparatively short period of one year from the date of the order.

Another objection raised is that there may be cases of hardship where the mortgagor applies to the Collector to redeem on payment of a certain sum and finds himself confronted with the decision by the Collector that the sum due is a much larger sum far beyond the mortgagor's ability to pay. We are not impressed by this objection, for if the mortgagor instead of applying to the Collector for a decision had had recourse to a suit he would have been forced to find the sum decreed on pain of losing his property altogether.

Our conclusion then is that, the real nature of the suit contemplated by the Legislature in s. 12 of Act II of 1913 is a suit to set aside the Collector's order. That order unless it be set aside is conclusive and as in the case before us that order was not set aside within the period of limitation provided, the present suit to redeem the mortgage is out of time.

For the foregoing reasons we dismiss this appeal with costs.

Z. K. *Appeal dismissed*

(1) 35 C. 202; 35 I. A. 22; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 8 OF 1924.

March 17, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Thakur CHHOTEY SINGH—PLAINTIFF—APPELLANT

versus

Thakur BALDEO BUX SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 66—Mortgage, simple—Lease by mortgagor, whether binding on mortgagee—Possession taken by mortgagee under covenant contained in mortgage—Lessee, whether entitled to compensation from mortgagor.

Where a simple mortgage contains a term that the mortgagee would be entitled to take possession of the mortgaged property on default in the payment of interest, a lease granted by the mortgagor before any default takes place is binding on the mortgagee who subsequently takes possession of the property under the terms of the mortgage on default of payment of interest. If, however, the lessee voluntarily gives up possession of the mortgaged property to the mortgagee, he is not entitled to claim compensation from the mortgagor on the ground of failure of consideration. [p. 948, col. 2; p. 949, col 1.]

Appeal against a decree of the Additional Subordinate Judge, Sitapur, dated the 22nd October 1923.

Messrs. *Niamatullah* and *E. R. Kidwai*, for the Appellant.

Mr. *A. P Sen*, for the Respondent.

JUDGMENT.—The plaintiff Chhotey Singh was a lessee from a lady *Musammat* Sheoraj Kuar under the following circumstances. She had mortgaged the property in suit to Raja Seth Raghubar Dayal on 21st June 1907. The mortgage was to last for 10 years and the mortgagee was given a right to take possession as a mortgagee in default of payment of principal and interest at the end of 10 years, or in default of payment of 4 successive instalments of interest. Interest was payable every 6 months, so the mortgagee was granted a right to take mortgagee possession in default of payment of interest for a continuous term of 2 years.

Relevant documents have not been printed; both parties have been negligent. We had, therefore, to refer to documents on the record which were not printed. It appears from the plaint of the suit for possession brought by the Raja's son that the first default of payment of interest was made on 14th December, 1913.

On 20th June, 1911 the lady gave a lease of the property in suit to the plaintiff for a term of 7 years reserving a rent of Rs. 1,400 per annum. The rent was found to be too onerous, so on 1st December, 1913 a new lease was granted for a fresh period of 7 years reserving a rent of Rs. 1,000.

On 14th February, 1916 the mortgagee sued for possession in accordance with the terms of his mortgage (plaint Ex. 15). His cause of action was that no interest had been paid from 14th December 1913 to 21st December, 1915 that is for 1322 and 1323 *F*. The plaintiff lessee as well as other lessees of other properties included in the mortgage were made parties to the suit.

This suit was compromised as between the mortgagee's son Seth Swami Dayal, the mortgagor's heir Baldeo Bakhsh Singh and two lessees Tirbeni Bux Singh and Ram Bhukhan. The plaintiff of the present suit Chhotey Singh was not a party to the compromise. The leases of defendants Nos. 3 and 6 were to continue but it was agreed that the rent would be payable to the mortgagee.

Chhotey Singh, who was defendant No. 5 to the suit for possession of the mortgagee, had paid to the mortgagor an advance of Rs. 600. As regards this sum the mortgagee and mortgagor came to terms under the compromise. Paragraph 5 relating to that matter is as follows:—

"The defendant No. 5 (that is Chhotey Singh) has paid the defendant No. 1 (that is mortgagor) Rs. 600 as *theka* money in advance for the village of Sultanpur which he will be entitled to set off against rent of 1327 *F*., the last year of the term of the *theka*, and that will be credited to Chhotey Singh by the plaintiff (that is the mortgagee), if the *theka* continues.

But as Chhotey Singh still owes the *theka* money due to the defendant No. 1 for 1322 and 1323 *F*., so if the defendant No. 1, having credited the advance money in favour of defendant No. 5 towards his own *theka* dues does not make the sum over to the plaintiff, then the plaintiff shall be entitled to recover this sum of Rs. 600 from the defendant No 1 in the month of *Jeth* 1327 *F*. with interest at 1 per cent. per month through Court." This clause in the compromise would indicate that the mortgagee was ready to continue the lease granted by the mortgagor to Chhotey Singh. This compromise was filed on 29th July, 1916 and it appears that a decree was passed by the Court on 5th August, 1916 in terms of the com-

promise with respect to those who were parties to the compromise and *ex parte* against Chhotey Singh for possession.

This *ex parte* decree was set aside on the application of Chhotey Singh on 9th January, 1917 (Ex. 12) so far as Chhotey Singh was concerned.

On 24th January, 1917 Chhotey Singh confessed judgment (Ex. A-3, page 7 of the printed record). His application objected only to costs under s. 35, C. P. C. It was in the following terms:—

"In the above noted suit the defendant No. 5 (that is Chhotey Singh) has the status of the *thekadar* of the village of Sultanpur and if the plaintiff agrees, the *theka* should be maintained, otherwise the defendant No. 5 has no objection against the plaintiff's claim being decreed. The plaintiff be awarded possession. The only objection is about costs. The real defendant is the mortgagor and this defendant is only a formal defendant. The defendant No. 5 is in the position of a tenant. The costs should be allowed against the original mortgagor and the plaintiff himself states in his plaint that he has no cause of action against defendant No. 5 because the date on which the cause of action accrued was the day appointed for the payment of interest. No cause of action as against this defendant has been entered in the plaint, so the defendant No. 5 should be exonerated from costs."

The Court treated this application as an admission of claim and delivered judgment on 24th January, 1917 (Ex. 16) decreeing the mortgagee's suit for possession against Chhotey Singh.

There is no evidence that the decree had to be executed, nor does Chhotey Singh allege in his plaint that he was ejected in execution of decree. Chhotey Singh voluntarily gave up possession at the end of 1323 *F*.

The present suit was instituted on 5th May, 1921. It was for the recovery of the alleged loss suffered by the plaintiff lessee by his losing possession at the end of 1323*F*. He sued for the recovery of profits which he would have made during the years 1324, 1325, 1326 and 1327 *F*.

The learned Subordinate Judge held that the plaintiff was entitled to recover profits. He, however, did not fix the amount of damages because he held that the cause of action accrued on 14th September 1916 and the suit was brought more than three years afterwards. He applied Art. 115 of the Limitation Act and not Art. 116 to the suit.

The suit having been dismissed the plaintiff appealed to this Court. His case was that Art. 116 applied and the suit was within time. It is not necessary for us to decide this question, of limitation because, in our opinion, no suit lies for the recovery of damages under the circumstances of the present case.

It is clear to us that the plaintiff voluntarily gave up the lease as it was to his interest to do so in September 1916. We have already noticed how he was unable to pay a rent of Rs. 1,400 which had to be reduced under a fresh agreement to Rs. 1,000 in 1913. Copies of *jamabandi* of the village of Sultanpur for the years 1321, 1322 and 1323 *F*. (Exs. A-5, A-6 and A-7, pp. 9, 10 and 11) indicate that the realization was less than the lease money in 1322 and 1323 *F*. and slightly in excess in 1321 *F*. The lease, therefore, was not a profitable business and the plaintiff was obviously desirous of getting rid of it.

The mortgage was a simple one and the clause enabling the mortgagee to take possession under certain circumstances did not deprive the mortgagor in possession of his rights to deal with the property in a proper and reasonable manner. The lady was prohibited from wasting the property under s. 66 of the Transfer of Property Act but there was no other restraint on her. As we have already noticed the interest was regularly paid up to the date of the lease, so on the date of the lease there was no apprehension of the mortgagee being entitled to take possession. The lease was only for a term of 7 years and as pointed out above it was profitable to the owner of the property. The lease was not to the prejudice of the mortgagee. It was held by a Bench of the Allahabad High Court in *Ram Lal* v. *Muhammad Irshad Ali* (1) that the granting of a lease by a mortgagor of a simple mortgage after the passing of decree for enforcement of that mortgage was not an act destructive of or permanently injurious to the security within the meaning of s. 66 of the Transfer of Property Act, because that section contemplated some substantial waste by the mortgagor. We were not referred to any section in the

(1) A. W. N. (1890) 39.

Transfer of Property Act which would prevent a mortgagor in possesssion from giving the lease such as a prudent manager would. Such a lease would be binding on a mortgagee who took possession under the terms of the mortgage on default of payment of interest.

On behalf of the plaintiff-appellant a Bench ruling of this Court: *Qurban Ali* v. *Seth Raghubar Dayal*(2) was quoted. With respect, we are of opinion that the proposition of law laid down therein are wider than would be justified by the provisions of the Transfer of Property Act. In the Allahabad case referred to in that judgment [*Wazir Ali* v. *Moti Chand* (3)] the lease was held to be prejudicial to the interest of the mortgagee and in such a case it would naturally not be binding on him. In the present case there is no evidence whatsoever that the mortgagee desired to take possession if Chhotey Singh was not willing to give it up. Chhotey Singh, himself stated in his application of 24th January 1917 that in the plaint of the mortgagee no cause of action as against him was stated. This was quite true because in the plaint no reason is given why the lease should not be held to be binding on the mortgagee. The lessee, of course, on mortgagee taking possession becomes the lessee of the mortgagee instead of one of the mortgagor but that fact did not imply that the lessee was bound to give up possession. In fact in the present case Chhotey Singh was never ejected by execution of a decree or by any other process of law. He himself abandoned possession to suit his own convenience as it was to his profit at the time to do so. Subsequently he discovered that the mortgagee had made some profit during the years 1324 to 1327 *F.* and was tempted to bring the present suit against the mortgagor for recovery of that sum.

In our opinion the lease was such as would be binding on the mortgagee and it was Chhotey Singh's own doing that he gave up possession under the lease. He cannot hold the lessor liable for damages.

For this reason we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(2) 16 Ind. Cas. 476; 15 O. C. 239.
(3) 2 A. L. J. 294.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 357 OF 1924.
April 3, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

D. S. APTE—DECREE-HOLDER—APPELLANT
versus
TIRMAL HANMANT SAVNUR—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48 (1) (b)—Execution of decree—"Subsequent order", whether must be by Court which passed decree—Order directing payment by instalments passed by Execution Court, whether extends limitation.

The words "any subsequent order" in s. 48 (1) (*b*) of the C. P. C. mean any order made by a competent Court and not necessarily by the Court which passed the decree. An order made by an Execution Court that the amount recoverable under a decree should be recovered by instalments falls within the purview of a subsequent order contemplated by s. 48 (1) (*b*) and operates to extend limitation. [p. 950, col. 1.]

Second appeal from a decision of the District Judge, Dharwar, in Appeal No. 20 of 1923, confirming the order passed by the Subordinate Judge, Hubli, in Darkhast No. 721 of 1921.

Mr. *S. B. Jathar*, for the Appellant.

Mr. *R. A. Jahagirdar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—In this case a decree was passed on May 28, 1903, in the Subordinate Judge's Court. The final decree was passed by the High Court on September 8, 1908. The plaintiff applied for execution on December 21, 1921. The opponent against whom this proceeding was instituted contended that the property sought to be attached and sold was not liable for the decretal debt on the ground that it was in his possession as the grandson of the surety of the principal debtor. This contention found favour with the Subordinate Judge, and accordingly the application was dismissed.

The judgment-creditor appealed, and although no question of limitation was raised in the grounds of appeal, the question of limitation was raised at the commencement of the argument before the District Judge. The respondent argued that as between the date of the decree and the date of the last application more than twelve years had elapsed under s. 48 of the C. P. C. there could be no further application. Now, on June 9, 1911, the Subordinate Judge made an order that the amount should be recovered by annual instalments

of Rs. 125 each, the first instalment to become due on February 1, 1912. In case of default to pay any, the whole to be recovered at once. Each instalment to carry interest at six per cent. per annum. The District Judge, following the decision in *Jurawan* v. *Mahabir Dube* (1) held that as that order was made by the Subordinate Judge sitting as a Court of Execution, it was not an order within the meaning of that word in s. 48 (1) (*b*) of the C. P. C. In that case it was held that the expression "subsequent order" in s. 48 (1) (*b*) of the C. P. C. means a subsequent order made by the Court which made the decree and acting as that Court, and not an order of a Court executing the decree, that an order made by a Court executing a decree allowing a judgment-debtor time to pay up the balance of the decretal money, would not be a subsequent order within the meaning of s. 48, and would not give a fresh period to the decree-holder to execute his decree, nor was an order merely giving time for payment an order staying execution or an injunction, so that the time so given could be excluded in computing limitation against the decree-holder.

With great respect, I cannot see myself why the words "any subsequent order" must be limited as if the words "by the Court which passed the decree" were there. The words "any subsequent order," to my mind, mean, any order made by a competent Court. As the District Judge points out, any other construction would lead to this absurdity that there might be an order by a competent Court directing that the decree should be paid by instalments, with the result that when twelve years had expired, some of the instalments might still remain to be paid, even if there had been no default on the part of the debtor. It would certainly be an extraordinary interpretation to put on those words which might result in a creditor being deprived of his right to execute for the subsequent instalments if they were not paid.

It is not suggested in this case that the order of June 9, 1911, was not made by a competent Court.

The present *darkhast* sets out the previous history of the decree. It recites the following order made in *Darkhast* No. 286 of 1908:—

"The defendant No. 3 is examined. Having regard to all the circumstances I order that the amount should be recovered by annual instalments of Rs. 125 each. First due on February 1, 1912. In case of default to pay any, the whole to be recovered at once. Each instalment to carry interest at six per cent per annum from this date of recovery to be recoverd along with the instalment June 9, 1911."

I fail to see on what possible ground we could hold that that was not a subsequent order within the meaning of s. 48 (1) (*b*): I think that the District Judge has some excuse for following the decision in *Jurawan Pasi* v. *Mahabir Dhar Dube* (1) as there was no decision of this Court on the same point. We allow the appeal, set aside the order of the District Judge dismissing the appeal before him, as that appeal was dismissed on a preliminary point which was raised neither in the Trial Court nor in the grounds of first appeal, and remand the appeal for further hearing before the District Judge. The appellant will be entitled to his costs in this Court

Coyajee, J.—I am of the same opinion.

Z. K. *Appeal allowed.*

(1) 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 7

LAHORE HIGH COURT.

CIVIL APPEAL No. 2239 OF 1923.

January 22, 1925.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Jai Lal.

RAM DAS-UTTAM CHAND—PLAINTIFFS—APPELLANTS

versus

DHANPAT-DIWAN CHAND—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Principal and agent—Suit for accounts—Place of suing.

In the absence of any express contract regulating the rights of the parties or trade usage, a suit against an agent by his principal for rendition of accounts for payment of money due thereon can only be instituted at the place where the agent resides or carries on business or where the contract of agency was made or where it was to be performed or where the refusal to account took place. [p. 953, col. 2.]

Plaintiff sent goods from Sargodha to the defendant at Karachi to be sold by the latter as commission agent. Defendant accepted the plaintiff's drafts, paid money at his request and having sold the goods credited the amount realised to plaintiff's account. Defendant also purchased goods at Karachi at plaintiff's request and sent them abroad under plaintiff's direc-

tions to various constituents. Goods were also despatched by defendant to Sargodha, the goods being consigned to defendant himself and the Railway Receipt being handed over to a Bank which transmitted it to its own branch at Sargodha for being handed over to the plaintiff by the latter on payment of the price of the goods. Defendant was put in funds in various ways, for instance, by actual remittance of money, *hundis* sent by the plaintiff drawn in favour of the plaintiff and by defendant drawing upon plaintiff and selling the *hundis* to a Bank at Karachi. Plaintiff instituted a suit for accounts against the defendant and for recovery of money due thereon at Sargodha:

Held, that the cause of action arose at Karachi and that the Sargodha Court had no jurisdiction to entertain the suit. [p. 954, col. 1.]

[Case-law discussed.]

Appeal from an order of the Senior Sub-Judge, Shahpur, dated the 2nd July 1923.

Bakhshi *Tek Chand* and Mr. *Nanak Chand*, for the Appellants.

Messrs. *Manohar Lal* and *Badri Das*, for the Respondents.

JUDGMENT.—The plaintiffs are grain dealers at Sargodha in the District of Shahpur. The defendants are commission agents who do their business at Karachi. The present suit was instituted at Sargodha. The defendants pleaded that the Sargodha Court had no jurisdiction and that the cause of action had arisen at Karachi. The learned Senior Subordinate Judge accepted the plea of the defendants and returned the plaint to be presented to the proper Court. Against the order returning the plaint the present appeal has been preferred.

A mass of documentary evidence consisting of letters and telegrams of the parties, copies of account books and some oral evidence bearing on the question of jurisdiction was produced by the parties. The following facts are either admitted or established by the evidence on the record.

(1) The dealings between the parties commenced in May 1920 when the plaintiffs sent goods to the defendants to be sold by them as commission agents at Karachi, the defendants charging their commission. They accepted the plaintiffs' drafts, paid money at their request and having sold the goods credited the amount realized to their account.

(2) Later on the defendants at the plaintiffs' request purchased goods at Karachi and sent them abroad according to the plaintiffs' directions to various constituents.

(3) The defendants purchased goods at Karachi and despatched them to Sargodha and in doing so they adopted the following procedure;—

They drew money from the Karachi Branch of the National Bank of India and handed over the Railway receipts to the Bank which transmitted them to the Sargodha Branch to be handed over to the plaintiffs on payment of the price of the goods received.

(4) Sometimes the plaintiffs sent money to Karachi and drew the same by means of *hundis* and *vice versa*.

(5) The defendants also used to draw *hundis* upon the plaintiffs. Shortly put the defendants were put in funds by various ways, such as; (*a*) actual remittance of money; (*b*) *hundis* sent by the plaintiffs drawn in favour of the defendants; (*c*) defendants drew upon plaintiffs and sold the *hundis* to the Branch at Karachi, etc., etc.

The plaintiffs instituted the suit on the following allegations:—That there were mutual dealings between the plaintiffs and the defendants and that the latter received from the plaintiffs by way of loan Rs. 3,82,698 9-6 out of which they paid Rs. 3,78,078, leaving a balance of Rs. 4,619-13-0 due to the plaintiffs. They further claimed a sum of Rs. 1,130 on account of the profits of the grain transactions. As summarised in the judgment of the lower Court the plaintiffs gave the following reasons for instituting the suit at Sargodha:—

(1) That the defendants resided in the District of Shahpur at Sargodha.

(2) That the goods were sent from Sargodha and some goods were despatched and delivered to them at Sargodha;

(3) That by special agreement the money was payable and was actually paid at Sargodha; and

(4) That the defendants had expressly agreed to render accounts at Sargodha.

The defendants, on the other hand, pleaded that their firm carried on business at Karachi; that the relationship between the plaintiffs and the defendants was that of principal and commission agent; that the fact that the defendants individually lived at different places in the District of Shahpur did not make the slightest difference and that the suit was cognizable by the Karachi Court and the Sargodha Court had no jurisdiction to try it. They denied that there was any agreement to render accounts at Sargodha or to pay any money there. They complained that by the statements contained in the plaint the plaintiffs had tried to change the nature of the suit which was

practically a suit for an account by a principal against an agent. All the contentions raised by the defendants were accepted, and as already observed, the plaint was returned.

The following contentions have been raised by Mr. Tek Chand in support of this appeal:—

That the relationship between the plaintiffs and the defendants was not that of principal and agent but that of lender and borrower and that even if it be admitted that the defendants had acted as the commission agents of the plaintiffs, at least part of the cause of action for the suit had taken place at Sargodha for the following reasons:—

(*i*) that advances by way of loan were made to the defendants by the plaintiffs from time to time; and

(*ii*) that goods were consigned by the defendants to Sargodha in their own name, the Railway receipts were sent to the Sargodha Branch of the National Bank with the direction that they were to be handed over to the plaintiffs after receipt of cash payment. As regards this last point the argument of Mr. Tek Chand is that, because the defendants were themselves the consignees, the delivery of the goods after payment of cash must be taken to have in fact and in law been made at Sargodha.

We may at once remark that there is no evidence on the record to show that there was any special agreement between the parties that the accounts would be rendered at Sargodha or that the money would be payable there, or that the goods would be delivered at that place. The whole thing, therefore, hinges upon the determination of the question whether it was a suit for an account by a principal against an agent. We have been taken through the entire evidence by the learned Counsel for the appellants and have arrived at the same conclusion at which the learned Judge of the Court below has arrived, namely, that the defendant's firm is the firm of commission agents and that they were employed by the plaintiffs as such. The payments made by the plaintiffs to the defendants either by way of advance or otherwise must be taken to have been made in relation to the purchasing, selling and despatching of grain by the defendants on behalf of the plaintiffs. The mere fact that in respect of the goods depatched to Sargodha the Railway receipts were sent in the manner described above could not bring about any change in the relation between the parties. This, according to the arrangement between them, was one of the methods of payment. It is admitted by Mr. Tek Chand that there is no direct evidence in support of the proposition that the delivery of the goods despatched to Sargodha was to take place at Sargodha; but he contends that from the circumstance that the Railway receipts of the goods were to be handed over to the plaintiffs only after payment to the Bank it can reasonably be inferred that the delivery of the goods to the plaintiffs was to take place at Sargodha. In the absence of any evidence on the point we find ourselves unable to draw this inference from the above circumstance. The position is fully covered by authorities to which we shall presently refer.

The general rule applicable to suits for accounts between principal and agent was laid down by Mr. Justice Chatterji in the case of *Muhammad Shafi* v. *Karamat Ali* (1).

The facts of the present case, however, are somewhat similar to the facts in the case of *Salig Ram* v. *Chaha Mal* (2), to which we shall refer in some detail. The plaintiffs in that case, who were grain dealers at Hathras, on the 30th December 1910, telegraphed to the defendant, who was a commission agent at Karachi, ordering two wagon loads of *juar* to be sent at once to Hathras. They sent Rs. 600 by telegram and another Rs. 600 by means of a *hundi*. The *juar* was despatched on 2nd of January 1911, and reached Hathras on the 12th of January. The Railway receipt was, on the plaintiff's instructions, sent value payable for the balance due to the defendant, but for some reason it was not delivered to the plaintiffs and, owing to instructions given by the defendant to the Railway Authorities, the grain was not delivered to the plaintiffs until the 8th of February 1911. Meanwhile the price of *juar* had fallen and the speculation resulted in a loss. The plaintiffs sued for compensation due on account of the alleged negligence of the defendant, and instituted the suit at Hathras. The learned Judges of the Division Bench held that the suit was not cognizable at Hathras, because the cause of action had arisen at Karachi. The passage dealing with this

(1) 76 P. R. 1896.
(2) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

particular point is to be found at page 52* of the report and is to this effect:—

"The sole question for decision is, whether the cause of action in whole or in part arose at Hathras, *vide* s. 20 (c) of the C. P. C. which applies to the facts of the present case. The case is clearly one for compensation under s. 212 of the Contract Act in respect of the direct consequences of the defendants' neglect and misconduct as alleged. The latter was the appellants' agent, and it was his duty to purchase the grain at Karachi, to place it on the Railway at Karachi, and despatch it to the plaintiff's address, and he was then directed to post the Railway receipt and send it by V. P. P. to the plaintiffs. * * * * *

"It is thus quite clear that the defendant's neglect or misconduct or both, took place, if at all, at Karachi. In the course of the transaction he had nothing to do outside Karachi. He had not contracted to deliver at Hathras, but merely to place the goods on the rails at Karachi and to post the Railway receipt there also. We fail to see that the cause of action, *i. e.*, the defendant's alleged neglect or misconduct which resulted in loss, occurred anywhere else but at Karachi."

As contended in this case the argument was also put forward before the learned Judges of the Allahabad High Court that the cause of action partly had arisen in Hathras to which the learned Judges replied. "The contract was made at Karachi, where the plaintiff's offer was accepted. The performance of the contract had to be completed at Karachi and the money due was payable at Karachi. The defendant contracted to act as the plaintiff's agent at Karachi for the purpose of purchasing and despatching the goods and to do certain acts there also. His negligence or misconduct, if any, occurred there."

This ruling has been consistently followed in various cases.

In the case of *Rowther* v. *Rowther* (3), under circumstances similar to those of the present case it was held that "the cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place." The facts of the case shortly stated were as follows:—

The defendant was employed by the plaintiff as his agent at Tiruvaloor in Tanjore District. The proposal to employ the defendant as agent was made by letter addressed to him at Tiruvaloor, and was accepted by defendant by letter through the post. It was held that the contract was clearly to be performed at Tiruvaloor, and that, therefore, the refusal to account occurred there. The learned Judge held that as the suit was based upon a contract of agency the cause of action took place at the place where the agent resided. In support of this proposition he relied upon the above quoted ruling.

This case was again followed by a Division Bench of the Allahabad High Court in the case of *Tika Ram* v. *Daulat Ram* (4), and it was held by the learned Judges that "in the absence of any express contract regulating the rights of the parties or trade usage, a suit against an agent by his principal for rendition of accounts and for payment of money due thereon can only be instituted at the place where the agent resides or carries on business."

In the case of *firm of A. M. Mylappa Chettiar* v. *Agha Mirza Mohamed Shirazee* (5), the facts are summed up in the headnote thus:—

"That the plaintiff, a trader at Negapatam, offered to buy timber from the defendant at Mandalay who accepted the offer. Under the terms of the contract defendant shipped the timber from time to time at Mandalad took the bills of lading in his own name and drew from a Bank at Mandalay such sums of money as were due to him (defendant) in respect of the timber shipped, by handing over the bills of lading to the Bank who in their turn passed it on to the plaintiff through another Bank with whom plaintiff had dealings. The defendant made default in sending the timber as agreed and the plaintiff instituted the suit for damages." The suit was instituted in the Negapatam Court and objection was taken to its jurisdiction. The learned Judges held that no part of the cause of action for the suit arose at Negapatam and that the Negapatam Court had no jurisdiction to try the case. The facts of that case, were peculiarly similar to the facts of the present case. It was contended in that case as it is contended in the present case, that

(3) 55 Ind. Cas. 266; 12 Bur. L. T. 198.

*Page of 34 A.—[*Ed.*]

(4) 80 Ind. Cas. 661; 46 A. 465: 22 A. L. J. 591; (1924) A. I. R. (A.) 530; L. R. 6 A. 9 Civ.

(5) 54 Ind. Cas. 550; 37 M. L. J. 712; 26 M. L. T. 504.

at least a part of the cause of action had arisen in Negapatam because the delivery of the goods was to be made there. The learned Judges held that the Bank in Madras and that at Mandalay were the agents of the plaintiff and that in fact and in law the delivery of the goods was made at Mandalay and the payment was also made there. In a similar manner in the present case the defendants delivered the Railway receipt to the Bank at Karachi to be sent to the Bank at Sargodha who in their turn passed it on to the plaintiff. It is true that the Madras case was a case between principal and principal, but the rule laid down in that case will apply with a greater force to a suit between a principal and his agent.

Mr. Tek Chand for the appellant relied upon a large number of cases in support of his contention. All those were cases of isolated contracts between two contracting parties and are distinguishable from the case of a principal against his commission agent. In fact in one of the cases relied upon by Mr. Tek Chand himself this distinction is clearly pointed out. That is the case of *Ram Lal* v *Bhola Nath* (6), in which a principal had sued another principal and the learned Judges of a Division Bench of the Allahabad High Court distinguished the case of *Salig Ram* v. *Chaha Mal* (2), upon the following ground:—"In the first place, it was not a suit between two principals for damages for breach of a contract but was one for compensation under s. 212 of the Indian Contract Act in respect of the direct consequences of the defendants' negligence and misconduct as alleged. The defendant there was the agent of the plaintiff and it was his duty to purchase grain at Karachi, to place the goods on the rails at Karachi and to post the Railway receipt to the plaintiff's address."

It is unnecessary to refer to and discuss the other cases cited by Mr. Tek Chand because they are all distinguishable from the case against an agent for account. In our opinion the view taken by the Court below was right. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(6) 59 Ind. Cas. 359; 18 A. L. J. 749; 2 U. P. L. R. (A.) 254; 42 A. 619.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 97 OF 1924.

June 8, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Mukerji.

MOHAMMAD SHAFIQ ULLAH KHAN —PLAINTIFF—APPELLANT

versus

NUHULLAH KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Marriage—Acknowledgment of legitimacy—Presumption of marriage, when available.

Under the Muhammadan Law it is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of a son is allowed to take the place of direct proof. Where direct proof is available to establish that a marriage between the parents was impossible or would have been invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. [p. 958, col. 2.]

Habibur Rahman v. *Altaf Ali*, 60 Ind. Cas. 837; 19 A. L. J. 414; 40 M. L. J. 510; 33 C. L. J. 479; 23 Bom. L. R. 636; (1921) M. W. N. 366; 29 M. L. T. 354; 14 L. W. 175; 26 C. W. N. 81; 48 C. 856; (1922) A. I. R. (P. C.) 159; 48 I. A. 114 (P. C.) and *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*, 10 A. 289; 6 Ind. Dec. (N. S.) 193, followed.

Letters Patent Appeal against a judgment of Mr. Justice Sulaiman differing from that of Mr. Justice Kanhaiya Lal, dated the 16th April 1924.

Messrs. *P. L. Banerji* and *U. S. Jang*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal comes before this Bench on account of a difference of opinion between two learned Judges of this Court who heard the appeal in the first instance from the Court of a Subordinate Judge. The two learned Judges having differed, this appeal was filed under s. 10 of the Letters Patent.

The only point for determination in this appeal is whether the defendants respondents are the legitimate sons of one Enayat Ullah Khan. In the Court of Subordinate Judge there were a few other points of difference between the parties, but those points do not any longer arise

Enayat Ullah Khan died on 30th April 1916, and left him surviving several brothers, a son, the plaintiff-appellant, and the defendants who claim to be the step-brothers of the plaintiff. The plaintiff's case, as made in the plaint, was that the defendants were the children of one *Musammat* Durga Dhobin, the wife of one Cheta and it was doubtful whether their father was Enayat Ullah. As the case proceeded, the position taken up by the plaintiff was that

possibly Enayat Ullah Khan was the father of the first two of the defendants, but he was surely not the father of the 3rd defendant, Halimullah Khan. His witnesses stated in Court that *Musammat* Durga took up her residence permanently with Enayat Ullah Khan some 30 years prior to their deposition. In the arguments, however, before us, it has been practically conceded that Enayat Ullah Khan was the father of not only all the three defendants, but also of their two elder brothers Asad Ullah Khan and Ruh Ullah Khan who are dead, and who died before Enayat Ullah Khan. The plaintiff had a full brother Rafiq Ullah Khan, who also predeceased his father Enayat Ullah.

The plaintiff, claiming to be the sole heir of his father, declared in the plaint that the defendants who were holding three-fourths of Enayat Ullah Khan's property were not entitled to the same, being illegitimate children of that gentleman. The defence as explained by the application dated 22nd December 1922 (printed at page 6 of the record) was that the defendants were the children of one Mahmuda Begam, a lady of Sherwani Pathan clan, to which Enayat Ullah admittedly belonged, and that Mahmuda Begam was the lawfully wedded wife of Enayat Ullah. The defendants' case as developed in the course of the evidence was that their grandfather (mother's father) was a Sherwani Pathan, that he came from the village of Shahjahanpur which was not far from the village of Enayati to which Enayat Ullah belonged and settled in the latter village. The defendants were unable to state if any relations of their alleged maternal grand-father, Mansur Khan, were alive.

The Court of first instance came to the conclusion that there was not enough evidence to satisfy it that the defendants' mother was a Hindu by religion at the time she entered Enayat Ullah's house, and that even if such was the case, namely, the defendants' mother was in the beginning a Hindu and the wife of a Hindu, that fact did not help the plaintiff's case. It further expressed the opinion that a series of acknowledgments made by Enayat Ullah raised a strong presumption of legitimacy in favour of the defendants. The learned Judge was also not satisfied as to the truth of the defendants' story that their mother was a girl of the Sherwani clan. In the result the suit was dismissed.

On appeal two learned Judges of this Court differed. One of the Judges held that it was not established that the defendants' mother was the wife of Cheta (the alleged husband of Durga) so as to exclude all possibilities of a legal marriage, but it was established from both oral and documentary evidence that she was the wedded wife of Enayat Ullah Khan. Accordingly the learned Judge was of opinion that the appeal should be dismissed. On the other hand, the learned colleague of the Judge held that it had been definitely established that the defendants' mother was the undivorced wife of one Cheta Dhobi, and that in the circumstances no presumption of a lawful marriage between Enayat Ullah and *Musammat* Durga could be raised. He was therefore of opinion that the appeal should be allowed and the plaintiff's suit should be decreed.

We have heard the learned arguments addressed to us at length, and have come definitely to the opinion that we must accept almost in its entirety the opinion of the learned Judge who was in favour of decreeing the plaintiff's appeal. In view of the fact that there is on the record a well-reasoned judgment in favour of the plaintiff, we do not think it necessary to discuss the evidence in detail, but we would give some indication of the reasons which led us to think that the plaintiff's appeal should succeed.

Before discussing the oral evidence, we should point out that the Court of first instance did not hear in person three of the plaintiffs' witnesses, who were, being *purdanashin* ladies, examined on commission. Then the learned Judge does not say that the witnesses did not impress him well. He rejected their evidence on the mere ground that the plaintiff's witnesses were not independent—a remark which is not at all accurate, in the majority of cases.

As already observed, the parties to the suit are children of Enayat Ullah Khan, and, therefore, the relations of Enayat Ullah Khan would be equally relations of the parties, and would have no reason whatsoever to have any particular bias for the plaintiff in preference to the defendants. This is a very important point to bear in mind. We find that no less than five close relations of Enayat Ullah have come forward to swear that the defendants were the children of *Musammat* Durga, who was the wife of one Cheta. It is true that they have

all more or less admitted that *Musammat* Durga, later on, adopted the Muslim faith in so far as that fact was evidenced by her saying the prayers, but this is hardly of any importance. The question is whether there was or could be any lawful marriage between Enayat Ullah Khan and the mother of the defendants at the time the latter were begotten. Briefly the witnesses are these. Hidayet Ullah is a full brother of Enayat Ullah himself. He swears that no Mansur Khan, the alleged father of the alleged mother of the defendants, ever settled in the village of Enayati, and that *Musammat* Durga who was the wife of Cheta Dhobi was the mother of the defendants, and that before she became the mother of the defendants, she bore Baldewa, (a witness in the case) to Cheta Dhobi. There is absolutely not a word in cross-examination to suggest any reason why Hidayet Ullah Khan should have any reason to love or bear affection to the plaintiff in preference to the defendants. Indeed this gentleman's evidence goes to indicate that he is thoroughly truthful witness and was not prepared to deny truth of such facts as might be taken in favour of the defendants. He said that the defendants' mother did not leave the *zanana* house, (as she used to do before) when she went to live with Enayat Ullah Khan. He added that she became a Muhammadan. He further said that it was this *Musammat* Durga who later on came to be known as *Musammat* Mahmuda Begam, the name given by the defendants to their mother.

It is abundantly clear that after *Musammat* Durga went into the permanent keeping of Enayat Ullah, the latter could not tolerate that his mistress should continue to be called by a Hindu name, and he gave her a Muhammadan name. Hidayet Ullah Khan further said that all the relations of Enayat Ullah regarded the defendants as sons of *Musammat* Durga, and added, as an indication of this fact that the defendants could not be married in a Sherwani caste, and had to be content with marrying three sisters respectively, these three sisters being the daughters of one Abdul Latif Khan of Bhikanpur. Abdul Latif Khan in his turn was believed to have been the son of a maid-servant by her master. The evidence of Hidayat Ullah Khan if unexplained is almost conclusive of the facts in controvercy. Hidayat Ullah, it may be mentioned, is a man of 68 years. The only thing that was suggested against Hidayet Ullah was that his son Maslah-ud-din had some criminal case with Nuh Ullah, one of the defendants, although no further particulars of the case is coming forth. Muslah Uddin it appears takes an interest in the plaintiff's case. But this would be quite natural if it be a fact that the defendants are only illegitimate children of Enayat Ullah Khan, while the plaintiff is a real and genuine relation of Muslah Uddin and his father Hidayet Ullah.

The next witness is Enayet Ullah's sister, Enayat Unnisa, a lady of 80 years of age. She goes as far as Hidayet Ullah himself, and fully supports the plaintiff's case. In cross-examination it was brought out that the mother of Muslah Uddin was the daughter of this witness's husband's sister. We all know how Muhammadan boys and girls are married, as far as possible in the family itself, and the fact that a nephew of the witness married her husband's sister's daughter makes her no closer relation of the plaintiff than of the defendants themselves.

The third witness is Sharafat-un-nissa aged 60 years, another full sister of Enayat Ullah Khan himself.

Then comes Abrar Fatma, a daughter of Enayat Ullah's brother Shafayat Ullah.

The next witness is Usman Khan, the husband of the last-mentioned witness Abrar Fatma. Thus we have five relations of Enayat Ullah coming to support the plaintiff's case. Then we have the evidence of two caste people, Ehsan Ullah and Abdur Rashid Khan aged respectively 60 and 65 years, who fully support the plaintiff's case. Then we have two old residents of the village of Enayati itself, unconnected with the family, namely, Chunni Rai a Hindu and Zamin Ali a Muhammadan who come forward to support the plaintiff's case. These witnesses like other witnesses say that no Mansur Khan ever lived in the village of Enayati, or came to live there, and that *Musammat* Durga was the wife of Cheta. On the top of all this evidence we have the evidence of Baldewa himself, who is now a man of 55, and who swears that his mother, the wife of his father Cheta became the mistress of Enayat Ullah, and bore several sons to him. He added in cross-examination and this statement of his only goes to establish the truth of his whole statement, that after his mother left Cheta, Cheta kept

a woman who bore him two sons Puran and Gobardhan, both of whom are living. There is absolutely nothing against Baldewa. He also stated, as seems to be the truth, that *Musammat* Durga died 12 years ago, and that Cheta died about 15 years ago.

The defendant Nuh Ullah was examined and he had to admit that none of the three defendants could find a wife within the family circle, and had to go to a different family, and had to marry respectively the three daughters of Abdul Latif. He admitted that although the defendant Halim Ullah has been a widower for seven or eight years, no cousin of his (those who would be cousins through Enayat Ullah) is prepared to marry him, although marriageable girls in the family are available. This admission on the part of Nuh Ullah clearly establishes the truthfulness of the statement of Hidayat Ullah that the members of the family of Enayat Ullah look upon the defendants as *Musammat* Durga's sons.

As against this large body of evidence we have the statements of four witnesses for the defendants, only two of whom are relations. These are Ahmad Ullah and Qamarunnisa. Ahmad Ullah is a young man and is of the same age as the youngest of the defendants. In the circumstances, Ahmad Ullah could have no first hand knowledge of the actual state of things. He stated that his father had come to give evidence on behalf of the defendants. But, evidently, the latter (Hamayet Ullah Khan) thought better and did not give evidence for the defendants. This fact is very significant. The other witness, an old lady, a sister-in-law of Enayat Ullah was examined on commission, but was not cross-examined. The plaintiff brought this fact to the notice of the Court by his application printed at page 9 of the record, but it does not appear that this witness was at all cross-examined. Two witnesses, Amir Khan and Sana Ullah were examined to prove that Mansur Khan a Sherwani by caste came to live in the village and married his daughter to Enayat Ullah. But none of these two witnesses even belonged to the Sherwani caste, and one of these, namely, Amir Khan, although he called himself a Pathan in describing himself, had to admit in cross-examination that he was not even a Pathan. I have already stated that the Court of first instance did not believe the evidence of these witnesses, and the learned Judge of this Court, who was prepared to find in defendants' favour on other points found that it was certainly the case that whoever the mother of the defendants was, she was not a girl of the Sherwani caste. It is not necessary to discuss the evidence of Amir Khan and Sana Ullah in detail, but one thing is very significant and may be pointed out. It is this. If Mansur Khan migrated to the village of Enayati to which the parties belong, he must have had some means of subsistence, and like most of the residents of the villages must have been a cultivator. This would leave some trace of his existence in the village records; but as no such trace was available, Amir Khan, defendants' witness had to state that Mansur Khan had no house of his own and had no land of his own to cultivate. On the entire oral evidence it is, therefore, abundantly proved that the defendants are the children of a woman who was initially known as *Musammat* Durga and was the wife of Cheta Dhobi, and bore to her husband a son Baldewa examined in the case.

On the record there are a large number of letters and copies of other documents, and these are strongly relied upon on behalf of the defendants to prove that Enayat Ullah acknowledged the defendants as his sons, nay the plaintiff himself treated the defendants as his brothers, and called their mother "mother." It would not be necessary to examine these documents in great detail. It appears that on the death of *Musammat* Durga, a suit was brought for recovery of Rs. 170 by the defendants against their father Enayat Ullah, purporting to be one for recovery of the dower debt due to their late mother. Enayat Ullah Khan confessed judgment in the suit, and his petition, admitting the correctness of the claim, is the only document on the record. All the Judges who have so far heard the case including ourselves are of opinion that this proceeding of the suit was a collusive one, and it was meant only to support the story of the defendants' legitimacy. In the circumstances, this document, the confession of Enayat Ullah, not only does not furnish evidence in support of the defendants' case, but it really takes away much from the weight of other evidence that has been adduced on their behalf. Then it appears that on the death of plaintiff's full brother, Rafiq Ullah Khan, his widow brought a suit for her dower and impleaded not only the plaintiff as a defendant, but also the other defendants. A copy of the

judgment is the only part of the record of that case that is on the record of this case, and the judgment shows that the plaintiff did not take exception to the suit, on the ground that the defendants were not heirs of Rafiq Ullah. This suit was decided on 30th November 1916. We are unable to draw any adverse inference to him, from the fact that the plaintiff did not raise the question of legitimacy of his alleged brothers in the dower suit. The defence was that no asset of Rafiq Ullah was available, for the simple reason that he predeceased his father and got nothing from him. Then it appears that Enayat Ullah had borrowed money from one Ahmad Said Khan and the latter obtained a decree against the present parties for money. The plaintiff arranged with Ahmad Said Khan that the latter should receive from the former only a quarter share of the debt and release his quarter share in the property from his claim. Ahmad Said Khan accordingly put in a petition to this effect in Court on 20th May 1920 (see page 67 of the printed record). It was within two months of this petition of Ahmad Said Khan that the present suit was brought. It cannot, therefore, be said that by trying to save a quarter share only of the property, the plaintiff really accepted the validity of the defendants' claim to the remaining three-fourths of their father's property.

Coming to the letters filed we find that the oldest one is dated 1885, and is addressed by the plaintiff to his father. In this document he speaks of "younger brothers." There are similar letters in which the plaintiff has either sent his blessings or affection to the defendants or respect to their mother. It has been very pertinently pointed out in the course of the argument that nobody could expect that the plaintiff, in writing to his father or even to the defendents, would speak of his father's mistress or the defendants, respectively, as anything but "mother" or "brothers." The defendants' mother had been living in the house. Sheer courtesy would demand that the plaintiff should call his father's mistress 'mother' and his father's children 'brothers'. Besides the very fact that the defendants' mother had been living for such a long time with Enayat Ullah Khan, would make her almost a member of the family, however, unsanctified might be the proceeding which brought the woman into the house. The letters, therefore, do not carry the case any farther for the defendants. The fact that mutation of names took place on the death of Enayat Ullan in favour of the parties does not necessarily add much strength to the defendants' case. The plaintiff required some time to make up his mind as to whether he would acquiesce in his father's actions and treat the defendants as brothers and let them enjoy a portion of his father's property, or whether he would take such extreme step, as of declaring to the world that after all his father was living in adultery with a Hindu woman coming not from a very high class of society. It would require a good deal of deliberation and courage to come forward with these allegations against a dead man's and a dead father's character.

Taking the whole evidence on the record, therefore, we are more than satisfied that the plaintiff's case is a true one, namely, Enayat Ullah kept a Hindu married woman as his mistress, and the defendants are the children of Enayat Ullah by that woman.

In the teeth of the above finding no rule of presumption of legitimacy or marriage can avail the defendants. The state of the law has been very clearly set forth in the judgment of this Court delivered by the learned Judge who was for decreeing the appeal, and we do not propose to go over the same ground again. It would be sufficient to mention that it is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of legitimacy in favour of a son is allowed to take the place of direct proof of marriage. Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise [See Privy Council case of *Habibur Rahman* v. *Altaf Ali* (1) and also *Muhammad Allahadad Khan* v. *Muhammad Ismail Khan* (2)].

The result is that this appeal succeeds, and we set aside the decrees of this Court and that of the Court of first instance and decree the plaintiff's claim for possession with costs throughout, costs in this Court

(1) 60 Ind. Cas 837; 19 A. L. J. 414; 40 M. L. J. 510; 33 C. L. J. 479; 23 Bom. L. R. 636; (1921) M. W. N. 366; 29 M. L. T. 354; 14 L. W. 175; 26 C. W. N. 81; 48 C. 856; (1922) A. I. R. (P. C.) 159; 48 I A. 114 (P. C.).

(2) 10 A. 289; 6 Ind. Dec. (N. S.) 193.

including Counsel's fees on the higher scale.

We direct an enquiry into the amount of mesne profits accruing due since the institution of this suit, by the Court of first instance under O. XX, r. 12, cl. (c) of the C. P. C.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 749, 750, 1016 AND 1017 OF 1923 AND 1333 TO 1338 OF 1922.

April 22, 1925.

Present:—Justice Sir B. K. Mullick, Kt., and Mr. Justice Ross.

RAMGOBIND SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu SHASHI SEKHAR PRASAD SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 52, 105, 157, 158—Civil Procedure Code (Act V of 1908), s. 9, O. XXII, r. 4—Landlord and tenant—Landlord's right to recover fair and equitable rent—Suit to enforce rights, nature of—Jurisdiction of Civil Courts—Co-sharer landlord, whether can maintain suit—Appeal—Death of respondent—Failure to bring legal representatives on record within time prescribed—Ignorance of death—Abatement.

Clause *(d)* of s. 158 of the Bengal Tenancy Act entitles a Court to determine the rent payable by the tenant at the time of the application, and there is no reason why this should be restricted to cases where the rate of rent has already been ascertained. If the contract is that the tenant shall pay a fair and equitable rent, then that is the existing rent payable and it is the business of the Court to ascertain it. [p. 960, cols. 1 & 2.]

An application under s. 158 of the Bengal Tenancy Act must be made by the whole body of landlords. [p. 960, col. 2.]

Section 24 of the Bengal Tenancy Act directs that an occupancy *raiyat* shall pay for his holding at a fair and equitable rate If a rent is fixed by the demise, that rent is presumed to be "fair and equitable." If no rent has been fixed, then the tenant is under a liability arising out of his contract, to pay such rent as the Court may deem to be fair and equitable. [*ibid.*]

The jurisdiction for assessing a fair rent where no rent has at any time previously been assessed is not confined to that conferred by ss. 50, 105, 157 and 158 and similar sections of the Bengal Tenancy Act. [*ibid.*]

A landlord's right to recover fair and equitable rent on the basis of the contract of tenancy can be enforced in the ordinary Civil Courts under the provisions of s. 9 of the C. P. C. Such a suit is maintainable at the instance of a co-sharer landlord with regard to his share of the rent and it is not necessary that the whole body of the landlords should join as plaintiffs [p. 960, col. 2.]

In general, where the relationship of landlord and tenant exists without any arrangement for the payment of rent properly so-called there is always an implied contract on the part of a tenant to compensate the landlord for use and occupation of the land. In Bengal and Behar the conditions are special and the law in such a case implies a contract to pay not compensation but rent. [p. 961, col. 2; p. 962, col. 1.]

It is obligatory upon an appellant to see that the necessary parties to the appeal are on the record. Ignorance of the fact of the death of a respondent is no excuse for an appellant's failure to bring the legal representatives of the deceased respondent upon the record within the time prescribed by law. [p. 960, col. 1.]

IN APPEALS NOS. 749, 750, 1016 AND 1017 OF 1923.

Appeals from a decision of the Subordinate Judge, Arrah, dated the 7th May 1923.

IN APPEALS NOS. 1333 TO 1338 OF 1922.

Appeals from a decision of the Officiating Subordinate Judge, Arrah, dated the 20th July 1922, reversing that of the Third Munsif, Arrah, dated the 27th July 1921.

Messrs. *Janak Kishore*, in No. 749, 750, *A K Roy, S. S. Prasad Singh*, in Nos. 1016 and 1017, *N. C. Ghose* and *W. H. Akbari*, in Nos. 1333 to 1338, for the Appellants.

Messrs. *A. K. Roy, S. S. Prasad Singh* and *B. N. Singh*, in Nos. 749, 750 and 1333 to 1338, for the Respondents.

JUDGMENT.

Mullick, J.—Appeals Nos. 1016 and 1017 arise out of Suits Nos. 621 and 622 respectively of 1920 in the Court of the Third Munsif of Arrah, in which the landlords asked for the assessment of fair and equitable rent. The Munsif assessed the rent at Rs. 7 per *bigha* in each case. Eventually after certain orders made in appeal by the Subordinate Judge and in second appeal by the High Court, to which it is not necessary to refer in detail, the Subordinate Judge reduced the rent to Rs. 5 per *bigha*, but before this judgment was passed another batch of cases regarding lands in the same neighbourhood came up in appeal before another Subordinate Judge and he agreeing with the lower Court, found that the fair and equitable rent was Rs. 7 per *bigha*. Appeals Nos. 1333 to 1338 relate to this second batch and are preferred by the tenants. Appeals Nos. 749 and 750 are appeals by the tenants in Suits Nos. 621 and 622 who are not satisfied with the decree of the Subordinate Judge reducing the rates from Rs. 7 to Rs. 5 per *bigha*.

I will take Appeals Nos. 749 and 750 first. These appeals are concluded by findings of

fact. The Subordinate Judge has upon evidence found that Rs. 5 per *bigha* is a fair and equitable rate. He has rejected the decrees, upon which the Munsif relied on the ground that some are under appeal and that others were made as against tenants, who were themselves co-sharer landlords and he has preferred to rely upon the profit made by the sale of mangoes which is the only crop grown upon the lands.

There is also another defect which is fatal to these appeals. One of the respondents Surendra Narain Singh died on the 31st July 1924 and no substitution of heirs has yet been made in his place, the decree being joint and indivisible the abatement of the appeal against the heirs of Surendra Narain Singh causes the appeals to fail also as regards the other respondents. It is urged by the appellants that they were not aware of the death of Surendra Narain Singh till about a week ago, but that is no excuse for it is obligatory upon an appellant to see that the necessary parties are on the record. It appears that the landlords in their Appeals Nos. 1016 and 1017 substituted the heir of Surendra Narain Singh within the time allowed by law and no reason has been assigned why the tenants in their appeals could not have done the same.

The appellants, however, urge that the suits are not maintainable, as the plaintiffs are only co-sharer landlords. It is said that this is a suit under s. 158 of the Bengal Tenancy Act (VIII of 1885) and all the landlords must sue. This contention requires careful examination. The lands have been recorded in the Cadastral Survey *Khatian* as occupancy holdings liable to be assessed with rent. The Settlement Officer found that the tenants had occupancy rights but that the rent had not been fixed by express contract and that none was being paid. He thought there was, therefore, no existing rent which could be declared to be the fair and equitable rent. It is said that as s. 158 of the Bengal Tenancy Act only empowers a Court to record the existing rent it does not apply. But cl. (*d*) of s. 158 entitles a Court to determine the rent payable by the tenant at the time of the application, and there is no reason why this should be restricted to cases where the rate of rent has already been ascertained. If the contract is that the tenant shall pay a fair and equitable rent, then that is the existing rent payable and it is the business of the Court to ascertain it. Section 158, therefore, in my opinion applies.

But then s. 158 requires that the application must be made by the whole body of landlords, and, therefore, if the suit is not maintainable under the general or any other law but is one sanctioned exclusively by the Tenancy Act then the plaintiffs must fail. To this the plaintiffs reply that s. 158 is not restrictive and the right to claim a fair and equitable rent is an obligation arising out of the contract between the parties and is enforceable in the ordinary Civil Courts under the provisions of s. 9 of the C. P. C. If this contention is accepted then the fact that the plaintiffs are only co-sharer landlords will not be a bar to the suit.

In my opinion this contention is well-founded. Section 24 of the Bengal Tenancy Act directs that an occupancy *raiyat* shall pay for his holding at a fair and equitable rate. If a rent is fixed by the demise, that rent is presumed to be "fair and equitable" an expression first used in s. 5 of the Rent Act of 1859 (Act X of 1859). If no rent has been fixed then the tenant is under a liability arising out of the contract to pay such rent as the Court may deem to be fair and equitable. The landlord does not require the authority of the Tenancy Act to bring a suit to enforce the liability and, therefore, s. 188 does not apply. The argument that the landlord cannot ask the Civil Court to make a contract between the parties is really not relevant because here there is in fact a contract. I am unable to hold that the only jurisdiction for assessing a fair rent where no rent has, at any time, been previously assessed is that conferred by ss. 52, 105, 157 and 158 and similar section of Act VIII of 1885.

Therefore here there is no necessity to seek the aid of the Tenancy Act at all. So far back as 1864 it was held in *Nityanund Ghose* v. *Kishen Kishore* (1) that by the universal custom of the country mere occupation of land without express permission on the part of the landlord or express condition to pay rent on the part of the occupier constituted the relationship of landlord and tenant and that the tenant was bound to pay a fair rent and the landlord to give him a *patta*. That was a suit by the tenant under s. 5 of Act X of 1859 to compel the landlord to give

(1) W. R. 1864, Act X Ruling, 82.

him a *patta* and the following observations of the learned Judges of the Calcutta High Court appear to me to lay down what is still the law, although the provisions for the exchange of *patta* and *kabuliyat* have been since repealed.

"The lands (say their Lordships) then, being lands of which the plaintiff is the proprietor, and the defendant never having paid rent for the same, or acknowledged the *zemindar's* right to treat him as a tenant, do the parties stand in the relation of landlord and tenant.

The defendant holds and cultivates the plaintiff's lands, and had the present suit been one for rent during the occupancy, there is little doubt the defendant would be deemed to be a tenant and be adjudged liable to payment of rent, for it is an acknowledged principle that every *zemindar* has an inherent right to the rent of any and all lands held and cultivated within his *zemindari*. In the same way, is he not entitled to receive from the person who holds and cultivates any land within his *zemindari* a *kabuliyat*?

We think that, though by the law of landlord and tenant, as applied in England, a person who takes and cultivates the lands of another (there being no express permission to cultivate on the side of the landlord, nor any express condition to pay rent on the part of the cultivator) would not be allowed to be regarded as a tenant, but treated as a mere trespasser, the peculiar circumstances of this country preclude the applicability of the technical doctrine of the English Law of landlord and tenant to such a case. Here it is a very usual thing for a man to squat on a piece of land or to take into cultivation an unoccupied or waste piece of land. Tenancy, in a great many Districts in Bengal, commences in this way and where it does so commence it is presumed that the cultivator cultivates by the permission of the landlord and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it. Thus, the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law administered in England, as a trespasser, but as a tenant and he would be so although he may never have expressly acknowledged the landlord's right, or entered into any express contract with him for the payment of rent. If he chooses to cultivate the *zemindar's* lands and the *zemindar* lets him, there is an implied contract between them, creating a relationship of landlord and tenant."

What then is the rent the tenant should pay in such a case? At the time of the Permanent Settlement competition rents were unknown and the fair and equitable rate was the customary rent, that is to say the *Pargana* rate. Regulation VII of 1822 which was the first legislative measure for making a Survey and Settlement gave the Settlement Officer no power to enhance rents for the simple reason that enhancements beyond the *Pargana* rate were not then contemplated: see *Ishur Chandra Sarkar* v. *Troylokya Nath Singha* (2) and it was not till 1879 and 1885 that general powers were given to Settlement Officers to settle fair rates.

As for the Civil Tribunals, it was not till 1859 that rules were made for enhancement and reduction of rents: (see ss. 13, 14, 15 and 17 of Act X of 1859). These rules have with modifications been repeated in the Tenancy Act of 1885, but in cases such as we have here the power of the Civil Court to assess a fair and equitable rate be it the *Pargana* rate customary before 1859 or the prevailing rate or a rate depending on the price of foodgrains, has never been in doubt. In *Barhamdat Missir* v. *Krishna Sahay* (3), the learned Judges, while holding that the Settlement Officer was not the only authority who could now assess a fair and equitable rent, expressed some doubts as to whether the jurisdiction of the Civil Court fell under the general law relating to declaratory suits or under the special law contained in s. 158 of the Bengal Tenancy Act of 1885. In my opinion both jurisdictions are available and as s. 158 does not expressly bar the operation of the general law, s. 9 of the C. P. C. operates.

If, therefore, the Bengal Tenancy Act does not exclude the operation of s. 9 of the C. P. C., then s. 188 of the former Act is no bar and the plaintiffs, although they are co-sharer landlords are entitled to maintain the suit.

In general where the relationship of landlord and tenant exists without any arrangement for the payment of rent properly so-called, there is always an implied promise

(2) 19 Ind. Cas. 675; 17 C. W. N. 865.
(3) 20 Ind. Cas. 910; 18 C. W. N. 166.

on the part of the tenant to compensate the landlord for use and occupation of the premises. The relationship has been sometimes called in English Law a *quasi*-tenancy and that law always implies a contract or promise by the occupier to pay the landlord a reasonable sum for use and occupation: *Helier* v. *Sillcox* (4). In Bengal and Bihar as pointed out in *Nityanand Ghose* v. *Kissen Kishore* (1), the conditions are special and the law implies a contract to pay not compensation but rent.

The result, therefore, is that Suits Nos. 621 and 622 are maintainable in their present form and the Appeals Nos. 749 and 750 must be dismissed with costs.

APPEALS Nos. 1333 TO 1338 OF 1922.

In these appeals also the right to proceed against Surendra Narain Singh's heirs has abated and for the same reasons as in Appeals Nos. 749 and 750, it must be held that the appeals cannot proceed. They are, therefore, dismissed with costs.

It appears to have been admitted by the parties when these appeals came up on the 6th August 1924 before another Division Bench of this Court that they would be governed by the decision in Appeals Nos. 1016, 1017, 749 and 750. But in the circumstances that have occurred this agreement cannot be enforced as the appeals are at the outset incompetent. Kulel Singh one of the appellants in Appeal Nos. 1336, is reported to be dead, but it is unnecessary to give time for the substitution of his heirs because the abatement of the appeal against the heirs of Surendra Narain Singh before the death of Kulel Singh took place renders the whole appeal liable to dismissal and it is immaterial whether Kulel Singh's heirs are now substituted or not. The same objection as in Appeals Nos. 749 and 750 was taken in these appeals regarding the maintainability of the suits by co-sharer landlords; but for the reasons given above the objection is decided against the appellants.

The result is that Appeals Nos. 1333 to 1338 are dismissed with costs.

APPEALS Nos. 1016 AND 1017 OF 1923.

These are appeals by the landlords and they ask that the decree of the Munsif at the rate of Rs. 7 per *bigha* be restored. The Subordidate Judge has found on evidence that the fair and equitable rate of rent is Rs. 5 per *bigha* and the case is concluded by that finding. The appeals are dismissed.

There being no respondent, there will be no costs.

ROSS, J.—I agree.

Z. K. *Appeals dismissed.*

(4) (1850) 19 L. J. Q. B. 295; 14 Jur. 573; 87 R. R. 521.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 232 OF 1924.

April 9, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

VISHNU SHANKAR JOSHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

YUSUFF NUR MAHAMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 65—Execution of decree—Sale of property under two decrees—Prior sale set aside—Subsequent sale, confirmation of, effect of.

Under s. 65 of the C. P. C. property sold in execution of a decree must be deemed to have been vested in the purchaser from the time when it was sold and not from the time when the sale becomes absolute. But until the sale becomes absolute the property cannot be said to be vested in the purchaser, who has only an inchoate right which becomes permanent only when the sale is made absolute.

Certain property belonging to a judgment-debtor was attached in execution of a decree passed by Court *T* and was subsequently attached in execution of a decree passed by Court *P*. It was sold in execution of the decree of Court *T* and a few days afterwards it was sold in execution of the decree of Court *P*. The sale by Court *T* was set aside under a compromise arrived at between the parties to that sale and was, therefore, never confirmed. The sale by Court *P* was duly confirmed:

Held, (1) that when the Court *T* sold the property the purchaser merely had a right to get the sale confirmed and that until he obtained a sale certificate the property would not vest in him and that similarly when the Court *P* sold the same property the purchaser at that sale obtained only an inchoate right which would fail to materialize if the previous sale in the Court *T* was confirmed;

(2) that when the *T* sale was set aside the right of the purchaser from the Court *P* which had been in the meanwhile in suspense revived and that the sale having been confirmed his title dated back to the date of the sale.

Second appeal from the decision of the Assistant Judge, Thana, in Appeal No. 134 of 1922, confirming a decree of the Second Class Subordinate Judge at Panvel in Civil Suit No. 83 of 1921.

Mr. *P. S. Bakhale*, for the Appellants.

Mr. *Y. V. Bhandarkar*, for Respondent No. 1.

JUDGMENT.

Macleod, C. J.—One Merwanji had several money-decrees standing against him. In execution of one of them, the Thana First Class Court attached a certain land belonging to him on May 25, 1916. About the same time in execution of another decree the Panvel Second Class Court also attached the same property. The fact that the Thana Court had attached the property had not been brought to the notice of the Panvel Court.

Under s. 63 of the C. P. C., where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property, and shall determine any claim thereto, and any objection to the attachment thereof, shall be the Court of highest grade. Sub-s. (2) says that nothing in this section shall be deemed to invalidate any proceeding by a Court executing one of such decrees.

The Thana Court sold the property on February 28, 1917, and the Panvel Court sold the same property on March 3, 1917. Under s. 65 of the Code "where immoveble property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute." But until the sale becomes absolute, the property cannot be said to be vested in the purchaser, who has only an inchoate right, which becomes permanent when the sale is made absolute. The sale by the Thana Court was never confirmed. The judgment-debtor applied to set it aside under O. XXI, r. 89, and ultimately it was decided by compromise that if the judgment-debtor deposited a certain amount by a certain time the sale should be set aside. The deposit wes accordingly made by the judgment-debtor on September 11, 1920, and the sale was set aside, and the proceedings in the Thana Court thus terminated. The sale of the Panvel Court was duly confirmed and the present plaintiff is the purchaser. The judgment-debtor had obtained from defendants Nos. 2 to 4 the necessary money to set aside the sale by the Thana Court. In consideration thereof he sold the property to them on September 21, 1920, with certain other properties, and he put purchaser in possession thereof.

The plaintiff had then to bring this suit to recover possession. The Subordinate Judge decreed the plaintiff's claim, and that decree was confirmed in appeal by the Assistant Judge.

It was argued before the Assistant Judge, and the argument has been repeated in this Court, that when the Thana Court sold the property on February 28, 1917, the judgment-debtor's interest in the land ceased, and further that the attachment proceedings in the Panvel Court also came to an end, as there was no property on which it could take effect, or which could be conveyed to the purchaser. The Judge said:—

"The fallacy of this argument lies, as pointed out by the Trial Judge, in assuming that the title of the judgment-debtor is transferred to the Court-purchaser immediately on the acceptance of his bid. But that is not the law."

It seems to me that when the Thana Court sold the property, the purchaser merely obtained a right to get the sale confirmed, and it would not be until he obtained the sale certificate, that the vesting of the property would date back to the date of the sale. When the Panval Court sold the same property, the purchaser also obtained an inchoate right which would fail to materialize if the previous sale in the Thana Court was confirmed. When the Thana sale was set aside then the right of the purchaser from the Panvel Court which had been in the meanwhile in suspense, revived, and if the sale was confirmed, then his title would date back to the date of the sale. There was nothing to prevent the judgment-debtor objecting to the sale in the Panvel Court before the certificate was issued. He did not do this. So we think the plaintiff is entitled to succeed.

We dismiss the appeal with costs.

Coyajee, J.—I agree.

Appeal dismissed.

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 717 OF 1923.
June 5, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

PIARE LAL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Sri THAKURJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Antecedent debts, payment of—Debt paid off not mentioned in deed, effect of—Sons, whether bound.

In a case in which false recitals are dishonestly and fraudulently entered in a deed of transfer in order to deceive persons entitled to challenge the alienation, the Court may prevent the transferee from shifting his ground and setting up a case that although the consideration was not paid or appropriated in the manner stated in the deed it was appropriated in payment of obligations which were in the nature of antecedent debts and that, therefore, the transfer was justified although not on the grounds stated in the deed itself. [p. 965, col. 1.]

Per *Sulaiman, J.*—Under the Hindu Law antecedent debts of the father unless tainted with immorality or illegality are binding on the sons, and a transfer of family property by the father in lieu of such debts is perfectly valid. It makes no difference in principle if a portion of the sale consideration though originally intended to pay off one antecedent debt, is, as a matter of fact, when it is discovered that that debt does not exist, honestly utilized to pay off another antecedent debt. Where both the debts are binding on the sons they cannot complain if one is paid off rather than the other. The payment of debts due from the father is considered to be one of the recognised legal necessities. When, therefore, an antecedent debt has in fact been discharged, though the debt is not the one actually mentioned in the deed, the transfer should not be vitiated unless there are circumstances showing an attempted fraud. [p. 964, col. 2; p. 965, col. 1.]

Second appeal from a decree of the District Judge, Gorakhpur, dated the 21st of February 1923.

Dr. *M. L. Agarwala*, for the Appellants.

Messrs. *J. M. Banerji* and *P. L. Banerji*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is an appeal by the plaintiffs arising out of a suit brought by them for the cancellation of a sale-deed executed by their father on the ground that the transfer was not binding on the family.

The Court of first instance decreed the claim but on appeal the learned District Judge has dismissed it. The findings of the lower Appellate Court are that the father is still alive and is really running this case. It has further found that the defendant acted in a *bona fide* manner when he purchased the property. It has found that the sale consideration was fully paid and was binding on the family in its entirety. It has, however, pointed out that out of the sale consideration, Rs. 1,600 had been left in deposit with the vendee for payment to a named creditor Hira Lal on account of an antecedent mortgage debt of the 9th of January 1917. The learned Judge has held that subsequent to the execution of the sale-deed, the plaintiff's father served a notice on the vendee informing him that only Rs. 358 remained due to Hira Lal on his bond and requesting that the balance should be paid to the vendor direct. The vendee however did not do so but under a subsequent arrangement which took place on the 1st of May 1919, the balance was utilised in payment of certain other previous debts of the vendor, though these had not been mentioned in the sale-deed.

The main contention on behalf of the appellants is that if the vendee had made due enquiry he would have come to know that the entire sum of Rs 1,600 was not due to Hira Lal and that, therefore, the transfer in lieu of it was not justified. It is further urged that inasmuch as the payment of the other debts of the father was not in contemplation at the time when the sale-deed was executed they should be altogether ignored for the purpose of considering whether the transfer was or was not valid.

I am unable to accede to the contention of the appellants. It is true that apparently the vendee did not make enquiries from Hira Lal before making the purchase, but when the entire sum of money was left in his hands for payment to Hira Lal, the vendee might very well accept its accuracy provisionally intending to ascertain the exact amount due, at the time of actual payment to the said creditor. When subsequently he discovered that the whole of that amount was not due to Hira Lal, he did not pay it over to the plaintiffs' father, but made him agree to utilise the balance in payment of other antecedent debts of his.

Antecedent debts of the father unless tainted with immorality or illegality are binding on the sons, and a transfer in lieu of them is perfectly valid. Does it make any difference in principle if a portion of the sale consideration, though originally intended to pay off one antecedent debt, is, as a matter of fact, when it is discovered that that debt does not exist, honestly

utilised to pay off another antecedent debt? After all when both the debts are binding on the sons they cannot complain if one is paid off rather than the other. The payment of debts due from the father is considered to be one of the recognised legal necessities. When, therefore, an antecedent debt has in fact been discharged, though not the one actually mentioned in the deed, the transfer should not be vitiated unless there be circumstances showing an attempted fraud. In cases where false recitals were dishonestly and fraudulently entered in deeds of transfer in order to deceive persons entitled to challenge the alienation, a Court may prevent the transferee from shifting his ground and setting up his own fraud. That, however, cannot be said to be the case here, when the lower Appellate Court has found that the transferee acted in perfect good faith. I am conscious that in this view the principle of transfers in lieu of antecedent debts, which has so far been laid down in reported cases, is being slightly extended, but I think it is being extended legitimately. There is at least the authority of a Bench of this Court in the case of *Jagdishwar Prasad* v. *Shco Bahhsh Rai* (1) that the fact that the money advanced for one legal necessity is used or diverted to some other purpose is not sufficient in itself to invalidate the transaction.

Had this been a case where the plaintiffs have been taken by surprise on the defendant leading evidence contrary to the recitals in the sale-deed, I would have made the defendant pay the costs of the plaintiffs. But this cannot be the case where the father is actually behind the scene. I would accordingly dismiss the appeal with costs.

Boys, J.—This was a plaintiffs' appeal. The suit was brought by two minor Hindu sons to set aside a sale-deed dated the 28th of October 1918 for Rs. 2,000, the sale-deed having been executed by their father and it being alleged that it was neither for an antecedent debt nor for legal necessity.

The First Court decreed the suit, but the lower Appellate Court allowed the appeal and dismissed the suit.

The consideration set out in the deed was as follows:—

(1) Rs 1,600 left in deposit with the vendee for payment to one Hira Lal in reference to a mortgage in favour of Hira Lal, dated the 1st of January 1917.

(2) Rs. 100 left with the vendee for payment to Vishun Ram in regard to an oral debt.

(3) Rs. 180 left with the vendee for paymant to certain creditors.

(4) Rs. 120 for cash and stamps etc.

It appears that the money was in effect not applied to the purpose set out in the sale-deed but was, as the lower Appellate Court expresses it, "eventually used largely for other purposes." For the purposes of the appeal before us it may be taken that it has been found that there was, in fact, no mortgage in favour of Hira Lal for Rs. 1,600. How the original entry of this item came to be made we have no information. But on the 8th of December 1918 Babu Lal, the father of the plaintiffs, who executed the document, sent a notice to Mahabir, who was the trustee of the defendant temple Sri Thakurjee the vendee, informing him that only Rs. 358-5-3 was actually due to Hira Lal and asking Mahabir to pay the balance of Rs. 1,600 to him (Babu Lal). Mahabir was apparently too cautious to do this, but an arrangement was entered into between him and Babu Lal as to the disposal of the Rs. 1,600. It was agreed that it should be disbursed as follows:—

(1) Rs. 358-5-3 to pay off the mortgage in favour of Hira Lal.

(2) Rs. 125 to pay off a decree in favour of one Munna Lal.

(3) Rs. 654 to pay off a *hundi* in favour of Jhinku.

(4) Rs. 424 to pay of a *hundi* in favour of Mahadeo and Sukhdeo.

(5) Rs. 38-10-9 Cash.

Rs. 1,600 Total.

Before considering whether which, if any, of these debts as finally declared could be regarded as antecedent debts or for legal necessity so as to support the validity of the transfer a preliminary question has to be decided. That question is:—Is it, in order to support a transfer by a father, essential to show that the various reasons for the sale set out in the deed constituted legal necessity or antecedent debts; or, on the other hand, is it sufficient to show that the money though not disbursed as shown in the deed, was in fact, disbursed for other debts and purposes which by their nature would support a transfer?

I will first refer to some general con-

(1) 51 Ind. Cas. 856; 1 U. P. L. R. (A) 119.

siderations before discussing the only judicial authority which has been brought to my notice.

For the plaintiff it might be urged that if a sale by a Hindu father can be supported by purposes other than those stated in the deed, a situation might in particular cases arise which it would be impolitic to permit. If an invalid purpose be entered in the sale-deed (as in this case) the sons, in ignorance of the real application of the money and deceived by the incorrect entry in the deed, may be compelled in their own just and proper interests to file an unnecessary suit to set aside the deed, only to find it defended by the setting up of a good antecedent debt as having been discharged in fact by the purchase money, a defence which would come as an entire surprise to the plaintiff. The whole purpose, from the sons' point of view, of setting out the destination of the consideration in the sale-deed would be defeated and in fact a false document would be being registered and nobody would know whether they were legally entitled to challenge the transaction or legally bound to accept it.

On the other hand, for the defendant it may be urged that the net result of the transaction is exactly the same as if the vendor had arranged with the vendee to tear up the original sale-deed and to execute a fresh one setting out the real eventual manner of disbursement. To this plea there would seem to be a two-fold answer. In the first place there is the undesirability to which we have just referred of leaving those who may be entitled to challenge the deed under a misapprehension; and in the second place even where a second deed is executed before any suit is brought there might well be cases in which the position of strangers to the first deed had become affected in the interval between the two deeds in a manner in which it would not have been affected if the first deed had contained a true statement of the position.

Again it may be contended for the defendant vendee that he is not obliged to enter at all in the deed the intended application of the money; that he only enters it for his own protection. That is so, but, if he does enter it, it is obvious that it is expedient that he should be required to enter it correctly.

Having stated these general considerations I will come to the judicial authority.

Counsel on either side were unable to refer us to any authority, but my learned brother, Mr. Justice Sulaiman, has since drawn my attention to the decision of this Court by Mr. Justice Walsh and Mr. Justice Ryves reported as *Jagdishwar Prasad* v. *Sheo Bakhsh Rai* (1). In that case the document set forth a purpose to which the money was to be devoted which, if established in fact, would be sufficient to establish legal necessity, but, before the money was disbursed for that purpose, the vendor changed her mind and devoted the money to another purpose which would have been equally effective as regards legal necessity if that purpose had been originally stated in the deed. The transaction was upheld. This case is only distinguishable from the present in that in that case both the declared purpose and the eventual application of the money were capable of supporting legal necessity whereas in the present the greater part of the declared purpose did not exist and could not constitute legal necessity. This distinction does not, however, alter the fact that the case is authority for the proposition that alteration of the destination of the consideration is not by itself sufficient to invalidate the transaction where the actual disbursement would support an allegation of legal necessity.

Even accepting that proposition, the question here is whether misdescription of the reason for the transaction coupled with the further element that the reason had little or no existence in fact and that the money could not have been devoted to the payment of a non-existent debt is sufficient to render the transaction impeachable notwithstanding that the money was actually disbursed for a purpose which would have supported the deed if it had been originally executed with that puspose in view.

In view of the general considerations which I have already stated I am not prepared to accept as a broad proposition of general application that it is quite immaterial what purpose is set out in the deed if only the vendee or mortgagee can subsequently show that the money was in fact disbursed for a proper purpose; but he who seeks equity must do equity, and in the peculiar circumstances of this case equity is wholly on the side of the vendee. He was clearly very careless in not making proper enquiry at the outset, but on discovery of his mistake it has been found that he exercised proper caution in securing that

the money which he was to advance and which he still held was only devoted to objects which could, as it has been found have supported his sale-deed if they had been the original objects set out in the deed.

I agree, therefore, that the appeal should be dismissed. Further in view of the fact that it has been found that the father is himself behind this suit and that, therefore, the plaintiff cannot really have suffered any such surprise as that to which I have alluded above I would allow the respondent his costs in this Court including Counsel's fees on the higher scale.

By the Court.—This appeal is dismissed with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 175 OF 1922.

February 5, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Odgers.

DEVICHILAI IYENGAR—PLAINTIFF—APPELLANT

versus

RAGHUPATHI VENKATACHARIAR—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Will by father, validity of—Testamentary guardian, appointment of—Minor—Guardian—Permanent alienation of immoveable property to meet step-mother's maintenance claim, validity of—Mesne profits, right to—Repudiation, date of.

A Hindu father has no power to dispose by Will of joint family property, nor can he appoint testamentary guardians of his minor son to manage properties to which the son is entitled by survivorship. [p. 968, col. 1.]

Subbarami Reddi v. *Ramamma*, 59 Ind. Cas. 681; 43 M. 824; 12 L. W. 249; (1920) M. W. N. 529, *Chidambara Pillai* v. *Rangasami Naicker*, 45 Ind. Cas. 905; 41 M. 561; 34 M. L. J. 381; 23 M. L. T. 266; (1918) M. W. N. 265; 7 L. W. 454, followed.

Prima facie it is a breach of trust on the part of the guardian of a minor to make a permanent alienation of immoveable property belonging to the minor for the purpose of providing for the maintenance of a person who is only entitled to be maintained for her lifetime. [p. 968, col. 2.]

The obligation of a Hindu son to maintain his father's widow is only co-extensive with the widow's lifetime. [*ibid.*]

A sale of a minor's property by his guardian in fraud of the minor's rights is not void but only voidable and is valid till avoided. [p. 969, col. 2; p. 970, col. 1.]

Bhirgee Nath Chaube v. *Narsingh Tewari*, 35 Ind. Cas. 475; 39 A. 61; 14 A. L. J. 1161, *Subbe Goundan* v. *Krishnamachari*, 68 Ind. Cas. 860; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112 and *Krishna Dhone* v. *Bhagaban Chandra*, 34 Ind. Cas. 188, relied on.

A quondam minor seeking to recover possession of properties improperly alienated by his guardian during his minority is entitled to mesne profits only from the date of the repudiation and where there has been no repudiation before the plaint, from the date of the plaint. [p. 969, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Tuticorin, in O. S. No. 42 of 1920.

Messrs. *S. Varadachariar* and *P. V. Krishnaswami*, for the Appellant.

Mr. *A. Krishnaswami Iyer*, for the Respondent.

JUDGMENT.

Spencer, J.—Plaintiff is the appellant. He brought this suit for recovery of ancestral property that had came into possession of his step-mother's brother's families through her Will dated 9th December 1903. The plaintiff's father died on 30th July 1900 while plaintiff was a minor. The plaintiff's mother Nachiar Ammal was his father's junior wife and Chinnapen Janaki was the name of the senior wife. The 1st defendant and the 3rd defendant's husband are brothers of Chinnapen Janaki, the plaintiff's step-mothor. The 2nd defendant is the 1st defendant's son. On 23rd July 1900 the plaintiff's father executed a written Will appointing his junior wife Nachiar Ammal, his sister Alagu Janaki and his aunt's son Ranga Iyengar as managers of his properties after his death and guardians of the minor plaintiff. In case of difference of opinion among them the decision of Nachiar Ammal was to be final. There was a bequest of 1 acre 63 cents. in favour of Ranga Ayyanagar and there was also a provision of 6 *kottas* of paddy and Rs. 25 each per year for the maintenance of the testator's first wife, Chinnapen Janaki, with the provision, that if she did not accept this allotment, she should have Rs. 1,200 down in cash. The plaintiff's first witness, who is a *purohit* and also a paternal relation of the plaintiff, deposed that after the plaintiff's father died, Chinnapen Janaki and her brother came and obstructed the performance of the funeral ceremonies and refused to let the corpse be removed from the house until she was given some lands for maintenance in lieu of the paddy and cash provided in the Will. This evidence as to coercion of the plaintiff's guardian given by this witness was not rebutted by anything for defendants. On 4th August 1900 the 3 guardians appointed under the Will entered into an agreement, in which Chinnapen Janaki

joined, (Ex. II) which contains a statement that the plaintiff's father directed that *nanja* lands worth Rs. 2,000 and Rs. 1,200 in cash for providing a residence and other *nanja* lands specified in the schedule in lieu of the sum of Rs. 1,200 should be given to Chinnapen Janaki for maintenance with all rights of disposal. After this the senior widow Chinnapen Janaki brought a suit (O. S. No. 150 of 1902) for a declaration of her right and for transfer of the *patta* belonging to the properties allotted to her and obtained a decree *ex parte* as the plaintiff's guardians did not defend it. The plaintiff's step-mother died on 28th December 1903 after willing away the property in favour of her brothers Now plaintiff has come of age and sues for recovery of the joint family property which has been improperly alienated. In the lower Court his suit was dismissed.

The written Will of the plaintiff's father was clearly invalid in so far as it purported to dispose by Will of joint family property [*vide Subarammi Reddi* v. *Ramamma* (1)] and the appointment under it of testamentary guardians to manage the properties of the plaintiff (a minor co-parcener) was also illegal [*vide Chidambaram Pillai* v. *Rengaswami Naicker* (2)]. The alleged oral Will, even if true, was also invalid for the same reason that the plaintiff's father had no power to dispose of immoveable property belonging to the joint family after his death.

The learned Subordinate Judge found under Issue No. 6 (*a*) that the properties covered by Ex. II are joint family properties and this finding has not been challenged. He upheld the alienation under Ex. II both as being a proper provision for maintenance and as being a family settlement of a disputed claim.

The appellant's Pleader argues that the plaintiff's mother acting as his natural guardian, had no power to delegate her authority by taking in two other persons to act with her. If she acted *bona fide* in the capacity of the natural guardian of her son, I should not be inclined to hold that any disposition made by her was invalid for the mere reason that other persons, who were not authorised to deal with the property, joined in the transaction, but the more important question to be decided is whether the alienation of joint family properties can be justified under the circumstances of this case. Regarding it as an act of a guardian of a minor, against whom a claim for maintenance had been preferred, was it a prudent act to buy off an uncertain claim for future maintenance for life by making a gift of ancestral property in perpetuity? Chinnapen Janaki might have died immediately after receiving the gift; in fact she lived only for three years more, by which time she had parted with her rights in the property. *Prima facie* I consider that it was a breach of trust on the part of the plaintiff's guardian to make permanent alienations of immoveable property for the purpose of providing for the maintenance of a person who was only entitled to be maintained for her lifetime according to the Hindu Law. In Lewin's Law of Trusts, XII Edition, page 710, the general principle is stated to be that, if a trustee does without suit what would have been ordered by the Court and what is compellable by suit his act is valid. If the plaintiff's mother had been appointed guardian by the Court under the Guardians and Wards Act, she would have had to apply under s. 34 cl. (*e*) for appropriating such portion of the income of the ward's property as the Court might direct towards the maintenance of the persons dependent on him. She would have had no power to transfer any part of the immoveable property without the previous permission of the Court (*vide* s. 29), and no Court would have given permission for a permanent transfer of immoveable property without the strongest reasons being forthcoming. The obligation of the minor to maintain his father's senior widow was only co extensive with the widow's lifetime, and the power of the guardian to alienate the family property must also be regarded as co-extensive with that obligation.

It is argued that the plaintiff's guardian's act can be justified as having saved the plaintiff from being sued for maintenance. As a matter of fact it did not prevent the senior widow from afterwards suing the plaintiff, and if no provision had been made such as that contained in Ex. II and if the widow had sued for maintenance it is impossible to believe that any Court would have decreed a permanent transfer

(1) 59 Ind. Cas. 681; 43 M. 824; 12 L. W. 249; (1920) M. W. N. 529.

(2) 45 Ind. Cas. 905; 41 M. 561; 34 M. L. J. 381; 23 M. L. T. 266; (1918) M. W. N. 265; 7 L. W. 454.

of ancestral properties to meet a claim for maintenance for life.

In my judgment, therefore, the permanent alienation made under Ex. II was wholly unjustifiable and must now be set aside. The action of the plaintiff's guardians in not defending O. S. No. 150 of 1920 must, in this view of the case, be regarded as grossly negligent.

The appeal is, therefore, allowed and the plaintiff will be given a decree as prayed for in his plaint except as to his claim for mesne profits from 20th December 1903. As regards mesne profits, the alienation by the plaintiff's guardian being voidable, as explained in *Bhirgee Nath Chaube* v. *Narsingh Tewari* (3) and *Subba Goundan* v. *Krishnamachari* (4) and not having been repudiated before the institution of this suit, I agree with my learned brother in thinking that the plaintiff is entitled to mesne profits at the rate found by the lower Court to be fair from the date of suit only and the decree will provide accordingly. The decision in *Saraj Ranjan Chowdhury* v. *Prem Chand Chowdhury* (5) to which our attenation was drawn at the eleventh hour is not in point. There is no doubt that a plaintiff could not under any circumstances recover mesne profits for more than 3 years before suit as that remedy would be barred by Art. 109, Limitation Act. That is all that the case is an authority for. As each side has succeeded in part, each will bear his own costs in the appeal.

Odgers, J.—I agree. My learned brother has dealt with the reasons why the first ground on which the learned Subordinate Judge supported this claim, namely, that it was a proper provision for maintenance, cannot be supported. I am also of opinion that the second ground, namely, that it was a family settlement, or, as it was well stated, as being the price of family peace equally cannot be supported. That the senior widow had a claim for maintenance is of course not disputed. The only question was as to its *quantum* and, in my opinion, it cannot be said that it was a *bona fide* buying off or a settlement of family dispute when that was the only question.

(3) 35 Ind. Cas. 475; 39 A. 61; 14 A. L. J. 1161.

(4) 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112.

(5) 43 Ind. Cas, 781; 22 C. W. N. 263; 27 C. L. J. 257.

After our judgment in this appeal had been pronounced, a discussion arose regarding the mesne profits which ought to be allowed to the plaintiff who had succeeded in the appeal before us.

It is contended for the appellant that mesne profits should be allowed from the date of the alienation by the plaintiff's guardian which we have held, in our judgment, to be wholly unjustifiable and have accordingly set aside. On the other hand, the respondent contends that the alienation being only voidable and not void, mesne profits can only be awarded from the date when the alienation is set aside, *i.e.*, by reference back, to the date of the plaint. The question, therefore, arises as to whether the alienation evidenced by Ex. II is void *ab initio* or only voidable. There is no doubt on the authorities that the alienation by a Hindu widow of her husband's estate as against a reversioner is good until the sale is set aside. For instance, in *Rangaswami Goundan* v. *Nachiappa Goundan* (6) it was held that "when the alienation of the whole or part of the estate is to be supported on the ground of necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one"; See also *Bijoy Gopal Mukerji* v. *Krishna Mohishi Debi* (7), where their Lordships say referring to the alienation of the Hindu widow "Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir." That being the state of the law with regard to the alienation of a deceased husband's estate by a Hindu widow, does it make any difference if the alienation is not by a Hindu widow as such but by her as guardian for her minor son who takes it as the estate of the deceased father? Apparently there is no difference in principle and it has been held by the Calcutta High Court in *Krishna Dhone* v. *Bhagaban Chandra* (8) that a sale of a

(6) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 610; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66.

(7) 34 C. 329 at p. 333; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(8) 34 Ind. Cas. 188.

minor's property in fraud of his rights is only voidable and is valid till avoided. After the argument was concluded we were referred by Mr. Bhashyam to a statement in *Saraj Ranjan Chowdhury* v. *Prem Chand Chowdhury* (5). That was a case of limitation when the question arose whether Art. 100 of the Limitation Act was applicable to a suit for mesne profits where possession had been obtained by the defendant under a sale subsequently set aside. The appeal was originally heard by Doss and Richardson, JJ., who differed in opinion. Doss, J., at page 267* says: "It is only when the sale is finally set aside by a suit or the decree is finally reversed on appeal, that the possession by virtue of the ultimate judicial declaration becomes wrongful, not merely from the time when such declaration is pronounced but *ab initio*, *i. e.*, from the time the unsuccessful party or the purchaser was installed into possession," and he held that the plaintiff could recover mesne profits for the whole time during which the defendant had been in possession. Richardson, J., differed holding that the claim for mesne profits for more than three years before suit was barred. On the hearing of the Letters Patent appeal by three Judges the opinion of Richardson, J., prevailed. If, therefore, the *dictum* of Doss, J., is treated as applicable to the facts of the present case, of which I am not convinced it would appear to have been overruled. In *Subbe Goundan* v. *Krishnamachari* (4) there was a suit instituted by the co-parceners to set aside a sale of ancestral immoveable property by the manager on ground that the sale was not for family necessity. Here again it was said by the learned Judges (Kumaraswami Sastri and Devadoss, JJ.,) that in the case of sales by a father or managing member of a joint family for alleged necessity the sale will be good till avoided as it is open to the other co-parceners to affirm the transaction. The learned Judges there followed the ruling in *Bhirgee Nath Chaube* v. *Narsingh Tewari* (3) and limited the claim for mesne profits to the period from the date of suit as there was no repudiation before the suit. I do not think that the fact that the plaintiff could not, until he had attained majority, elect to either affirm or disaffirm the transaction can make any difference in principle. By reasons of his disability the law gives him no title to assert his legal rights until his disability is at an end. The learned Vakil for the plaintiff referred to a decision of the Privy Council in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (9) but nothing can be gained from the judgment of their Lordships of the Privy Council in that case as to the period for which mesne profits should be allowed. Their Lordships held that as the sale-deeds in question were invalid as such, the claim for mesne profits was well founded and the amount would be as ascertained in execution proceedings. The decision, therefore, does not affect the present case. On these considerations and on the state of the authorities, I am of opinion that in this case the mesne profits should be allowed from the date of suit and I would direct accordingly.

Appeal allowed.

V. N. V.

(9) 35 C. 420; 7 C. L. J. 335; 12 C. W. N. 393; 18 M. L. J. 100; 5 A. L. J. 184; 11 Bur. L. R. 49; 3 M. L. T. 344; 10 Bom. L. R. 230; 35 I. A. 48 (P. C.).

*Page of 22 C. W. N.—[*Ed.*]

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2194 OF 1922.

February 24, 1925.

Present:—Justice Sir Hugh Walmsley, KT.

UPENDRA NATH GHOSH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHUSAN SAHANA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 2 O. XLI, r. 4—Defendant-appellants—Abatement of appeal—Easement—Declaratory suit—Parties.

In the case of defendants-appellants when the appeal proceeds on a ground common to all of them, the abatement of the appeal as against one of the appellants has not the effect of causing the appeal to abate as against all of them. The principle of O. XLI, r. 4, C. P. C., is applicable to such a case. [p. 971, col. 2.]

Kali Dayal Bhattacharjee v. *Nagendra Nath Pakrashi*, 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44 and *Pulin Bihari Roy* v. *Mohendra Chandra Ghosal*, 67 Ind. Cas. 10; 34 C. L. J. 405, distinguished.

In a suit for declaration of an easement, servient owners who are not in possession and who have done nothing in the way of giving a cause of action to the plaintiff are not necessary parties. [p. 972, cols. 1 & 2.]

Madan Mohan Chakravarty v. *Sashi Bhusan Mukherji*, 31 Ind. Cas. 549; 19 C. W. N. 1211, followed.

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 19th May 1922, reversing that of the Munsif, Kalna, dated the 30th September 1920.

Babus *Samatul Chunder Dutt* and *Debi Prosad Dutt*, for the Appellants,

Babus *Mohendra Nath Roy* and *Ramgati Sirkar*, for the Respondents.

JUDGMENT.—The plaintiffs prefer this appeal. They sued to obtain a declaration of their right to take water from the defendants' tank for the purposes of irrigation and for orders directing the defendants to abstain from obstructing them.

The defendants denied the existence of the right and said that the plaintiffs had never been in the habit of taking water from the tank, and that they could not acquire any right by prescription against the defendants, as they were both the tenants of the same landlord. Another defence was that if the right existed at all it was confined to three plots immediately adjoining the tank and that the plaintiffs by breaking down an ail on the further side of those plots had increased the area to which water would flow and had thereby added to the burden and in consequence forfeited the right altogether. Defect of parties was also pleaded.

The learned Munsif found that the suit was not bad for defect of parties and that the plaintiffs had proved long user from which an origin in grant could be inferred but he held that the right was limited to the three western plots only: he did not accept the argument that the plaintiffs had forfeited the right by trying to extend it to the plot on the east. On these findings he gave the plaintiffs a partial decree.

The defendants preferred an appeal to the District Court. While it was pending one of the defendants, Mosabbar Shana, died the remaining defendants did not apply for the substitution of his heirs within the time allowed by law and the appeal abated so far as he was concerned. The plaintiffs urged in consequence that the whole appeal abated.

The learned Judge held that the whole appeal did not abate. In regard to the defendants' plea of non-joinder he held that the omission of three ladies was fatal to the suit. On the facts he agreed with the First Court, although his finding about a grant is stated less definitely, but he held that by adding to the burden the plaintiffs had forfeited their right altogether. In short he dismissed the suit for two reasons: the first that three lady co-owners had not been made parties, the second that the plaintiffs had forfeited the right by trying to enlarge it.

I may add that there was an appeal by the plaintiffs in regard to the plot on the east that was dismissed and I am not concerned with it. The present appeal relates only to the three plots on the west.

Four questions have been urged before me, namely, whether the appeal could proceed, whether the suit was bad for defect of parties, whether such a right could be acquired by the plaintiffs against the defendant, while they were both tenants of the same landlord, and whether the Judge's view that the plaintiffs forfeited their right is correct.

On the first question two authorities have been quoted for the plaintiffs in support of the contention that the omission to substitute Mosabbar's heirs had the effect of causing the whole appeal to abate.

They are the cases of *Kali Dayal Bhuttacharjee* v. *Nagendra Nath Pakrashi* (1) and *Pulin Bihari Roy* v. *Mahendra Chandra Ghosal* (2). In the first case the appeal had abated as against one of the plaintiff-respondents who had obtained a decree for possession. It appears to me that different considerations obtain when the abatement is as against a defendant-appellant. In the second case the problem was avoided. On these authorities I am not prepared to hold that the appeal abated as against all the appellants. I think the case is one to which the principle of O. XLI, r. 4 is applicable. The appeal proceeds on grounds common to all the defendants and one of them might have appealed and secured a modification of the decree in favour of all. Surely, therefore, it is unreasonable to hold that the absence of one must disqualify the others from carrying on the appeal. That is the view taken by the learned Judge and I agree with him that the appeal could proceed.

The next question, also a tenchnical one, is raised on behalf of the defendants. The learned Judge found that three ladies, the daughters of Sushar, the deceased brother of the first defendant, have an interest in the tank and that they ought to have been made parties. As the First Court took the opposite view it is said that the learned Judge has offended against the provisions of s. 99, C. P. C. It is necessary, however, to see first whether those ladies were necessary parties. The Munsif found and his finding is not displaced that they were not

(1) 54 Ind. Cas 822; 30 C. L. J. 217; 24 C. W. N. 44
(2) 67 Ind. Cas. 10; 34 C. L. J. 405.

in actual possession and that they had no hand in resisting the plaintiffs. The Judge added the fact that no one knew the extent of their fractional interest. It appears further that two defendants were added after the filing of the written statement, and it has not been suggested to me that any one else was named in the written statement as a necessary party. This last point is a reason for being slow to accept the learned Judge's views. The other points bear on the matter whether the suit could proceed in the absence of the three ladies, and I think that they afford reason for holding that it could, particularly the fact that they had done nothing in the way of giving a cause of action to the plaintiffs. In this view I am supported by Chatterjea, J.'s judgment in the case of *Madan Mohan Chakrarty* v. *Sashi Bhusan Mukherji* (3).

The third question is a very difficult one as pointed out by Chatterjee, J., in the judgment just mentioned. I do not think it arises, however, for, as I read the finding of the learned Judge it is that the circumstances warrant the presumption of grant. That was the Munsif's finding expressed clearly, and more than once. The learned Judge is less definite but in the paragraph dealing with the rights of one lessee against another, he rejects the defendants' argument for two reasons, the first is that he thinks that one lessee can prescribe against another, and the second is that the matter is not one of prescription but of grant. He says that user comes down "from a very long time which gives rise to a presumption of grant." He goes on to say that "I agree with the learned Munsif that the plaintiffs had the right" and the Munsif, it must be remembered in the ordering portion of his judgment declared plaintiff's right of easement by ancient grant. I hold, therefore, that the learned Judge has endorsed the First Court's specific finding of grant and, therefore, that the question as to the rights of one lessee against another does not arise.

The fourth question raises a problem which is enveloped in obscurity. This is not surprising for easements and natural rights show such infinite variety that a hard and fast rule cannot be expected. In the present case the leading feature for consideration is, I think, that the additional burden can easily be removed. As the dominant and servient tenements can be restored to the *status quo ante*, I think the view taken by the Munsif is reasonable, namely, that the plaintiffs should have their right declared so far as it extends to the three plots on the west.

The result is that I allow the appeal, and set aside the judgment and decree of the lower Appellate Court, and restore those of the First Court. I think a supplementary order is required for the purpose of ensuring that the *status quo ante* is restored, and I direct that the declaration be conditional upon the plaintiffs replacing the ail between the western plots and the eastern plots within three months from the date of this decree. The ail to be made must be adequate and it will be open to the defendants to move the Court if they are not satisfied as to the alignment and adequacy of the ail.

As to costs, the Munsif's order will stand as to costs in his Court; the parties will bear their own costs in this Court and in the lower Appellate Court.

N. H. *Appeal allowed.*

(3) 31 Ind. Cas. 549; 19 C. W. N. 1211.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 303 OF 1924.

May 18, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

HUSAIN BAKSH—DEFENDANT—APPELLANT

versus

M. MAHFUZUL HAQ—PLAINTIFF AND MUHAMMAD HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Shia Law—Pre-emption, right of, when arises—Properties never held jointly, effect of—Right of way, joint—Co-sharers, more than two, effect of.

The right of pre-emption under the Shia Law is of a much more restricted character than that allowed under the Hanafi Law. According to the Shia Law *shufa* is the legal title of one partner (*sharik*) in the joint property to the share of another partner (*sharik*) therein in the event of its transfer by sale, and a right of pre-emption can only be claimed under that law by a person who is a partner of a share in the joint and undivided property. [p. 973, col. 2.]

Under that law there can be no right of pre-emption except in relation to property which is held jointly or which was at one time held jointly and has been divided off while the roads and rivulets passing through them continue to be held in joint proprietary right and the proprietary right in such roads and rivulets is included in the sale. [p. 974, col. 1.]

Where the properties have not been held jointly at

any time, there can be no right of pre-emption because there never was any original partnership in respect of the properties to permit of a right of way being treated as a residuum of that joint right. If any right of way is enjoyed jointly by the owners of the properties, it is only a subsidiary or beneficial right appertaining to each property but not a right flowing out of the joint nature of the properties held by each. [*ibid.*]

Upon a sale of property by a Shia Muhammadan no right of pre-emption arises, where there are more than two co-sharers in such property. [p. 975, col. 1.]

Abbas Ali v. *Maya Ram*, 12 A. 229; A. W. N. (1890) 93; 6 Ind. Dec. (N. S.) 895 and *Muhammad Razi-ud-din* v. *Raghubir Prasad*, 46 Ind. Cas. 82; 16 A. L. J. 507, followed.

Second appeal from a decree of the Additional Subordinate Judge, Saharanpur, dated the 22nd October 1923.

Mr. *S. A. Haider* and Dr. *S. N. Sen*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The plaintiff-respondent sued for pre-emption under the Muhammedan Law in respect of a house situated in Saharanpur city which was sold by *Musammat* Habib-un-nissa to Husain Bakhsh on the 9th January, 1920. The house of the plaintiff stands to the north of the house in dispute. The allegation of the plaintiff was that two *parnalas* of his house discharged water into the inner courtyard of the house sold; that there was a joint wall between the two houses, and that there was also a plot of land lying in front of the doors of the two houses which was used as a common pathway, closed on one side, and belonging to the persons whose houses opened towards that lane. The vendor and the vendees are Shias. They denied that the plaintiff was a co-sharer in the property sold or in any pathway appertaining to it or that the plaintiff had any right to claim pre-emption. The Court of first instance found that the plaintiff was not entitled to pre-emption as he had no joint interest in any portion of the property sold, and there was no joint wall standing between the two houses nor any joint pathway belonging only to these two tenements. The lower Appellate Court, however, held that although there was no joint wall or other joint interest held by the parties in the house in question, there was a blind passage in front of the doors of the houses of the parties, which was common to all the houses existing there, and inasmuch as that passage was sold along with the house in question, the plaintiff as a sharer in the passage was entitled to claim pre-emption in respect of both.

The defendant-vendee appeals and his contention is that the plaintiff is not entitled to pre-emption, firstly, because there was no joint passage belonging to the houses of the parties; and secondly, because no right of pre-emption could be enforced as the property was not divided property and the common passage was owned by more than two persons having houses opening towards it.

The right of pre-emption under the Shia Law is of a much more restricted character than that allowed under the Hanafi Law. According to the Shia Law *shufa* is the legal title of one partner (*sharik*) in the joint property to the share of another partner (*sharik*) therein in the event of its transfer by sale, and, as stated by Baillie, a right of pre-emption can only be claimed under that law by a person who is a partner of a share in the joint and undivided property (Baillie's Muhammadan Law, page 179).

According to the Sharaya-ul Islam quoted by Shyama Charan Sarkar, the right of pre-emption does not belong to a neighbour nor does it attach to the property that has been divided, unless a road or rivulet of water (if any running through it) be still in joint tenancy. It is a necessary condition that the person claiming a right of pre-emption should at that time be (actually) a co-sharer (of the seller).

Tagore Law Lectures, 1874, page 447.

Again:—"When there is more than one claimant by right of pre-emption, opinions are divided as to the establishment of the right. According to one of these it is established absolutely whatever be the number (of the claimants); according to another it is established with a plurality of partners when the claim is for land, but not when it is for more than a single slave; and according to the third it is not established with respect to anything when there is more than one (co-sharer). And this (last opinion) is the most prevalent".

Similarly says Baillie :—

"It is otherwise in the case of lands which have been divided off, where the roads or rivulets passing through them continue to be held in joint property, and one of the partners in the latter sells his share together with his portion of the divided land, for there the other partner's right of pre-emption attaches not only to the share in the road or rivulet which was held in joint property but also to the portion of the land

divided off as being connected in sale with the other. If, however, the land should be sold separately, there could be no ground for a claim for pre-emption in respect of it; and even with respect to the road or rivulet which continued in joint property, it is only when sufficiently wide to admit of a division that the right can attach to either of them" (Baillie's Imamia Law, page 177).

Thus there can be no right of pre-emption except in relation to property which is held jointly or which was at one time held jointly and has been divided off while the roads and rivulets passing through them continue to be held in joint proprietary right.

Where the properties are or were not held jointly at any time as in the present instance, there can be no right of pre-emption because there never was any original partnership in respect of the said properties to permit of the right of way being treated as a residuum of that joint right. If any right of way is enjoyed jointly by the owners of the properties, it is only a subsidiary or beneficial right appertaining to each property but not a right flowing out of the joint nature of the properties held by each. This will be further clear from another passage of the Sharaya-ul-Islam, translated by Baillie:—

"There is no privilege of pre-emption to a neighbour, nor in property that has been divided, unless the road or rivulet of water, running through it, is still held in partnership. The privilege is established by general assent when there are only two partners; when there is more than one claimant, opinions are divided. According to one of these, it is established absolutely, whatever be the number. By another it is established with a plurality of partners in the case of lands but not of a slave. By the third it is not established in respect of anything when there is more than one partner. And this last opinion is the most prevalent and best supported by traditional authority". (Baillie's Muhammedan Law, page 179).

The Court below refers to a passage from the Sharaya-ul-Islam, which states:—

"The right of pre-emption is established in land where there is a partnership in the pathway or in the drinking water, if sold long with the land".

But this passage refers to a case where the property was originally joint and has been divided off, leaving the pathway or the drinking water or rivulet joint. It also refers to a passage in Jawahir-ul-Kalam, a commentary on the Sharaya-ul-Islam, where it is laid down:—

"There is another precept which has been held to be correct by more than one. There is a house belonging to a tribe of people, who partitioned it and each of them took a piece separately and built on it and left between them an open space in the house in which they have their passage. A man came and purchased the shares of some of them. Can he do so (without the risk of being pre-empted)? The reply was, he can do so; but he should close the door and open it on another pathway".

That extract only goes to confirm what we have said above, namely, that the right of pre-emption can only be exercised where the property is or was held jointly at one time or another and has been divided off, leaving a residue of the proprietary rights in the way or water undivided, if the latter is included in the sale. An extract from the Riyayat-ul-Misil was cited before the Court below on behalf of the defendant-appellant which goes to show that no right of pre-emption can be exercised unless there is jointness in the substance of the rights.

The Court of first instance observed that the passage lying in front of the doors of the houses of the parties was used by the parties and owners of two or three other houses and that it belonged to the owners of all these houses jointly. But the finding of the lower Appellate Court on that point is not very specific or clear. All that it says is that the passage was common to all the houses and a right to that passage was sold along with the house in question. Assuming, however, for the sake of argument that that passage was the joint property of the owners of the houses, which have doors opening towards it, including the present plaintiff and the defendant vendor, a joint proprietary right to that passage would not give the plaintiff a right of pre-emption, because the houses, to which that passage appertain, were never at any time joint property. They are separate houses, having a distinct and separate title. The passage in question does not appertain to any joint property, which had been divided or partitioned or to a house divided between the co-sharers thereof and in respect of which a right of pre-emption could be claimed.

In *Abbas Ali* v. *Maya Ram* (1) and *Muhammad Razi-ud-din* v. *Raghubir Prasad* (2), it was held that upon a sale of property by a Shia Muhammadan no right of pre-emption arises, where there are more than two co-sharers in such property. Here the property was not held by the plaintiff and the defendant-vendor jointly at all. The houses owned by them were never joint. The passage in question is either a public way or a private pathway belonging to more than two persons. In either case, the plaintiff is not entitled to claim pre-emption. This appeal is, therefore, allowed and the claim of the plaintiff dismissed with costs here and hitherto including fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

(1) 12 A. 229; A. W. N. (1890) 93; 6 Ind. Dec. (N. S.) 895.

(2) 46 Ind. Cas. 82; 16 A. L. J. 507.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 1972 OF 1924.

February 27, 1925.

Present :—Mr. Justice LeRossignol.

THAKAR DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM DASS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 5, 8—Arbitration, reference to, in pending suit—Failure of arbitrators to act—Procedure—Refernece, whether can be superseded.

Where a dispute in a pending suit is referred to arbitration and the arbitrators fail to act, the Court is not bound to take action under para. 5 of Sch. II to the C. P. C., if neither party has served a notice upon the other for the removal of an arbitrator and the substitution of another. Even where the Court takes action under para. 5 it is within its discretion to refuse to appoint a fresh arbitrator and to supersede the reference. In a case where nothing has been done under a reference for several years it is desirable that the reference should be superseded and the case dealt with by the Court itself.

Miscellaneous appeal from an order of the Senior Sub-Judge, Amritsar, dated the 16th June 1924.

Dr. *Nand Lal*, for the Appellants.

Mr. *Badri Das*, for the Respondents.

JUDGMENT.—This is a miscellaneous appeal from the order of the Senior Sub-Judge superseding a reference to arbitration. Having heard Counsel I see no reason to interfere. On the contrary I entirely agree with the learned Sub-Judge that an order for supersession was a proper order to pass in this case. The suit is one for dissolution of partnership and rendition of accounts and has been dragging its slow length along from the 2nd of December 1919. Twice before this, references to arbitration have been superseded and twice before this, has the case come up in revision to this Court. Nothing has been done in the case except to refer it to arbitration with no result up-to-date.

For the appellants it is contended that the action of the Court under para. 8 of the Second Schedule of the Code was unjustified and it should have taken action under para. 5. In my opinion the Court could not take action under para. 5, inasmuch as neither party had served a notice upon the other for the removal of an arbitrator and the substitution of another. Even, however, if the Court had taken action under para. 5 it was within the discretion of the Court to refuse to appoint a fresh arbitrator and to supersede the reference. In a case such as this where nothing has been done for over 5 years it is very desirable that the reference to arbitration should be superseded and the case be dealt with by the Court itself.

For these reasons I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 37 OF 1923.

August 8, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

GIRJABAI SHIVDEORAO VINCHURKAR—DEFENDANT—APPELLANT

versus

NARAYANRAO GANPATRAO VINCHURKAR—PLAINTIFF—RESPONDENT.

Pensions Act (XXIII of 1871), s. 4—Kulkarni *commutation—Suit by co-sharer for his share of income—Certificate of Collector, whether necessary—Tenants-in-common—Eldest brother collecting revenue for all—Principal and agent—Limitation Act (IX of 1908), Sch. I, Art. 89.*

A suit for accounts of the income of *kulkarni* commutation of certain villages and of the revenue received from the *taluka* treasury is not maintainable without a certificate of the Collector inasmuch as it relates to a grant of money conferred by the British Government within the meaning of s. 4 of the Pensions Act. [p. 976, col. 2.]

Damodar v. *Satyabhambai*, 31 B. 512; 9 Bom. L. R. 889 and *Babaji Hari* v. *Raja Ram Ballal*, 1 B. 75; 1 Ind. Dec. (N. S.) 50, relied on.

Where the eldest representative of a family collects the whole revenue of which he and his brothers are tenants-in-common there is a relationship of principal and agent, the eldest representative being the agent of his brothers in respect of the recovery of the particular portion of that revenue in regard to which those brothers have a share. [p. 978, col. 1.]

In such a case a suit for recovery of the plaintiff's share is governed by Art. 89 of the Limitation Act and is within time if brought within three years of the death of the agent [*ibid.*]

Gabu Naroba v. *Zipru Ramsing*, 59 Ind. Cas. 357; 45 B. 313; 22 Bom. L. R. 1289, relied on

First Appeal from the decision of the First Class Subordinate Judge at Nasik, in Suit No. 218 of 1921.

FACTS.—Three brothers, Raghunathrao, Krishnarao and Madhavrao, who owned certain *mirasi*, *inami*, *patilki* and *vatani* lands and cash allowances and Babs, entered into an arrangement in 1869 by which the eldest brother Raghunathrao was to remain in sole management of the properties and to divide the income among the brothers. Raghunathrao died in 1889, and was succeeded by Shivdeo Rao his adopted son. This arrangement was confirmed again in 1897. Shivdeo Rao, on his death in 1918, was succeeded by his widow Girjabai. In 1921, Narayanrao, a grandson of Madhavrao sued Girjabai to recover his share in the income of his properties. Among the Babs was the income of the Kulkarni commutation of three villages and the income of the Rusum received from the Taluka Treasury. The defendant contended firstly that as regards these four items the suit was not maintainable in the absence of a certificate under s. 4 of the Pensions Act.

Mr. *G. N. Thakor*, (with him Mr. *V. D. Limaye*), for the Appellant.

Mr. *D. R. Patvardhan*, for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—[After stating the facts the judgment proceeded:—] First, it has been urged that a certificate under the Pensions Act is necessary in view of the provisions of s. 4, and that a suit cannot be entertained without such a certificate. It is contended that the suit, so far as it relates to these four items, relates to a grant of money conferred by the British Government within the meaning of s. 4. The learned Judge overruled this objection on the ground that this was a suit for accounts generally of various items, and that a suit of this nature cannot be said to relate to pension or grant of money within the meaning of the section. There are no doubt conflicting considerations, one favourable to the contention and the other against it. In the present case, it is urged on behalf of the respondent that really in virtue of the two arrangements, one in 1869 and the other in 1897, the defendant must be taken to be in the position of a person who, as soon as the money was received, held the money for the other sharers so far as those sharers were concerned and that the money then ceased to be a grant from the Government. The decisions bearing on this point which have been referred to are *Damodar* v. *Satyabhamabai* (1) on the one hand, and *Raghavendra Ayyaji Desai* v. *Gururao Raghavendra Desai* (2) on the other. Looking at the point for the moment, apart from the decisions, it is difficult to say that the suit, so far as these four items are concerned, does not relate to the grant of money by the British Government within the meaning of s. 4. It is true that there was an arrangement between the parties, whereby the defendant's husband was to receive the money and then distribute it among the sharers according to their respective shares. But that by itself does not afford a sufficient basis for holding that the suit does not relate to those four items. The judgment of Chandavarkar, J., in *Damodar* v. *Satyabhamabai* (1) in which the earlier decisions on this point have been referred to, is very clear on this point, and, though there are observations to the contrary in *Raghavendra Ayyaji Desai* v. *Gururao Raghavendra Desai* (2), I think that the contention of the defendant on this point must be allowed. It is true that the section must be strictly construed but we cannot ignore the plain meaning of the words used. This conclusion necessitates giving time to the plaintiff to produce the necessary certificate. But it would not be necessary in any way under the circumstances of this case to delay the further proceedings in this suit. There is at present only a preliminary decree for taking accounts, and it can be provided in the decree of this Court that after the accounts are taken, before any decree in respect of these four items is passed, the plaintiff must produce the necessary certificate under the Pensions Act, and, if he fails

(1) 31 B. 512; 9 Bom. L. R. 889.
(2) 19 Ind. Cas. 882; 37 B. 442; 15 Bom. L. R. 362.

to do so, he cannot get any relief in respect of these items.

The next point relates to limitation. As regards that question the learned Judge has overruled that plea on the ground that the suit would be governed either by Art. 120, in which case the period of six years would apply or Art. 89 in which case no doubt the period would be three years; but it would run from the termination of the agency or from the date of the refusal to render accounts. In the present case it is not suggested that there was any demand and refusal to render accounts, and preferably it seems to me that Art. 89 would apply having regard to the terms of the agreement between the parties. It may be said, however, that when Shivdeorao died in 1918, the arrangement of 1897 came to an end. Without expressing any opinion as to whether or not in virtue of that very arrangement Shivdeorao's widow was in the position of an agent within the meaning of Art. 89, as the suit is brought within three years from Shivdeorao's death, it is clearly not barred.

It has been urged further in connection with this point, that as after 1890 there has been no rendering of accounts and no payments made by the defendant in respect of those items, the plaintiff's right to recover those items is extinguished. In the first place, though this point is mentioned in the plaint, no issue as to exclusion to the knowledge of the co-sharer for over twelve years from enjoyment of certain immoveable property was raised. It is assumed by the defendant for the purposes of this argument that these *babs* should be treated as immoveable property, and it is urged that the right of the plaintiff is extinguished. This point would require investigation on different lines altogether, and without allowing the plaintiff a further opportunity to adduce evidence on the point, it could not possibly be decided as desired by the defendant. There is no reason why such further opportunity should be allowed, and having regard to the facts in the case, it seems to me that the point is without any substance. I have already referred to the various suits, in which the right was asserted by one branch or the other and either allowed by the Court or compromised by the parties. Under the circumstances it would be difficult to hold that there has been exclusion. The letter written by the defendant's *kul mukhtyar* on July 26, 1920, to the present plaintiff is sufficient to negative the suggestion of such exclusion.

The next question relates to the merits of the plaintiff's claim. As regards item No. 12 the lower Court has disallowed the plaintiff's claim as it was admitted by the plaintiff's father in an earlier proceeding that he had given up the claim to that item. In spite of the contention of the respondent against this conclusion, it is clear it must be accepted. The admission of the plaintiff's father is unequivocal, and there is no reason why the decree on this point should be altered. Apart from that, the learned Judge has considered in his judgment the different items in respect of which various arguments were urged, and has come to the conclusion on a consideration of the two documents, Exs. 48 and 92, that all these *babs* really belonged to the family, and that all the members of the family were interested therein. The wording of the letter written by the defendant's *kul mukhtyar* in July 1920 affords corroboration of the plaintiff's claim: and indeed in the evidence of the defendant's *kul mukhtyar*, it has been practically admitted that all the suit *babs* are the private properties of the Vinchurkar family, that they are their ancestral properties, and that they belonged to three brothers Raghunathrao, Krishnarao and Madhavrao. It is urged on behalf of the defendant, as against the statement of his own *kul mukhtyar*, that, that was a mistaken statement as the witness was speaking without reference to the account books. That does not appear to me to afford sufficient ground for not accepting the statement of the witness. It is hardly necessary to deal with all these *babs* separately. It seems to me that in spite of the contentions urged before us on behalf of the defendant, the conclusion of the Trial Court on this point must be accepted. I only desire to add with reference to this point that these *babs* are of such a nature that it is possible that some of them may be found to be non-existent on taking accounts, or they may have existed only for a time during the period in respect of which the accounts are to be taken. That, however, will be taken into consideration when the accounts are taken. All that we decide now is that any items in respect of these *babs*, if received by the defendant, should be accounted for.

In the result, therefore, I would confirm the decree of the Trial Court, subject to

the reservation that on taking accounts no decree in respect of anything payable in respect of items Nos. 14, 19, 26 and 33 should be passed in favour of the plaintiff, unless he produces the necessary certificate under the Pensions Act before that time.

The appellant to pay the costs of the respondent in this appeal. The cross-objections are dismissed with costs.

Fawcett, J.—I concur in the judgment just delivered. With regard to the objection raised under the Pensions Act, the terms of s. 4 of that Act are very wide, and in view of the ruling of this Court in *Damodar* v *Satyabhamabai* (1) and similar rulings such as *Babaji Hari* v. *Raja-Ram Ballal* (3) I do not think we can possibly say that this suit, so far as it relates to the four items Nos. 14, 19, 26 and 33, does not fall under s. 4.

In regard to the points of limitation which have been urged, the first question to consider is the nature of the relations between the plaintiff and the defendant. So far as the defendant, as the eldest representative of the family, collects the whole revenue, of which the three brothers were tenants-in-common there clearly, in my opinion, is a relationship of principal and agent, the defendant being the agent of the plaintiff in respect of the recovery of the particular portion of that revenue, in regard to which he has a one-third share, and if that is the case, then Art. 89 of the Indian Limitation Act, and not Art. 62, is the proper Article to apply. In support of that I may refer to the ruling of this Court in *Gabu Naroba* v. *Zipru Ramsing* (4). But supposing that the relationship of principal and agent was broken by the arrangement of 1897, under which the plaintiff's father and the defendant's husband Shivdeorao agreed that the plaintiff might collect his share of certain items of revenue direct, then, if in contravention of that arrangement the defendant has collected the revenue that the plaintiff might have collected on his own account, the relationship becomes one of the defendant being a constructive trustee under s. 94 of the Indian Trusts Act. The defendant in that case would be practically in the position of a trustee *de son tort* by intermeddling and collecting this revenue; and her obligation to account still remains under s. 94 of the Indian Trusts Act. It is not open to her to say that she is a mere trespasser, and, therefore, not liable to account. In support of that I may refer to *Dhanpat Singh* v. *Mohesh Nath Tewari* (5). If in regard to certain items of the revenue the relationship is that of a trustee and *cestui que trust*, then the right Article to apply would, it seems to me, be Art. 120 and not Art. 62. Here, again, I may refer to rulings in cases similar to this, *Muhammad Habib-ullah Khan* v. *Safdar Husain Khan* (6) and *Subba Row* v. *Rama Row* (7). But in my opinion it does not necessarily follow that the relationship of principal and agent that was originally between the parties was broken by the arrangement of 1897. There is a presumption of the continuance of the former relationship of principal and agent, and before we can conclude that, that relationship has been broken, some more definite acts than the mere passing of this agreement of 1897 are necessary. The actual facts are consistent with the continuation of the previous relationship by the mutual consent, no real effect having been given to the agreement of 1897, so far as it intended to alter the previous arrangement. Accordingly I hold that Art. 89 of the Indian Limitation Act is the proper Article to apply to this suit, and I understand it has been so applied by this Court in previous litigation between Shivdeorao and the representatives of the second branch of the family. That being so, the claim is not barred, and even if Art. 120 is applied it would only knock off about one year.

I do not think there is any substance in Mr. Thakor's main contention that there had been exclusion of the plaintiff, which would bar his claim altogether. It seems quite clear that there have been prior claims of this nature, and the defendant's *kul mukhtyar* in his evidence admitted that some of these claims have been successful. For instance, with regard to the suit of 1906, he says that a decree was passed in his favour by arbitrators; in regard to this suit of 1914 there was a compromise, no doubt for a small sum, but still it goes against the theory of exclusion, and, as I have already said, the defendant cannot take advantage of the arrangement of 1897 and say she is not liable to account, if as

(3) 1 B. 75; 1 Ind. Dec. (N. S.) 50.
(4) 59 Ind. Cas. 357; 45 B. 313; 22 Bom. L. R. 1289.
(5) 57 Ind. Cas. 805; 24 C. W. N. 752.
(6) 7 A. 25; A. W. N. (1884) 219; 4 Ind. Dec. (N. S.) 254.
(7) 32 Ind. Cas. 899; 40 M. 291; 3 L. W. 192; 19 M. L. T. 134; (1916) 1 M. W. N. 188; 30 M. L. J. 341.

a matter of fact she acts against that arrangement and herself collects the whole revenue.

K. S. D. *Decree confirmed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 2394 OF 1924.

February 26, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

SECRETARY OF STATE—DEFENDANT—APPELLANT

versus

THE DUNLOP RUBBER CO., LTD., DELHI—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 31, 48—Suit for damages against Railway Company—Wrongful conversion—Non-delivery—Limitation, commencement of.

A suit against a Railway Company to recover compensation for wrongful conversion of the plaintiff's goods where non-delivery is also alleged, is governed by Art. 31 and not by Art. 48 of Sch. I to the Limitation Act, and limitation begins to run from the date on which the goods ought to have been delivered.

Venkatasubba Rao v. *Asiatic Steam Navigation Co.*, 30 Ind. Cas. 840; 39 M. 1; 29 M. L. J. 342; 2 L. W. 805; 18 M. L. T. 236; (1915) M. W. N. 644 (F. B.), relied on.

Appeal from an order of the District Judge, Delhi, dated the 30th May 1924, reversing the decree of the Subordinate Judge, Second Class, Delhi, dated the 8th February 1924.

JUDGMENT.—The only question in this appeal is whether the suit is barred by limitation. The plaintiffs booked five bundles of cycle tubes for despatch by passenger train from Delhi to Lahore, but as the International Cycle and Motor Works, Lahore, for whom the goods were intended, refused to take delivery, the plaintiffs got the Railway to send the goods back to Delhi, and on the 25th February 1921 a servant of the plaintiffs took delivery of five bundles from the Railway at Delhi, signing a receipt for them. When the bundles were brought to the plaintiffs' premises it was discovered that only one belonged to the plaintiffs, the other four being different from those which had originally issued from the plaintiffs' shop. The plaintiffs sent the five bundles back to the Station Superintendent, Lahore, asking for the delivery of the right bundles. Finally on the 20th July 1922, they sued the Secretary of State, asking for the recovery of the one bundle which was theirs, or for Rs. 800 on account of its price, and for Rs. 3,200 on account of the price of the four missing bundles, alleging that the Railway Authorities had wrongfully converted their goods. The five bundles* were obtained back from the Railway and the Trial Court gave the plaintiffs a decree for them, but it dismissed the rest of the claim as being barred by limitation, holding that the suit was one for compensation for non-delivery of goods against a carrier, and that the limitation was one year from the time when the goods ought to have been delivered. The Court referred to Art. 30 of the First Schedule of the Limitation Act, but apparently the Article which it meant to apply was Art. 31.

On appeal the District Judge held that the plaintiffs had not based their claim on non-delivery and were not debarred from proving facts which would bring their case under Art. 48 or Art. 49, and he also held that even if Arts. 30 or Art. 31 applied time would run from the 13th June 1921, when the plaintiffs ceased to have any reasonable hope of obtaining satisfaction from the Railway, and that, therefore, after allowing two months for the notice which had to be given to the defendant under s. 80 of the C. P. C., the suit would be within time. He accordingly accepted the plaintiffs' appeal and remanded the case for decision on the other issues. From that order the defendant has appealed to this Court.

The plaintiffs' claim to the one bundle for which they were given a decree by the First Court is not contested and the dispute is only in regard to the remaining four bundles. It is true that the plaintiffs alleged in their plaint that the Railway Authorities had wrongfully converted the goods of these four bundles, and a suit for compensation for such wrongful conversion is one of the description mentioned in Art. 48. But while alleging conversion of the goods the plaintiffs are alleging at the same time non-delivery, and they expressly mentioned in thtir replication that the goods had not been delivered to them, so that the suit is also one of the description mentioned in Art. 31. The question then is which of these two Articles is to be applied in the present case.

*The bundles which were returned by the plaintiffs.—[*Ed.*]

In *Venkatasubba Rao* v. *Asiatic Steam Navigation Co.* (1), it was held by a Full Bench of the Madras High Court that a suit against a carrier for compensation for non-delivery of goods was governed by Art. 31, whether the suit was laid in contract or in tort, and further that even if Art. 49 were applicable its operation would be excluded by the special Art. 31, on the principle "*generalia specialibus non derogant.*" We agree with that decision and hold that the suit must be governed by Art. 31, which applies specially to a suit against a carrier, whereas Art. 48 is not restricted to such a suit.

Under Art. 31 time runs from the date on which the goods ought to be delivered, and the question considered by the learned District Judge as to when the recovery of the plaintiffs' goods became hopeless appears to us immaterial. The present case is distinguishable from the cases relied on by the learned District Judge by the fact that one of the plaintiffs' bundles was actually delivered to them on the 25th February 1921. Clearly the four remaining bundles ought to have been delivered to them on the same date, so that the 25th February 1921 must be taken to be the date from which the period of limitation is to be computed. It follows that the suit, not having been instituted till the 20th July 1922, is barred by limitation.

We, therefore, accept the appeal, set aside the order of the lower Appellate Court, and restore the decree passed by the Subordinate Judge. The respondents will pay the appellant's costs in this Court and the lower Appellate Court. The parties will bear their own costs in the Trial Court.

Z. K. *Appeal accepted.*

(1) 30 Ind. Cas. 840; 39 M. 1; 29 M. L. J. 342; 2 L. W. 805; 18 M. L. T. 236; (1915) M. W. N. 644 (F. B.).

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 946 OF 1922.

March 17, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

FIRM OF MADHOWJI THAWOR —PLAINTIFFS

versus

YAR HUSSAIN HYDOR DASTI AND ANOTHER—DEFENDANTS.

Contract Act (IX of 1872), ss. 223, 224—Principal and agent—Moneys spent by agent authorizedly for unlawful purpose—Agent, right of, to recover—Indemnity against unlawful acts which are not criminal—Sea Customs Act (VIII of 1878), s. 167—Acts and omissions specified in section, whether crimes.

In a suit for an account by a principal against his agent for moneys received by the agent from or on behalf of the principal, the agent is entitled to deduct moneys authorizedly expended by him for unlawful purposes out of his principal's moneys in his hands, though the agent may not be able to claim such items specifically in a suit instituted by him for the recovery of the same. [p. 981, col. 2.]

Bayntun v. *Cattle*, (1833) 1 M. & R. 265, relied upon.

An agent is entitled to indemnity in respect of unlawful acts which are not criminal, provided he has acted in good faith and without knowledge that such acts are unlawful. [*ibid.*]

The use of the expressions "offence" and "penalty" in s. 167 of the Sea Customs Act, in respect of the acts and omissions specified in that section is not itself sufficient to show that such acts or omissions are crimes, and whether they are crimes or not would depend upon the ordinary criminal law of the land. [p. 981, col. 2; p. 982, col. 1.]

Reg. v. *Tyler*, (1891) 2 Q. B. 588 at p. 594; 61 L. J. M. C. 38; 65 L. T. 662; 56 J. P. 118, referred to.

Objections to Commissioner's report in a suit filed by a commission agent against his principal for recovery of the amount due to former on foot of the account between them.

Mr. *Fatehchand Assudamal*, for the Plaintiffs.

Mr. *Kewalram Jethanand*, for the Defendants.

JUDGMENT.—These are objections to the Commissioner's report in a suit filed by the plaintiffs as commission agents for the recovery of the balance of the amount due to them on the account.

The only objection pressed on behalf of the defendants is in respect of certain items debited in the account as purchase price paid to persons who were the holders of customs permits, to enable the plaintiffs to export the defendants' goods on the strength of those permits.

Section 19 of the Sea Customs Act VIII of 1878 empowered the Governor-General in Council to prohibit either generally or from or to any specified port the export of any specified articles. These powers were amplified by the Import and Export of Goods Act XI of 1916, and enable the Governor-General in Council by the issue of the requisite notifications to prohibit or restrict the export or import of any class of goods from any port to any port, and from or to any person, or class of persons. In 1921 and 1922 a notification issued in pursuance of this Act was in force here prohibiting the export of certain goods to certain ports except under a permit issued

by the Customs Authorities in favour of any persons to whom such permits may be granted. The favoured possessors of these permits made a harvest by openly transferring the use of these permits to intending exporters on payment to them of the so-called purchase price or gratification for their forbearance to export their own goods or the goods of their own constituents, and in lieu thereof to enable the intending exporters to export their goods under such permtis, all such goods being, however, consigned in the pseudo names of the holders of the permits.

The Customs Authorities were aware that the permits were being misued, and a somewhat peculiarly worded notice dated December 3, 1921 (Ex. 38) was put in the Customs Office under the signature of the Collector of Customs, prohibiting the allottees of these permits to transfer their ownership in the quantities allotted to them without the previous sanction of the Customs Collector on pain of their names being removed from the list of the shippers to whom allotments may be made in future. This notice further warned them that such transfer would render them liable to a penalty under the Sea Customs Act. It is not clear under what authority this notice was issued, but it appears to have remained a dead letter.

It is not seriously disputed that the payments in question were authorized by the defendants. Some of the so-called purchases, were made by the defendants themselves, the plaintiffs being required by them to make the necessary payments.

The defendants say that as these payments were made for an object which was unlawful and prohibited by Statute, they are, therefore, not recoverable either in law or in equity. The obvious answer to this contention is that this is not a suit for recovery of the specific items, and the plaintiffs are not seeking the aid of the law for their recovery. The defendants have admittedly paid large sums of money to the plaintiffs against the account without any reservation as to the mode of its application. The account consists of items paid in respect of lawful objects far exceeding the amount in suit. The plaintiffs have every right to say that they have either paid off the disputed items out of the defendants' money or have validly appropriated the defendants' money towards such items and that they are now seeking the aid of the Court for the amount due in respect of legitimate objects.

It is really the defendants who are seeking the aid of the Court to recover back money which has been applied in payment of, or appropriated towards items which are said to be unlawful. As between a principal and an agent in such cases the maxim is: "*In pari delicto potior est conditio defendentis*" or as the Pandects state: "*In pari causa possessor potior haberi debet.*" It is probably on this principle that in a suit for an account by a principal against his agent for moneys received by the agent from or on behalf of the principal, it has been held that an agent is entitled to deduct moneys authorizedly expended by him for unlawful purposes: see *Bayntun* v. *Cattle* (1).

This defence, therefore, fails *in limine*. It would also appear that the defendants have failed to prove that the disputed items are irrecoverable in law. An agent is entitled to indemnity against unlawful acts which are not criminal, provided he has acted in good faith, and without knowledge that such acts are unlawful; ss. 223 and 224, Indian Contract Act. It is not necessary for the purposes of this case to consider the further question whether the rule laid down in s. 224, Indian Contract Act, applies to a crime committed by means of an innocent agent and which is of a nature where the presumption that the agent had guilty knowledge either does not arise or is rebutted.

Reliance has been placed on s. 167 of the Sea Customs Act for the contention that the purchases were either criminal or unlawful being prohibited by Statute. This contention is again misconceived.

It is doubtful if the export of goods without a permit is a crime in itself. The use of the expressions "offence" and "penalty" in respect of the acts and omissions specified in s. 167 of the Sea Customs Act is not by itself sufficient to show that such acts or omissions are declared as crimes. As said by Bowen, L. J. in *Reg.* v. *Tyler* (2). "There are certain Statutes which do not create an imperative and positive duty..., but which only impose as the result of non-compliance with the directions of the Statute, a pecuniary loss on the individual who does not so comply. In such a case, it

(1) (1833) 1 M. & R. 265.
(2) (1891) 2 Q. B. 588 at p. 594; 61 L. J. M. C. 38; 65 L. T. 622; 56 J. P. 118.

is not the intention of the Legislature to make the disobedience of the law a misdemeanour; it is only the intention that if the person does not comply with the directions...he must submit to the penalty. In each case it is a question of the construction of the Act to see if that is what is meant".

A reference to s. 186 and s. 193 of the Act would show that the grouping together of a number of heterogenous acts and omissions in s. 167 of the Act was not intended to create new crimes. Section 186 expressly provides that the award of any penalty by an officer of the Customs would not prevent the infliction of any other punishment under which the person affected thereby is liable under any law. Section 193 again provides that the penalty imposed by the Customs Authorities may be recovered as fine by recourse to a Magistrate, but it does not declare it to be a fine. Whether the export of goods in contravention of s. 167, cl. (8) is a crime or not would, therefore, depend on the ordinary criminal law of the land. It is not necessary to pursue this point any further as the goods have been exported under permits. What is, however, complained of in the present case is not the export without a permit, but the alleged improper use of the permits. There is nothing in the notification of the Governor-General in Council to prohibit such use or to declare it unlawful. No restriction was imposed on the holder of any permit to compel him to export his own goods for sale. It would be conceded that he could consign goods of his own constituent under the permit, and if so, it would follow that it was equally open to him to allow the goods of the constituent of a brother commission agent to be consigned in his own name on payment to him of a fixed sum in lieu of or in substitution of the commission which he might otherwise have earned or the profits he might have made by sending his own goods. It is no doubt regrettable that the Customs Authorities should have issued permits to a limited number of exporters thereby enabling them to demand their own prices for the use of their names, and further that they should not have carried out their intention of striking out the names of such allottees who misused their allotment permits. But there are no grounds for holding that this act was either criminal or unlawful, or if the latter, the plaintiffs knew that it was unlawful. Even if the suit be treated as one for recovery of the specific items, this objection fails.

Both parties are agreed that in view of this finding, the Commissioner's report should be accepted as correct. The result is that there will be a decree for Rs. 2,422-12-6 with interest at six per cent. per annum from date of suit to payment and costs. The Commissioner's fees as claimed by him are sanctioned, and should be included as costs.

P. B. A. *Order accordingly.*

Z. K.

MADRAS HIGH COURT.

CIVIL APPEAL No. 72 OF 1922.

November 25, 1924.

Present:—Sir Victor Murray Coutts-Trotter, KT., Chief Justice, and Mr. Justice Srinivasa Iyengar.

VADDADI KAMARAJU—PLAINTIFF—APPELLANT

versus

KOCHERLAKOTA VENKATALAKSHMIPATHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6—Hindu Law—Reversioner—Relinquishment of reversionary right—Bona fide *settlement of dispute—Test.*

A reversioner in expectancy can neither validly transfer nor agree to transfer possession of a *spes successionis.* [p. 983, col. 1.]

Sri Jagannada Raju Garu v. *Sri Rajah Prasada Rao,* 29 Ind. Cas. 241; 39 M. 554; 17 M. L. T. 419; 28 M. L. J. 650; (1915) M. W. N. 626, and *Ananda Mohan Roy* v. *Gour Mohan Mullick,* 74 Ind. Cas. 499; 50 I. A. 239; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929; 28 C. W. N. 713; 40 C. L. J. 10 (P. C.), followed.

In considering the question whether a transaction between a reversioner and a widow was really a relinquishment of a *spes successionis* or a *bona fide* compromise of disputed rights, the substance of the transaction ought to be looked at apart altogether from any form which might have been given to it. If in substance the transaction is found to be only a dealing with the *spes successionis,* then it cannot be recognised and cannot form the basis of any binding obligation. But if the substance of the transaction is a *bona fide* settlement between the parties, then, in spite of the fact that the same transaction might be represented in one of its aspects as a dealing with a *spes successionis,* it is none-the-less a real compromise of disputed rights. [p. 984, col. 2.]

Where the effect of a compromise between a Hindu widow and a reversioner suing for declaration of his right and invalidity of alienations by her, is to recognise the right set up on behalf of the widow to part of the property on the ground that it is her

absolute property, and hence no part of the property inherited by her from her husband at all, the transaction is not a mere relinquishment by a reversioner of a mere expectancy and must be regarded as a *bona fide* compromise of doubtful disputes and is valid and binding. [p. 984, col. 2; p. 985, col. 1.]

The relinquishment of a reversionary right cannot be the consideration for a compromise. But, while a man cannot relinquish his reversionary right in given properties, he can relinquish his right to say that the properties in dispute form part of the estate to which he is the reversioner; he may for good consideration admit that the properties never formed part of the estate of the person from whom he claims and, therefore, he is not relinquishing his reversionary right to that estate but is merely admitting that the properties with which the dispute is concerned were not properties which formed part of the estate to which he was a reversioner. [p. 983, col. 2.]

Appeal from the decree of the Court of the Additional Subordinate Judge, Cocanada, in O. S. No. 2 of 1921.

Messrs. *S. Varadachariar* and *C. Rama Rao*, for the Appellant.

Mr. *A. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

Coutts-Trotter, C. J.—By s. 6 of the Transfer of Property Act it is enacted that the chance of an heir-apparent succeeding to an estate or other mere possibility of a like nature cannot be transferred. It is, therefore, clear that a reversioner in expectancy cannot validly transfer his *spes successionis*; and that doctrine has been carried by this Court a step further in the case reported as *Sri Jagannada Raju Garu* v. *Sri Rajah Prasada Rao* (1) that not only are transfers of expectancies forbidden but that contracts to transfer them, when the reversioner enters into possession are also forbidden on the ground that, were it not so held, the provisions of the Act would be rendered entirely nugatory and futile. That reasoning of this Court has been accepted by the Privy Council in the case of *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2). In the present case the plaintiff brought a suit in order to assert his position as reversioner to the estate of one Subbaraju. He impleaded the widow and various other persons who alleged themselves to be alienees from her; and he was confronted with this that in the year 1904 he brought a declaratory suit to have his position as reversioner to Subbaraju's estate declared and that suit had been settled by a compromise and a judgment based on it, the brief effect of which was that the plaintiff withdrew his claim provided that he was given certain lands which were in dipute between the parties. I intend to guard myself from deciding this case on any wider ground than, I think, is absolutely necessary to this decision. After the very learned and instructive arguments I have heard, I think one may fairly say that the effect of the decisions of the Privy Council referred to, namely, *Amrit Narayan Singh* v. *Gaya Singh* (3), *Kanhai Lal* v. *Brij Lal* (4) and *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2), a case to which I have already referred draw a line of demarcation between the cases and show clearly the principle in the light of which one is to decide, that is to say, on which side of the line a case with a given set of facts is to be decided. The distinction I mean, can be stated in this way correctly enough for the purposes of this case; that the relinquishment of a reversionary right cannot be the consideration for a compromise. But, while a man cannot relinquish his reversionary right in given properties, he can relinquish his right to say that the properties in dispute form part of the estate to which he is the reversioner; he may for good consideration admit that the properties never formed part of the estate of the person from whom he claims and, therefore, he is not relinquishing his reversionary right to that estate but is merely admitting that the properties with which the dispute is concerned were not properties which formed part of the estate to which he was a reversioner. In order to ascertain on which side of the line this case falls one has to note the circumstances and what the words of the agreement are. I need not read the plaint—nothing turns on it—but the defence in the suit of 1904 is material. Paragraph 5 of the written statement alleged that the properties in question in both these suits formed the self-acquisition of the first defendant and she was entitled to alienate it at her pleasure. Then with regard to the rest of the property para. 10 says this:—

"At the time of his death the first de-

(1) 29 Ind. Cas. 241; 39 M. 554: 17 M. L. T. 419; 28 M. L. J. 650; (1915) M. W. N. 626.

(2) 74 Ind. Cas. 499; 50 I. A, 239; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929; 28 C. W. N. 713; 40 C. L. J. 10 (P. C.).

(3) 44 Ind. Cas. 408; 45 I. A. 35; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 C. 590 (P. C.).

(4) 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 399; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).

fendant's husband gave the remaining half also of the said house-site to the second defendant for purposes of dwelling with absolute rights. Since then the second defendant has been living there with family. Later on the second defendant's husband built thereon a tiled house which at the time of the marriage of the second defendant's daughter was given away as a *katnam* (present) to the third defendant."

That was the issue that the parties desired to dispose of in that suit; and then some body intervened and brought them together and a compromise was filed in the suit and the agreement was as follows:—

"In respsct of the 4 acres of land * * * * * together with the various fruit trees thereon the defendants shall in 30 days' time from this date execute a registered deed, with the usual recitals, in favour of the plaintiff in view to the enjoyment thereof by plaintiff with absolute rights and that thereupon the plaintiff shall withdraw this suit."

That is what he got and it is to be noted that he got not merely an admission that the property was considered to belong to him but a conveyance to him from the defendants as the defendants were but for this agreement the owners of this property. It goes on to say "that in case the whole of the remaining suit property is enjoyed by the defendants with full rights according to their previous enjoyment, no dispute of any kind will be ever raised by the plaintiff." Then that is carried out; the compromise was dated the 9th February 1905 and it was recorded on the 20th March. Meanwhile the parties had executed another document—it is Ex. V in the case and that is what is described as a release of rights executed on the 8th March 1905 to the plaintiff. I quite concede that the language of this document in places affords considerable scope for an argument of the type that has been addressed to us that on its true construction it amounts to nothing more than a withdrawal of the plaintiff's reversionary right. For instance "as in accordance with the terms thereof I waived my reversionary right to the scheduled property and by way of consideration therefor the said Pulugartha Mahalakshmanamma Garu gave me by document executed this day property worth Rs. 1,000 described herein below out of what was conveyed to her by the gift deed, I have hereby relinquished the reversionary right possessed by me after the death of the said Mahalakshamma Garu".

On the whole I think that the true construction of this document is not that contended for by the appellant. It seems to me that what he really did was to acknowledge the claim of the defendants that this property in dispute formed no part of the estate to which he claimed to be, and perhaps was, the reversioner. If that be so and it appears to me, looking at all the documents, to be the most reasonable construction having regard to the terms of them, all looked at together, then no question arises because nobody could possibly contend that, if that was the real effect of the transaction, an agreement come to by this man on the basis of such a state of facts without giving consideration would be a complete estoppel. I, therefore, do not propose to consider other grounds on which the same result might be arrived at and which have been argued before us, because I think, it is enough to dispose of the appeal. I am of opinion that this appeal must be dismissed with costs.

Srinivasa Iyengar, J.—I agree in the judgment just pronounced by my Lord. I only wish to add a few words. In all such cases when the question arises whether the transaction was really a relinquishment of a *spes successionis* or a *bona fide* compromise of disputed rights, it seems to me that the best thing to do would be to look at the substance of the transaction apart altogether from any form which might have been given to it. If in substance the transaction is found to be only a dealing with the *spes successionis*, then of course, it cannot be recognised and cannot form the basis of any binding obligation. But if, on the other hand, the substance of the transaction is found to be a *bona fide* settlement between the parties, then, in spite of the fact that the same transaction might be represented in one of its aspects as a dealing with a *spes successionis*, it is nonetheless a real compromise of disputed rights. In the present case there seems to be really no doubt whatever, having regard to all the circumstances and all the documents, that what the parties did was to recognise the right set up on behalf of the widow to part of the property on the ground that it was her absolute property and hence no part of the property inherited by her from her husband at all and as to the rest of the property to recognise the

right claimed by the daughter as under a gift from her father. It is not possible to represent this transaction as in substance being a relinquishment by a reversioner of a mere expectancy. I, therefore, agree that the appeal should be dimissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 1 OF 1924.

March 16, 1925.

Present:—Mr. Daniels, J. C.

Mahant RAM DAS—DEFENDANT—APPELLANT

versus

Babuain BHAGWAN KUNWAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Finding on several issues—Appellate Court, judgment of—Subject-matter of suits not identical.*

A finding which is the real ground of the decision in a case operates as *res judicata* even though there may have been other issues in the case on which the case might equally well have been decided. [p. 986, col. 1.]

Where a certain issue is treated as material in the judgment of an Appellate Court and is decided, the decision on the issue operates as *res judicata*. [p. 986, col. 2.]

A suit for ejectment was dismissed on the finding that the plaintiff had no title to the land in respect of which he alleged an encroachment and that, as a matter of fact, there had been no encroachment on the plaintiff's rights:

Held, that the finding with regard to the want of title of the plaintiff operated as *res judicata* in a subsequent suit between the parties. [*ibid.*]

For the application of the rule of *res judicata* it is not necessary that the subject-matter of the two suits should be identical. The question is whether the issue determined was the same. [*ibid.*]

Case-law referred to.

Second appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 15th November 1923, modifying that of the Munsif, Fyzabad, dated the 22nd March 1923.

Mr. *H. Husain*, for the Appellant.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—The sole issue in this appeal is one of *res judicata*. The suit was brought by the plaintiffs Babuain Bhagwan Kunwar and Thakur Sheo Ratan Singh for possession of three plots, *kishtwar* plots Nos. 20, 30 and 31, of which they alleged they had been dispossessed by the defendant Mahant Ram Das. Their suit has been dismissed as regards plot No. 20 and this appeal relates only to the remaining plots corresponding to a portion of *abadi* plot No. 291. The Court below finds that the question of title to this area is concluded in the plaintiffs' favour by the principle of *res judicata* by reason of a decision given *inter partes* in a Suit No. 97 of 1910 decided by the Munsif of Fyzabad, on 16th January 1911 and by the District Judge on appeal on 29th April 1911.

That suit was also a suit for recovery of a small area out of *abadi* plots Nos. 289 and 291. The plaintiff in that suit was Mahant Thakur Das, the predecessor of the present appellant. The defendant was Thakur Sheo Ratan Singh who is the second plaintiff in this case. Mahant Thakur Das's claim was that he was owner in possession of *abadi* plots Nos. 289 and 291 by reason of a purchase at a Court sale, and that the defendant had dispossessed him by constructing shortly before the suit two latrines on plot No. 289 and one latrine on plot No. 291. The defence of Thakur Sheo Ratan Singh was that the plots in dispute were not included in the plaintiff's purchase at all but that he himself had purchased them and become the owner of them. He further alleged that the two latrines on No. 289 were old and that no latrine at all had been constructed on plot No. 291. On these findings the suit was dismissed and an appeal by Mahant Thakur Das to the District Judge was also dismissed. Three points have been argued by the appellant before me.

(1) That the finding on title in the previous suit does not operate as *res judicata*.

(2) That even if it is *res judicata* it operates only as regards the actual area in dispute in the previous case, namely, the area on which the latrines were alleged to have been constructed.

(3) That in any case the principle of *res judicata* can only operate in favour of the second plaintiff, and, therefore, the question of title must be tried out on the merits as between the appellant and the first plaintiff.

On the first point the appellant's argument is that as no latrine was constructed on plot No. 291 which is the plot in dispute in this appeal, there had been no encroachment on the rights of the plaintiff in the former suit and, therefore, the plaintiff had no cause of action. The finding on

title, according to him, was unnecessary for the decision of the suit and can, therefore, be ignored. He relies on the principle laid down in *Shib Charan Lal* v. *Raghu Nath* (1), that where two findings have been arrived at one of which logically has priority over the other that finding alone forms the basis of the decree and can alone operate as *res judicata*. In this case it is difficult to say that either finding arrived at has logical priority over the other. A finding that there had been no encroachment on the plaintiff's rights might have been sufficient for the dismissal of the plaintiff's suit, but so also was a finding that the plaintiff had no title to the land in respect of which he alleged an encroachment. If the plaintiff had no title to the land which he claimed, then obviously he could have no cause of action and it was immaterial whether any encroachment was made or not. Even in *Shib Charan Lal* v. *Raghu Nath* (1), it was recognised that there might be more than one finding which would operate as *res judicata*. The present case is governed by another principle, laid down by this Court in *Parmeshar Din* v. *Debi Prasad* (2), namely, that the finding which is the real ground of decision in the case operates as *res judicata* even though there may have been other issues on which the case might equally well have been decided. Here it is quite clear on reading the judgments of the two Courts and particularly the judgment of the Appellate Court, which is the operative judgment, that the case was actually decided on the question of title and not on the ground that there had been no encroachment. The learned Judge says the principal issue is whether the land in suit is owned and possessed by the plaintiff-appellant. He proceeds to discuss that issue at great length, and though in connection with it he remarks incidentally that at the *Amin's* inspection no latrine was found on plot No. 291, he goes on to say that what he has to decide is whether the learned Munsif is right in his finding as to the extent of the area purchased by the predecessor of the present plaintiff. He comes to the conclusion that the Munsif was perfectly right in holding that that purchase included plot No. 291 and that the predecessor of the present appellant was trying to take advantage of the loose description of boundaries in the mortgage-deed and sale certificate to claim land that does not belong to him. It is on these findings and not on any question of whether there had been any encroachment or not that he dismissed the plaintiff's appeal. That finding, therefore, clearly operates as *res judicata*. If any further support is necessary for this proposition it may be found in the recent judgment of their Lordships of the Privy Council in *Midnapur Zamindary Co.* v. *Naresh Narayan Roy* (3), where their Lordships say :

"An issue is *res judicata* where the judgment of the Appellate Court shows that the issue was treated as material and was decided."

I now come to the second plea. It is now well-established that it is not necessary to the application of the rule of *res judicata* that the subject-matter of the two suits should have been identical. This was laid down by the Privy Council in *Raja of Pittapur* v. *Buchi Sitayya* (4). The question is whether the issue determined was the same. The appellant places great reliance on an expression in the judgment of the Munsif in the former case that it was not necessary to determine the exact boundaries between the land purchased by the defendant and that purchased by the plaintiff. It was, however, necessary to determine as between the parties the title to the entire area marked G and H in the plain attached to the *Amin's* report in the former case. The title to the whole of these areas depended on the same title-deed and it was impossible to separate the title to the particular area alleged to be occupied by the latrine from the title to the remainder of the plot. The title to this entire area was found by both Courts in favour of the present respondent. These areas, as the learned Judge finds, correspond to the plots Nos. 30 and 31 in dispute in the present case. The issue was, therefore, the same in the previous suit as in the present suit and the finding of *res judicata* operates in respect of the entire area now claimed.

The third plea was not raised in either of

(1) 17 A. 174; A. W. N. (1895) 47; 8 Ind. Dec. (N. S.) 437.

(2) 48 Ind. Cas. 386; 5 O. L. J. 647.

(3) 80 Ind. Cas. 827; 51 I. A. 293; (1924) A. I. R. (P. C.) 141; 26 Bom. L. R. 651; 47 M. L. J. 23; 51 C. 631; 35 M. L. T. 169; (1924) M. W. N. 723; 29 C. W. N. 34; 20 L. W. 770; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76; 3 Pat. L. R. 193 (P. C.).

(4) 12 I. A. 16; 8 M. 219; 4 Sar. P. C. J. 598; 9 Ind. Jur. 121; 3 Ind. Dec. (N. S.) 152 (P. C.).

the Courts below and it is impossible now to entertain it.

The two plaintiffs purchased jointly under the same sale-deed and if the sale-deed conferred a good title on one of them it conferred a good title on both.

The appeal, therefore, fails and it is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 122 OF 1924.

April 20, 1925.

Present:— Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

DULHIN BINODINI DEBI—PETITIONER—APPELLANT

versus

PARMESHWAR DAYAL SINGH—AND OTHERS—OBJECTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree passed against minor—Negligence of guardian—Minor, whether can apply to set aside decree.

The Courts in India will allow a minor to intervene for the purpose of setting aside an *ex parte* decree passed against him provided he can show negligence on the part of his guardian in the conduct of the suit. [p. 988, col. 2.].

Appeal from an order of the Subordinate Judge, Daltonganj, dated the 22nd February 1924.

Mr. *Parmeshwar Dayal*, for the Appellant.

Mr. *Kailaspati*, for the Respondents.

JUDGMENT.

Mullick, J.—On the 24th March 1924 Parmeshwar Dayal and others brought a suit against Surendra Bakhsh Rai through his guardian, the manager of the encumbered estates, for a declaration that certain entries in the Settlement Record regarding the jungle and other lands of *Mauza* Saimria were incorrect. Surendra Bakhsh Rai died shortly afterwards and his widow Dulhin Binodini Debi was substituted in his place on the 7th July 1922. The written statement was filed by the defendant on the 6th December 1922. Issues were framed on the 5th January 1923 and on the 5th February 1923 an application was made to the Subordinate Judge for permission to call for certain papers which had been filed with the record of case No. 32 of 1919 which was then pending in appeal before the Judicial Commissioner of Chota Nagpur. The record and the papers were not produced and finally on the 28th August 1923 the suit was decreed *ex parte* against the defendant.

An application was then made under O. IX, r. 13 of the C. P. C. for the restoration of the case; but the Subordinate Judge on the 22nd February 1924 found that sufficient cause had not been shown by the appellant and the application was dismissed; hence this appeal before us.

It is to be observed that on the 8th April 1924 the estate came out of the Court of Wards and Srimati Binodini Debi thereafter became entitled to conduct the litigation herself.

Now the first question is whether there was in fact sufficient cause for the manager's failure on the 28th August 1923. In order to determine this point it is necessary to refer shortly to Suit No. 32 of 1919 which was decided by the Subordinate Judge on the 18th July 1921. That suit was instituted by Surendra Bakhsh Rai against Brij Behari Saran, Lakhi Koer, Parmeshwar Dayal and others. It was there alleged that certain lands on the boundary between *Mauza* Simaria and *Mauza* Donda had been wrongly included within the boundaries of *Mauza* Donda and the plaintiff claimed a declaration of his title and recovery of possession. He succeeded in the Court of the Subordinate Judge and also in the Court of the Judicial Commissioner of Ranchi who dismissed the appeal on the 21st May 1923. Therefore at the time when the defendant in the suit, with which the appeal now before us is concerned, made his application for the production of the documents the record of Suit No. 32 of 1919 was still in the Court of the Judicial Commissioner. It was subsequently sent to the High Court in consequence of a second appeal having been preferred and on the 28th August 1923 one of the reasons given by the manager for his failure to produce the documents was that the record had been sent to the Paper Book Department of the High Court and, therefore, the documents which were required by him were not available. It is quite clear that the manager would have had sufficient time to produce the documents if he had been diligent. In the first place, he should have taken copies of the documents before the record in Suit No. 32 of 1919 left the Court

of the Subordinate Judge of Daltonganj. In the second place he had time to take copies in the Court of the Judicial Commissioner and there was no reason except procrastination for his failure to produce them on the 28th August 1923, when his case was taken up by the Subordinate Judge. It is said that a law agent called Parasnath Lal sent a *Tahsildar* several times to obtain the copies and each time the *Tahsildar* came back and reported that he was unable to get the copies. The *Tahsildar* has not been examined and all that can be gathered from Parasnath's evidence is that both he and his superiors seriously neglected the interests of the ward. That was the view of the Subordinate Judge who refused to restore the suit and I think upon the evidence before us it was fully justified.

The question then is whether in the circumstance the ward was entitled to any relief. I think the authorities are clear that she was. As early as *Kesho Pershad* v. *Hirday Narain* (1), it was held that an application for restoration was maintainable by a minor against whom by reason of the guardian's neglect an *ex parte* decree had been passed. It was held that such negligence was sufficient cause for his non-appearance. Later the law was fully considered in *Lalla Sheo Churn Lal* v. *Ram Nandan Dobey* (2). There the question was whether a suit lay and it was held that a minor was competent to sue to set aside a decree in respect of which there had been gross negligence on the part of his guardian. To the same effect is *Cursandas Natha* v. *Ladkavahu* (3) and *Parmeswari Pershad Narayan Singh* v. *Sheo Datt Rai* (4). In *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (5), the question was whether a suit lay by reason of the guardian's negligence and the learned Judges, while holding that the practice of the English Courts was to re-open the proceedings in the original suit by motion, were of opinion that in India a separate suit would not lie except on the ground of fraud or collusion. At the same time the learned Judges expressed the view that the minor could avail himself of the procedure for setting aside *ex parte* decrees or for review. The law, therefore, seems to be settled that acting upon the principles of justice, equity and good conscience, the Courts here will allow a minor to intervene for the purpose of setting aside an *ex parte* decree provided he can show negligence on the part of his guardian in the conduct of the suit.

Here it is quite clear that there was negligence. It is contended on behalf of the respondent that there might not have been negligence, and that the manager might have been under the honest belief that he had no case and that for that reason he did not produce either the documentary or oral evidence. The fact, however, that the written statement in this case was not filed till it had been approved by the Legal Remembrancer to the Government and that on the 28th August 1923 the manager made strenuous efforts to get the suit adjourned in order to obtain the necessary evidence, clearly shows that far from thinking that he had no case he was anxious to contest it to the end. Unfortunately he had been dilatory and negligent and the defendant is entitled to have the decree set aside and the case restored for re-trial.

The result is that the appeal is decreed with costs and it is directed that the case be restored to the file of the Subordinate Judge and be disposed of according to law.

Ross, J.—I agree.

Z. K. *Case remanded.*

(1) 6 C. L. R. 69.
(2) 22 C 8; 11 Ind. Dec. (N. S.) 7.
(3) 19 B. 571; 10 Ind. Dec. (N. S.) 381.
(4) 6 C. L. J. 448.
(5) 12 C. 69; 6 Ind. Dec. (N. S.) 48.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 2 OF 1925.

February 11, 1925.

Present:—Mr. Justice Carr and Mr. Justice Brown.

MAUNG THA DIN—APPELLANT

versus

DAW PAW—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1—Application for leave to appeal as pauper, when can be entertained—Appellate Court, duty of—Record, whether can be looked at.

The proviso to r. 1 of O. XLIV of the C. P. C. is a necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers, and is apt to be overlooked. A right of appeal as a pauper is very distinctly limited. It is not sufficient for the applicant to show that he is a pauper. The Court must be satisfied from a perusal of the judgment and decree that there is something wrong with the decree. If the judgment and the

decree are on the face of them unexceptionable, the application cannot be entertained and it is not open to the Appellate Court to consider whether the judgment is justified by the record.

Appeal against the judgment and decree of the High Court on Original Side, in C. R. No. 203 of 1924.

Mr. *Ba Thein*, for the Appellant.

ORDER.—The applicant Maung Tha Din filed a suit on the Original Side of this Court in which he claimed to be the adopted son of respondent Daw Paw and one U Tu, deceased, and that he was entitled to a quarter share of the estate of U Tu. The adoption of the applicant was denied and was held by the Trial Court not to have been proved. Various other questions were raised, but it is not necessary to consider them now. The applicant has applied to be allowed to appeal *in forma pauperis* and the question now is whether that application should be rejected under the provisions of the proviso to r. 2 of O. XLIV of the C. P. C. We have read the judgment and decree and can see no reason for supposing that the decree dismissing the suit was wrong. The question of the adoption was largely a question of fact. It has been considered at length by the learned Trial Judge and the reasons given in the judgment for holding the plaintiff not to have been adopted appear to us entirely sound. We have been asked to refer to the record of the evidence before deciding whether to reject the application. But the provisions of the proviso to r. 1 are very clear. That proviso lays down "the Court shall reject the application unless, upon *a perusal thereof and of the judgment and decree appealed from*, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust." It is after a perusal only of the application and the judgment and decree that the Court must come to a decision under this proviso, and unless upon such perusal there is reason to think that the decree is wrong, it has no option but to reject the application. The provisions of the rule are mandatory, and give the Court no discretionary power. In considering an appeal under r. 11 of O. XLI, the Court may call for the record if it thinks fit to do so. Rule 1 of O. XLIV gives the Court no such option. As pointed out in the case of *Sakubai* v. *Ganpat Ramkrishna* (1), this proviso is a necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers, and is apt to be overlooked. The rights of an appeal as a pauper are very distinctly limited. It is not sufficient for the applicant to show that he is a pauper. The Court must be satisfied from a perusal of the judgment and decree that there is something wrong with the decree. If the judgment and the decree are on the face of them unexceptionable, the application cannot be entertained and it is not open to the Appellate Court to consider whether the judgment is justified by the record. It is only on the payment of Court-fees that an appellant can claim the full rights of appeal. He cannot claim the special privileges of O. XLIV unless the conditions of the proviso to r. 1 are satisfied. In the present case there is no reason whatever appearing in the judgment for supposing that the finding against the adoption was wrong. And if the adoption was not proved then the decree dismissing the suit was clearly correct. We have, therefore, no option to apply the mandatory provision to the proviso to r. 1 of O. XLIV, of the C. P. C. We reject the application.

Z. K. *Application rejected.*

(1) 28 B. 451; 6 Bom. L. R. 442.

PATNA HIGH COURT.

CIVIL REVISION No. 502 OF 1924.

March 3, 1925.

Present:—Mr. Justice Ross.

ASHARFI DHIMAR—PETITIONER

versus

MUHAMMAD DINDALAL—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 174—Application to set aside sale—Money deposited on separate chalans *in favour of decree-holder and auction-purchaser—Money not properly distributed between decree-holder and auction-purchaser, effect of—Sale set aside—Appeal, whether lies—Revision—Interference by High Court.*

Where a sale is set aside under the provisions of s. 174 of the Bengal Tenancy Act no appeal lies at the instance of the auction-purchaser against an order setting aside the sale. [p. 990, col. 2.]

Where, however, an appeal is preferred against such order and is entertained by the Appellate Court and the order is set aside in appeal, the High Court will not interfere in revision unless it is convinced that the order of the Appellate Court is wrong on the merits. [*ibid.*]

There is no rule requiring that a deposit under s. 174 of the Bengal Tenancy Act must be made by two

separate *chalans* in favour of the decree-holder and the auction-purchaser. Where, therefore, the total amount of the deposit made by the judgment-debtor is in accordance with the requirements of the section the mere fact that the deposit is made on two *chalans*, one in favour of the decree-holder and the other in favour of the auction-purchaser and that the amount deposited on the *chalan* in favour of the decree-holder is slightly in excess and the amount deposited on the *chalan* in favour of the auction-purchaser is slightly less than the respective amounts due to the decree-holder and the auction-purchaser, will not affect the maintainability of the application to set aside the sale. [*ibid.*]

Appeal from an order of the District Judge, Darbhanga, dated the 30th of June 1924.

Messrs. *Murari Prasad* and *Anirudhji Burman*, for the Petitioner.

Mr. *Saiyid Ali Khan*, for the Opposite Party.

JUDGMENT.—On the 16th of February 1924 a sale was held in execution of a decree for rent and the holding was purchased by the opposite party for Rs. 76. On the 13th of March 1924 the petitioner deposited in Court Rs. 59-0-6 under two *chalans*, the first in favour of the decree-holder showing, in its, original form, the deposit of Rs. 55-0-6 and the second in favour of the auction-purchaser showing, in its original form, the deposit of Rs. 4. The total amount deposited was, therefore, Rs. 59-0-6. The amount of the decree was Rs. 55-0-6 and the compensation due to the auction-purchaser was Rs. 3-12-0. The *chalans* were subsequently altered, by what authority it does not appear with the result that the decree-holder's *chalan* became one of Rs. 55-8-6 and the auction-purchaser's *chalan* one of Rs. 3-8-0, annas 8 having been transferred apparently from the latter to the former. With these *chalans* the petitioner filed an application before the Court stating that he had to pay the amount of the decree and compensation and prayed that the *chalans* might be passed and the sale be set aside. On that day the Court ordered *chalans* to issue to the judgment-debtor for depositing the decree money and costs with compensation as prayed for. On the 24th of March the order passed by the Munsif was that the decree money and costs with compensation had been deposited under *chalans* specified and that the sale should be set aside and the case dismissed on full satisfaction. Subsequently it was brought to the notice of the Court by the office that although the total amount due by the petitioner had been deposited, in fact the distribution according to the *chalans* in their final forms was incorrect, too much having been deposited in favour of the decree-holder and 4-annas too little in favour of the auction-purchaser. The Court then ordered on the 31st of March 1924, that is beyond the period of limitation prescribed by s. 174 of the Bengal Tenancy Act, that 8 annas deposited under the decree-holder's *chalan* should be transferred to the auction-purchaser. The auction-purchaser appealed to the District Judge against the order setting aside the sale and the learned District Judge has ordered an enquiry to be made into the alteration in the *chalans* and has directed that, if as the result of the enquiry the Munsif finds that the judgment-debtor was responsible for the alteration then the sale must stand: but if he finds that there has been fraud committed then he is at liberty to pass final order in the case on the merits as would seem to him fit and proper.

The first point taken in this application by the judgment-debtor is that no appeal lay at the instance of the auction-purchaser to the District Judge. This contention is established by authority and is conceded by the learned Vakil for the opposite party. He contends, however, that if he succeeds on the merits, this is not the case in which the Court should exercise its jurisdiction in revision, even if no appeal lay to the District Judge. This is a well-recognized principle and it is, therefore, necessary to look at the merits of the case. On the merits the contention on behalf of the petitioner is that the Court had accepted the deposit and set aside the sale and the money deposited was in fact more than sufficient to meet the requirements of s. 174; and it was for the Court to distribute the dues between the decree-holder and the auction-purchaser. It is pointed out that there is no rule requiring deposit to be made by two separate *chalans*, and that the fact that the distribution actually made in the two *chalans* was slightly erroneous cannot affect the title of the depositer to have the sale set aside, when in fact the full amount due had been paid; and that it was for the office of the Executing Court to make the proper distribution between the parties.

The argument on behalf of the opposite party is that the judgment-debtor chose to make the deposit by two *chalans* and took the risk of error; that the deposit must be made in a form which makes the money

immediately available to the person for whose benefit the deposit is made; and that the action of the learned Munsif in re-distributing the deposit after the period of limitation amounts to extending the time which he had no jurisdiction to do. Now the authorities that were cited for the proposition that the deposit must be made in a form immediately available have no application on their facts to the facts of the present case. The money was in Court and was immediately available; and the fact that some clerical process had to be gone through in the Court before the auction-purchaser could get his 4-annas does not bring the case within the principle of the decisions referred to of which the principal was *Rahim Bux* v. *Nundo Lal Gossami* (1). Nor, in my opinion, was time extended by the order of the 31st of March. The money was already in Court and the transfer of 8-annas from one *chalan* to the other was merely a clerical matter which had nothing to do with the extension of time. The deposit was made within the time limited by law and the fact that some action had to be taken in the office to make the proper amount available to the auction-purchaser cannot, in my opinion, be treated as an extention of time. Apparently the office of the Executing Court was in error and the judgment-debtor was misled as to the exact sums payable to the decree-holder and to the auction-purchaser respectively. But he had deposited the full amount required by law and his deposit had been accepted and the sale has properly been set aside.

The order of the 24th of March setting aside the sale was, in my opinion, a proper order and as no appeal lay at the instance of the auction-purchaser from that order, that order must be restored. The result is that the decision of the learned District Judge must be set aside and the order of the Munsif setting aside the sale restored. The petitioner is entitled to the costs of this application; hearing-fee one gold *mohur*.

Order set aside.

Z. K.

(1) 14 C. 321; 7 Ind. Dec. (N. S.) 213.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 59 OF 1925.

May 14, 1925.

Present:—Mr. Simpson, A. J. C.

SHUKRU—PLAINTIFF—APPLICANT

versus

FARZAND ALI—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. VII, r. 10—Finding that Court has no jurisdiction to try suit—Return of plaint—Procedure—Court, whether can try suit on merits.

Where a Court decides that it has no jurisdiction to entertain a suit, the proper course for it is to return the plaint for presentation to the proper Court, and not to proceed to decide the suit on the merits on the other issues.

Civil revision against the decree of the Subordinate Judge, Bara Banki, dated the 20th February 1925.

Mr. *S. M. Ahmad*, for the Applicant.

Mr. *Khaliquzzaman*, for the Opposite Party.

ORDER.—This is a civil revision. The applicant was plaintiff in the Small Cause Court of Bara Banki. He brought a suit to recover the sum of Rs. 200 as damages, because the defendant, being a servant of the *thekedar* of the village, had prevented him from growing water-nuts in a tank which he had taken on rent for the purpose of growing these nuts. The defendant filed a written statement in which, in para. 11 he pointed out that the suit ought to have been brought in the Revenue Court. The learned Judge framed an issue on this point, but he also framed the other issues arising in the suit and he decided them all. On the issue of jurisdiction he decided that he had no jurisdiction, nevertheless he proceeded to make a decree dismissing the plaintiff's suit. As plaintiff points out in the present application, the proper course for the learned Judge to adopt was to return the plaint to him for presentation to the proper Court. The defendant, who is present to-day, does not dispute this proposition, but merely claims that he ought not to be saddled with plaintiff's costs seeing that he raised the objection at the proper time. I set aside the judgment and decree of the learned Judge of the Small Cause Court as having been made without jurisdiction in a case which could not be tried in his Court, and I direct him to return the plaint for presentation to the proper Court. There will be no order as to costs.

Decree set aside.

Z. K.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 196 OF 1924.

February 9, 1925.

Present:—Mr. Justice Carr and Mr. Justice Brown.

MAUNG PO SHEIN—APPELLANT

versus

MAUNG PO KIN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 6, O. XLV, r. 13—Appeal to Privy Council—Stay of execution—Security—Procedure—Jurisdiction of High Court.

Order XLI of the C. P. C. applies only to appeals from original decrees, but by virtue of the provisions of O. XLII it is also made applicable to second appeals. It has no application to appeals to the King in Council. In the course of such an appeal the powers with regard to the stay of execution or the taking of security from the respondent are specifically laid down in r. 13 of O. XLV of the C. P. C. Under that rule the High Oourt may allow the decree appealed from to be executed taking such security from the respondent as it thinks fit for the due performance of any order which His Majesty in Council may make on the appeal. The provisions of this rule are alone meant to govern any question regarding the execution of a decree under appeal to His Majesty in Council and the provisions of r. 6 of O. XLI of the C. P. C. have no application to such a case.

Appeal from an order of the District Court, Myaungmya, in C. E. No. 18 of 1924.

Mr. *Das*, for the Appellant.

Mr. *Leach*, for the Respondent.

JUDGMENT.—The appellant sued the respondent for the recovery of certain immoveable properties in the District Court of Myaungmya. The suit was dismissed by the Trial Court but was decreed by this Court on appeal. The respondent has now obtained leave to appeal against the decree of this Court to the Privy Council. Meanwhile, possession of the land in dispute or a portion of the land in dispute has been made over to the appellant. The respondent in the making over of this land applied to the District Court under the provisions of r. 6 of O. XLI of the C. P. C., to have security taken from the appellant and the District Court has ordered the decree-holder to furnish security for mesne profits at the rate of Rs. 3,400 a year. It is against this order that the present appeal has been filed. It is contended that the District Court has no jurisdiction to pass the order it did, and, in our opinion, this contention must be upheld. Order XLI, C. P. C., is headed "Appeals from original decrees" and lays down rules for the procedure to be adopted in case of such appeals and for applications for stay of execution pending the appeal or the giving of security by the appellant for restitution of property. In the case of second appeal it is provided by O. XLII that the rules of O. XLI shall apply; but there is no such provision in O. XLV with regard to appeals to the King in Council. On the contrary, the powers with regard to stay of execution, or the taking of security from the respondent are specifically laid down in r. 13 of the Order. Under that rule the Court may allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal. It seems to us quite clear that the provisions of this rule are meant entirely to govern all questions regarding the execution of the decree under appeal before His Majesty in Council and that the provisions of r. 6, of O. XLI have no application, and the proper Court to deal with the matter is not the Original Court, but this Court. The decree in question was passed by this Court and not by the Original Court and we agree with the language expressed in the case of *Ram Bahadur* v. *Radha Krishen Chanderji* (1) that in such circumstances the "Court" means the High Court. The District Court was, therefore, acting without jurisdiction in passing the order it did. It has been contended on behalf of the respondent that no appeal lies against the order and the appellant himself would appear to have been doubtful on this point as he originally drew up his memorandum of appeal in the alternative as an appeal or revision and gave in his grounds of appeal reasons for interference in revision, but as in *Ram Bahadur's case* (1), the matter is not of importance, as the order, being passed without jurisdiction, is one which we shall be justified in setting aside in revision.

We set aside the order of the District Court requiring the decree-holder to furnish security. The respondent will pay the appellant's costs of this appeal. Advocate's fees five gold *mohurs*.

Z. K. *Order set aside.*

(1) 42 Ind. Cas. 835; 3 Pat. L. J. 40; (1917) Pat. 285; 3 P. L. W. 222.

PATNA HIGH COURT.

MISCELLANEOUS CRIMINAL CASE No. 78 OF 1924.

October 20, 1924.

Present:—Mr. Justice Kulwant Sahay.

SHEODHARI RAI—PETITIONER

versus

JHINGUR RAI AND OTHERS—OPPOSITE PARTY

***Criminal Procedure Code** (Act V of 1898), s. 526—Transfer of case—Magistrate making remarks adverse to prosecution, whether ground for transfer—Person at whose instance prosecution started, whether can apply for transfer.*

That in the course of the examination of the prosecution witnesses the Magistrate trying the case has made observations which go to show that he is not favourable to the prosecution is a sufficient ground for the transfer of the case to the Court of another Magistrate. [p. 993, cols. 1 & 2.]

A person at whose instance a criminal case is lodged is a party interested within the meaning of cl. (3) of s. 526 of the Cr. P. C., and is entitled to apply for transfer of the case, but his rights are subordinate to those of the Crown; in other words, if the Public Prosecutor or the person who is conducting the prosecution on behalf of the Crown is unwilling to have the case transferred, the person at whose instance the case was started has no power to get the case transferred. [p. 994, col. 1.]

Mr. *P. C. Rai*, for the Petitioner.

Messrs. *R. T. N. Sahai* and *B. P. Varma*, for the Opposite Party.

JUDGMENT.—The petitioner lodged an information at the Dumraon Police Station charging the opposite party with having been members of an unlawful assembly and with having forcibly looted the crops of the petitioner which were being conveyed from the fields to his *kalihan*. They were also charged with having caused hurt to several persons of the petitioner's party in the course of the loot of the crops. The Police investigated the case and submitted a charge sheet against the opposite party under ss. 147 and 379, Indian Penal Code, and the opposite party are being tried before the Sub-Divisional Magistrate of Buxar. The present application is made on behalf of the petitioner for transfer of the case from the file of the Sub-Divisional Magistrate of Buxar on the ground that during the course of the trial the Magistrate has made certain observations which have led the petitioner to apprehend that he will not get a fair trial in the Court of the Sub-Divisional Magistrate. It appears that in the course of the examination of the prosecution witnesses the learned Sub-Divisional Magistrate made certain observations which went to show that he was not favourable to the prosecution. For instance when one of the witnesses stated that the opposite party had looted the crops while the Police were in the village, the Magistrate is said to have observed "Were they fools that they comitted such an act before the Police?" Then again in the course of the examination of one of the witnesses the learned Sub-Divisional Magistrate is said to have observed that the accused had filed *tanazas* in respect of the fields in dispute and, that, therefore, the petitioner wanted to get rid of them by having them sent to Jail. During the examination of another prosecution witness the learned Sub-Divisional Magistrate is said to have observed as follows: "How much money have you paid to the Police as bribe" and when the witness denied having given a bribe to the Police, the learned Magistrate asked him "How much money have you taken for giving evidence." It is further stated that after the examination of the prosecution witnesses the Magistrate wanted to frame charges under ss. 147 and 379, Indian Penal Code, but that an application was made on behalf of the prosecution before him stating that the case made out disclosed an offence under s. 395, Indian Penal Code, and that the opposite party ought to be charged with an offence under s. 395 upon which he is said to have torn out the paper upon which the charge was being written. The learned Magistrate has sent an explanation in which he does not deny having made the observations as stated above during the examination of the witnesses. Under the circumstances it is clear that the petitioner has cause for reasonable apprehensions in his mind that the case is not being tried in a fair way by the Sub-Divisional Magistrate. The petitioner went to the District Magistrate and applied for the transfer of the case from the file of the Sub-Divisional Magistrate under s. 528, Cr. P. C. The learned District Magistrate observes that the remarks said to have been made by the Sub-Divisional Magistrate seem to have been uttered in a moment of annoyance and that at the worst they show a lack of temper or discretion but do not show that the Magistrate is prejudiced. I am not prepared to say that there was any reason for the Magistrate being annoyed and that the remarks and observations alleged to have been made by him and which have not

been denied by him were uttered in a moment of annoyance. I am, therefore, clearly of opinion that this is a fit case to be transferred from the file of the Sub-Divisional Magistrate.

A preliminary objection has, however, been taken on behalf of the accused persons to the effect that the petitioner has no *locus standi* to make this application for transfer inasmuch as he is not a complainant in the case, but that it is a Police case and that the case is being conducted by the Public Prosecutor on behalf of the Crown. Reliance has been placed upon the observations of Mullick, J., in the case of *Jamuna Kanth Jha* v. *Rudra Kumar Jha* (1) where he held that a private person has the right to set the Criminal Law in motion but he has no control over the proceedings and that he is not entitled to apply for the transfer of a case under s. 526, Cr. P. C. Mr. Justice Jwala Prasad, however, who was another member of the same Bench was of a different opinion. He held that the person at whose instance a criminal case is lodged is entitled to apply for transfer under s. 526 but his rights are subordinate to those of the Crown; in other words that if the Public Prosecutor or the person who is conducting the prosecution on behalf of the Crown is unwilling to have the case transferred, the person at whose instance the case was started has no right to get the case transferred. Clause (3) of s. 526 provides that the High Court may act either on the report of the lower Court or on the application of a party interested or on its own initiation. In the present case the question is, whether the petitioner is a "party interested" within the meaning of cl. (3) of s. 526. It has been shown by Mr. Justice Jwala Prasad in the judgment referred to above that a private person who lodges an information before the Police of a certain offence and a criminal prosecution is started upon that information is a person who is interested in the prosecution within the meaning of cl. (3) of s. 526. Reference has been made to cl. (8) of s. 526 which provides that the Public Prosecutor, the complainant or the accused is entitled to ask the Magistrate for a postponement in order to enable them to move the High Court for a transfer of the case, and the word used there is the complainant and not a person interested. It has been tried to be argued on behalf of the opposite party that the words "party interested" in cl. (3) have the same meaning as the word "complainant" in cl. (8) of s. 526. I am, however, unable to agree to this contention. If the Legislature intended that the words "party interested" in cl. (3) should have the same meaning as the word "complainant" in cl. (8) there is no reason why there was any difference introduced by the Legislature in the two clauses. If it was intended that the "party interested" could only be the complainant there is no reason why the word complainant was not used in cl. (3) as it was used in cl. (8). I am, therefore, of opinion that as held by Mr. Justice Jwala Prasad in the case referred to above the present petitioner is a party interested within the meaning of cl. (3) of s. 526 and he is entitled to apply for transfer of the case. It may be noted that there is no objection on behalf of the Crown to the transfer, and the Crown does not appear to oppose the application.

It has further been pointed out by the learned Vakil for the petitioner that the present application is really an application under s. 439 for revision of the order of the District Magistrate and is not a substantive application for transfer under s. 526. The application before the District Magistrate was apparently made under the provisions of s. 528, Cr. P. C., and the learned District Magistrate having refused to make the transfer the petitioner has come up to this Court against that order in revision and if that is so, then the question whether the petitioner is entitled to apply for transfer under s. 526 does not arise. Having regard to the circumstances of the case, I am of opinion, that this is a fit case in which a transfer ought to be ordered. The case is, therefore, transferred from the file of the Sub-Divisional Magistrate of Buxar to the file of the District Magistrate of Arrah, who will either try the case himself or make it over to another Magistrate competent to try it.

Z. K. *Petition allowed.*

(1) 52 Ind. Cas. 424; 4 P. L. J. 656; 20 Cr. L. J. 648; (1920) Pat. 42.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 68 OF 1925.
June 2, 1925.
Present:—Mr. Dalal, J. C.
PRITHIPAL—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 436, 438—Nuisance, proceeding relating to—Further enquiry, order of, whether can be made—Reference to High Court.

Proceedings under s. 133 and Chap. X of the Cr. P. C. are not covered by s. 436 of the Code and a Sessions Judge has, therefore, no power to order further enquiry in the case of such proceedings. He would have power, however, in a proper case to make a reference to the High Court under s. 438 of the Code.

Criminal revision against an order of the Sessions Judge, Gonda, dated the 14th February 1925, in Criminal Revision No. 3 of 1925.

Mr. *K. P. Misra*, for the Applicant.

Mr. *H. D. Chandra*, for the Opposite Party.

JUDGMENT.—I do not think that the learned Sessions Judge's order, dated 14th February 1925, is according to law. A conditional order was passed by a Magistrate under s. 133 with respect to the removal of a nuisance and after Pirthipal showed cause the Magistrate was satisfied that the order was not reasonable and proper and directed that no further proceedings shall be taken in the case. The opposite party Adhin took the matter up in revision to the learned Sessions Judge. He appears to have thought that he had power to order further inquiry under s. 435. This power he had not because that section is confined to a complaint which has been dismissed under s. 203 or s. 204 (3) or to a case of an accused person having been discharged. Proceedings under s. 133 and Ch. X are not covered by s. 436 and the Sessions Judge had no power to order further inquiry.

The language of the learned Judge leaves it doubtful whether he took proceedings under s. 436 or ordered further inquiry and a report to himself before he took action under s. 438 of making a report to this Court.

I think that the best order to pass under the circumstances of the case would be to set aside the order of the 14th February 1925, and remit the proceedings to the learned Judge for a trial of the revision application of Adhin according to law with this observation that he had no power to take action under s. 436 and the only action which he could take, if one is found necessary, would be under s. 438 of the Cr. P. C.—a report to this Court.

I order accordingly. No order is made as to costs.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 797 OF 1924.
February 17, 1925.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Zafar Ali.
TEK SINGH AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Death caused by violent blow from takwa—*Murder.*

A *takwa* is a deadly weapon and a person who strikes a blow on the head of another with such a weapon and with such a violence as to cut through the skull does so with the intention of causing death or such bodily injury as is likely to cause death, and if death is caused as the result of such a blow, he is guilty of the offence of murder. [p. 996, col. 2.]

Criminal appeal from an order of the Additional Sessions Judge, Lahore, dated the 23rd August 1924.

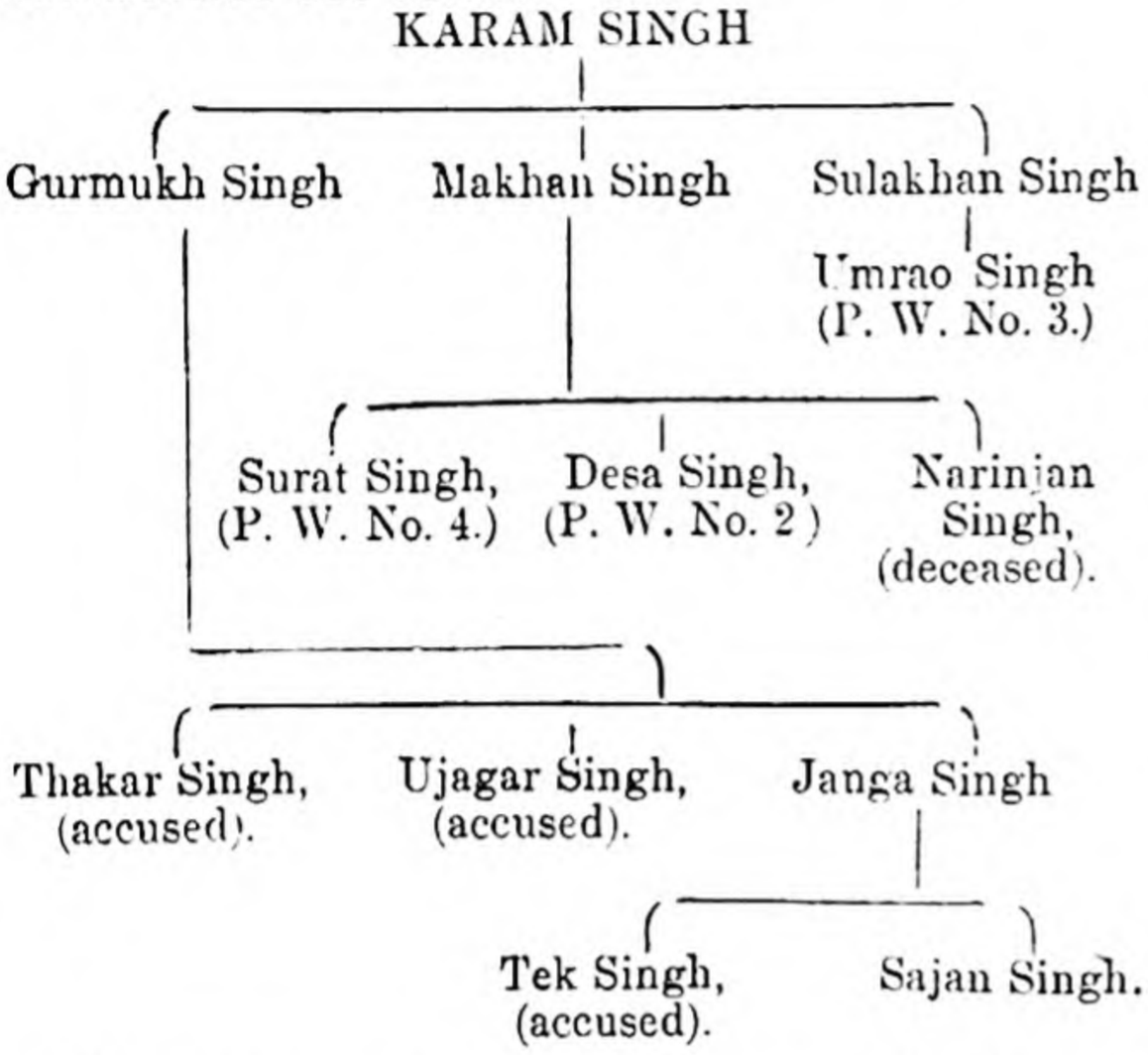
Dr. *Nand Lal* and Mr. *L. Saunders*, for the Appellants.

JUDGMENT.—Tek Singh and his two uncles, *i. e.*, his father's brothers Thakar Singh and Ujagar Singh were tried together for the murder of one Narinjan Singh, but Tek Singh alone has been convicted of the murder and sentenced under s. 302, Indian Penal Code, to suffer the penalty of death. Thakar Singh and Ujagar Singh have been convicted of simple hurt and sentenced under s. 323, Indian Penal Code, to rigorous imprisonment for one year each. All three have appealed jointly through their Counsel Dr. Nand Lal and the case is also before us under s. 374, Cr. P. C., for confirmation of the capital sentence. There is also before us an application filed by Desa Singh, brother of the deceased, seeking conviction of Thakar Singh and Ujagar Singh also for murder and for enhancement of their sentences.

The learned Sessions Judge has written a very elaborate judgment in which the testimony of each witness is fully criticised

and scrutinised and every point raised by the defence has been duly considered and disposed of.

The accused, the deceased, and the persons who figure as eye-witnesses of the occurrence are related thus :—



It is common ground that on the fateful morning a quarrel took place between Tek Singh appellant and Narinjan Singh deceased over the boundary line of their adjoining fields, that after that incident Narinjan Singh came back to the village and that it was in front of his *haveli* that he received at the hands of Tek Singh an injury on the head which rendered him unconscious and soon resulted in death. Tek Singh was admittedly armed with a *takwa* and caused the injury with that weapon. The prosecution theory was that the three accused together with Harnam Singh, who absconded after the event, attacked the deceased by way of retaliation for what had happened in the fields shortly before, and that they made the attack with the intention of doing him to death.

Tek Singh's defence was that as he passed by the house of Narinjan Singh deceased it was the latter who first attacked him and inflicted a wound on his arm with a *chhavi* and that it was to save his own life that he struck the blow which proved fatal. The remaining two accused pleaded that they were not present at the encounter between Tek Singh and the deceased.

Desa Singh, brother of the deceased, was the only eye-witness whose testimony has been believed and relied upon by the learned Sessions Judge because it received support from the medical evidence as well as from the evidence of the *Zaildar* who happened to be at a very short distance from the scene of the occurrence. The medical witness, who made the autopsy found besides the fatal incised wound opening into the skull cavity two more injuries,—(1) a bruise 7″ *by* 1″ on the outer side of the left forearm, and (2) a bruise $1\frac{1}{2}$″ *by* $\frac{1}{2}$″ on the back of the index finger. Both these injuries were in his opinion caused by *lathi* blows, but he stated that injury No (2) might have been the result of a violent fall against the lintel of the doorway where the deceased was standing when attacked. The existence of these two injuries supports the prosecution theory that Tek Singh had companions with him who were armed with sticks and who used the same. The *Zaildar*, who is a very respectable and disinterested witness, deposed that shortly before the occurrence he saw Tek Singh running towards the spot with a *dang* the head of which was concealed under his arm-pit, that he saw the other three accused near the spot immediately after the murder, and that there was no *takwa* lying on the spot by the body of the deceased. This evidence goes a long way to refute the defence theory and we agree with the learned Sessions Judge that the defence story is incredible and false and that the direct testimony of Desa Singh read in the light of the circumstances proved by the evidence of the *Zaildar* and the medical witness appears to be true and worthy of credence. The wound which Tek Singh bore on the inner side of his arm could not have been received at the hands of the deceased, because if an arm is raised to ward off a blow, the blow falls on the outer side of it and not on the inner side.

The deceased was a youth of 18 years of age. A *takwa* is a deadly weapon and a person who strikes a blow on the head with such a weapon and with such violence as to cut through the skull does so undoubtedly with the intention of causing death or such bodily injury as is likely to cause death. Tek Singh was, therefore, guilty of murder and as it was a premeditated cold-blooded murder, we confirm the sentence of death.

As regards the remaining two convicts we do not consider it desirable to re-open and decide in exercise of our revisional jurisdiction the question of their responsibility for the act of Tek Singh, but they undoubtedly caused hurts to the deceased

and the convictions and sentences under s. 323, Indian Penal Code, are, therefore, correct. The result is that we dismiss the appeal as well as the application for revision and confirm the sentence of death.

Z. K. *Appeal & application dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 108 OF 1925.

March 26, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

KANCHAN MOLA AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 71, 380, 457—Criminal Procedure Code (Act V of 1898), s. 35—House breaking with intent to commit theft—Theft—Separate sentences, whether can be awarded.

Where a person is convicted at one trial of the offence of house breaking with intent to commit theft and of the commission of theft after such house breaking, he can be sentenced to separate sentences in respect of each of those offences. [p. 997, col. 2.]

Criminal revision against an order of the District Magistrate, Khulna, dated the 12th January 1925, confirming that of the Sub-Deputy Magistrate, Bagerhat, dated the 17th December 1924.

Mr. *A. K. Fazlul Haq* and Babu *Probodh Chandra Kar*, for the Petitioners.

JUDGMENT.—The petitioners in this case have been convicted on the following charges:—First, that they on the 25th September 1924, committed house breaking at night entering into the dwelling hut of the complainant by cutting *sindh* with intent to commit theft and thereby committed an offence punishable under s. 457, Indian Penal Code; *secondly*, that they on the same day of September 1924, committed theft of money and ornaments valued about Rs. 1,500 from the dwelling hut of the complainant and thereby committed an offence punishable under s. 380, Indian Penal Code. On their conviction on the first charge they have been each sentenced to rigorous imprisonment for four months and a fine of Rs. 100. On their conviction on the second charge they have been sentenced to rigorous imprisonment for two months and a fine of Rs. 200 each, and the sentences of imprisonment have been ordered to run one after the other.

This Rule has been issued calling on the District Magistrate to show cause why one of the separate sentences passed on the petitioners should not be set aside.

The point we have to decide is as to the legality of the separate sentences. The law as to the legality of the separate sentences on conviction at one trial for two offences is to be found in s. 35, Cr. P. C., read with s. 71, Indian Penal Code. Section 35 has been materially altered by the recent amendment of the Code. In the Code of 1898, s. 35 commences with the following words:—"When a person is convicted at one trial of two or more distinct offences." These words have been altered and the section is now as follows:—"When a person is convicted at one trial of two or more offences the Court may, subject to the provisions of s. 71 of the Indian Penal Code, sentence him for such offences to the several punishments prescribed therefor which such Court is competent to inflict." Another important alteration that has been made is that the Explanation and Illustration which were found in the Code of 1898 have now been repealed. Those were as follows—Explanation—"Separable offences which come within the provisions of s. 71, of the Indian Penal Code, are not distinct offences within the meaning of this section." Illustration, "A breaks into a house with intent to commit theft and steals property therein. A has not committed distinct offences." It would seem, therefore, that under the Code of 1898, the Court would not have had power to punish the offender for more than one of these offences. But under the present Code no reference is made to distinct or separable offences, and it is not necessary to consider whether the offence of house breaking with intent to commit theft and the commission of theft after such house breaking are distinct offences. For the application of s. 35 we have now only to consider whether the offences are of the nature described in s. 71 of the Indian Penal Code so that the punishment for more than one of the offences is forbidden by that section. Section 71 is in the following terms. The first paragraph provides:—"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided."

It cannot be said that either the house breaking by night with intent to commit an offence or theft from a dwelling house are offences made up of parts. The offence of house breaking with intent to commit theft is complete as soon as the house breaking with that intent is committed. The offender would be liable to conviction even if he was frightened away after breaking into the house without committing theft. Also theft from a dwelling house can be committed without breaking into the house. The next paragraph of s. 71 is as follows:—"Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are punished." Here there is no case of offences falling within two or more separate definitions. The third paragraph is:—"Where several acts, of which one or more than one would, by itself or themselves, constitute an offence, constitute, when combined, a different offence." Here also the several acts of house breaking and theft when combined do not constitute a different offence. The case is not covered by the last two paragraphs with reference to which it is provided that the offender shall not be punished with a more severe punishment than the Court which tries him can award for any one of such offences.

It would, therefore, appear that there is nothing in s. 71, of the Indian Penal Code that in any way restricts the power of Court under s. 35 of the Cr. P. C. of 1923, and under that section the punishments for two offences of which a person is convicted at one trial are to commence one after the expiration of the other unless the Court directs that such punishments shall run concurrently.

The case-law on this point has been rendered obsolete by the amendment of the Code. It is, therefore, not necessary to discuss it. But as an illustration of this point we may refer to two cases. One is the leading case, the decision of a Full Bench of the Bombay High Court: *Queen-Empress* v. *Malu* (1). The decision in that case is clearly based on the illustration and explanation added to s. 35 of the Cr. P. C. of 1898 as is stated at the commencement of the judgment. I may also refer to the case of *Sarat Chandra Ghosh* v. *Emperor* (2) to which I was a party. The decision in that case was also based on a consideration of the provisions of s. 35 as to distinct offences and the illustration to that section.

I hold, therefore, that under the present law there is no illegality in passing separate sentences for the two offences and in directing that the sentences of imprisonment shall run one after the other. The Rule is discharged.

Z. K. *Rule discharged.*

(1) 23 B. 706; 1 Bom. L. R. 142; 12 Ind. Dec. (N. S.) 472.

(2) 74 Ind. Cas. 1043; 37 C. L. J. 171; (1923) A. I. R. (C.) 408; 24 Cr. L. J. 851.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 237 OF 1925.

April 28, 1925.

Present:—Mr. Justice Banerji.

CHARAN SINGH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 279—Motor Vehicles Act (VIII of 1914), s. 5—Rash or negligent driving—Attempt to pass car in front while car is approaching from opposite direction—Offence—Charge under s. 279, Penal Code--Conviction under s. 5, Motor Vehicles Act, legality of.

The facts which have to be proved for a conviction under s. 279 of the Penal Code and for a conviction under s. 5 of the Motor Vehicles Act are substantially the same and a person who is charged under one of these sections may be convicted under the other inasmuch as there is no question of prejudice to him in such a case. [p. 999, col. 1.]

A driver of a car who attempts to force his way past a car in front of him on his side of the road at a time when there is a car approaching on the opposite side of the road in the opposite direction almost immediately in front of his car, is guilty of conduct which comes within the purview of s. 5 of the Motor Vehicles Act. [p. 999, col. 2.]

Reference made by the Sessions Judge, Benares, dated the 28th March 1925.

REFERRING ORDER.—Charan Singh applicant was convicted under s. 5 of the Motor Vehicles Act, fined Rs. 50 or two months' simple imprisonment in default and had his license cancelled for the remaining portion of the year 1925, that is to say, about nine months from the date of the order. The facts of the case were that the Superintendent of Police personally saw the accused driving in what he regarded as a grossly negligent and dangerous manner. He stopped him and took his address directing him to appear for examination in driving. The Reserve Inspector reported that the applicant was not qualified to hold a license, and the license was,

therefore, cancelled by the Superintendent of Police.

Thereupon Charan Singh put in an application to the District Magistrate stating the facts and asserting that the cancellation of the license without conviction was illegal. The District Magistrat sent the application to the Superintendent of Police with the following remark "for favour of report. Para 18 appears to be the only section applicable. Do you want to prosecute ?". The Superintendent of Police replied that in the circumstances the best plan was to let the case go to Court when he would ask for the cancellation of the license. The papers were then sent to the City Magistrate "for necessary action." The City Magistrate tried the case summarily recording the offence complained of under s. 279 of the Indian Penal Code and convicting under s. 5 of the Motor Vehicles Act.

It is first urged that in effect there being no complaint or Police report on the record the City Magistrate took cognizance of his own initiative under s. 190C. He did not, however, give the accused the opportunity prescribed by s. 191 of trial by another Court, and, therefore, the conviction is bad. In my opinion this is an incorrect view of what took place. Although the proceedings preliminary to prosecution were very informal, I take it that the District Magistrate's order "To City Magistrate for necessary action" was in effect an order taking cognizance of the case and transferring it for trial to the City Magistrate.

The second ground of the application is that when the offence complained of was entered under s. 279 of the Indian Penal Code a conviction under s. 5 of the Motor Vehicles Act was bad. No very serious attempt has been made to argue this ground and I cannot see that there is any substance in it. The facts which have to be proved in both cases are substantially the same and the offence alleged comes equally well under either definition. There is no question of prejudice to the accused.

The third ground was on the merits. I am loath to go into question of fact in a revision application but as the disputed facts are in the present case mixed up inextricably with the question of whether any or all of those facts constituted the offence it is desirable that I should do so. The evidence of the Sub-Inspector was that as he was passing the Imperial Bank accused was coming in the opposite direction in a Ford Car at about 20 miles an hour, and swerving from side to side of the road. A Municipal water cart was also coming towards the Superintendent Police and applicant tried to get between the water cart and the Superintendent's car with the result that the latter was forced on to the "*patri*" and obliged to stop dead. There were a large number of foot passengers about.

The road is fairly wide at this point but its surface is indescribable. Only an optimistic Municipality would venture to describe it as a *pakka* road at all. If applicant was really doing 20 miles an hour in a Ford it is inevitable that he must have been swerving about the road a good deal. On the other hand it is necessary for any form of motor traffic to take a more or less serpentine course on a road of this description in order to avoid the engulphment of the car in the deeper pot holes, I do not necessarily take this swerving as a sign of reckless driving. What is to my mind absolutely clear proof of bad and dangerous driving is the fact that the Superintendent of Police was forced on to the *patri* of a broad road, and compelled to stop in order to avoid an accident. What applicant has been guilty of is the old and dangerous game of "three abreast." Clearly when he saw another car approaching him on its proper side of the road he ought to have drawn in behind the water cart and not have attempted to force his way past it in front of the on-coming car. I am in entire agreement that such conduct comes within the purview of s. 5 of the Motor Vehicles Act, that the conviction was a proper one.

In my opinion, however, taking everything into consideration the sentence is too severe, at any rate as regards cancellation of the license. Applicant has been driving cars regularly since 1912, and has obtained a large number of good certificates from a variety of masters. He has never before had a conviction for bad driving, and I regard the Reserve Inspector's verdict that he is unfit to hold a license because he is not a good enough driver as ridiculous in view of his record. I have no doubt that in passing his order the learned City Magistrate must to some extent have been influenced by this opinion after examination of the Reserve Inspector.

I, therefore order that the record be sent to the Hon'ble High Court with a recom-

mendation that the order cancelling applicant's license be quashed. A fine of Rs. 50 I regard as a quite adequate punishment for the offence which has been committed.

JUDGMENT.—I have read the record and I agree with the views of the learned Sessions Judge I set aside the order of the Magistrate directing the license of the accused to be cancelled.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

CRIMINAL JURY REFERENCE No. 62 OF 1924.
February 12, 1925.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.
EMPEROR—PROSECUTOR
versus
PREMANANDA DUTT—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Evidence Act (I of 1872), s. 32—Sessions trial—Disagreement between Judge and Jury—Reference to High Court—Verdict of Jury, when can be rejected—Dying declaration whether can be accepted in part—Statement made by deceased in answer to questions, value of.

A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisement of evidence is very often very unsafe. As regards a dying declaration to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it could be acted upon. In the case of a dying declaration, which by the law of this country assumes a character very widely different from what it is under the English Law, which is relevant under the provisions of the Evidence Act, whether the person who made it was or was not at the time when it was made under the expectation of death, and the weight to be attached to which depends not upon the expectation of death which is a guarantee of its truth but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it, it becomes almost always a question of fact as to whether it should be relied upon or not. Where the dying declaration is not couched in the very words of the person making it but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place the questions put to the deceased may have been leading questions and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being properly comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer so as to discover how much was suggested by the Examining Magistrate and how much was the production of the person making the statement. [p. 1005, col. 2.]

It is a matter entirely within the province of the Jury as to what value they should attach to a dying declaration. [p. 1006, col. 1.]

Before the High Court can refuse to accept the verdict of the Jury in a reference under s. 307 of the Cr. P. C., it must find that the verdict is unreasonable. [p. 1007, col. 2]

Reference made by the Sessions Judge, Chittagong, dated the 29th September 1924.

Mr. *B. L. Mitter*, for the Crown.

Mr. *K. N. Chaudhuri* and Babu *Probodh Chandra Chatterjee*, for the Accused.

JUDGMENT.

Mukerji, J.—The accused Premananda Dutt was tried by the Sessions Judge of Chittagong with the aid of a Jury on a charge under s. 302, Indian Penal Code, for causing the death of one Prafulla Kumar Roy by shooting him on the *paltan* ground in the town of Chittagong on the evening of 25th May 1924 at about 8-30 P. M. The Jury brought in a unanimous verdict of not guilty, and the learned Judge having disagreed with the same, has submitted the case to us under the provisions of s. 307, Cr. P. C.

In the course of an elaborate summing up, which is remarkable for its lucidity and its fairness, the learned Judge has set out all the facts and circumstances of the case and the various points that arise for consideration and his charge has been of immense assistance to us in dealing with the case.

The accused Premananda Dutt, according to his own statement, was a Preventive Officer in the Customs Department, which appointment, he says, he resigned and he became a Congress volunteer. He appears to be a youngman of about 24 years of age, and is what is ordinarily known as a political suspect.

The deceased Prafulla Kumar Roy was a Sub-Inspector of the Criminal Investigation Department. The accused and the deceased appear to have been known to each other for some time past, and there is evidence to show that since February 1924, the deceased was in touch with the accused, presumably watching him as a political suspect, and had met him on several occasions—on some occasions by appointment.

The case for the prosecution is that on the

day and at the hour mentioned before the accused and the deceased met by appointment at about 7 P. M., talked together for some time and they had talks on political matters, that they were seated under a tree and eventually the accused said to the deceased: "Prafulla Babu, you are a very dangerous man, you caused the Maniktala case to be detected and Ananta Singh arrested;" that the deceased replied: "What can I do? I am a paid servant." It is said that the accused then stood up and asked the deceased whether he would not leave the place; to which the deceased replied in the negative and said that the accused might go. The prosecution case is that when in this position the accused fired 3 shots at the deceased. As far as can be made out the time when the shots were fired was somewhere near 8-30 P.M. Immediately after this people came to the spot hearing the shots or cries, and carried the deceased or assisted him on to the road to the east of the field, put him into a gharry which they were able to secure and removed him to a bunglow at a short distance to the south, and there first aid was administered to him Thence he was removed to the General Hospital. Next morning it was considered necessary to remove him to Dacca in order to localize and trace the bullets and for better treatment. A journey by rail was unquestionably riskly but it was decided to undertake the risk as it appeared to be the only means of saving his life. He was put into a train, but expired on the way.

That the occurrence took place at or about the time mentioned above and under circumstances which clearly point to the offence as being one of murder are matters about which there can hardly be any doubt or dispute. Nine witnesses have deposed that they came to the spot immediately or shortly after the occurrence on hearing shots or cries from the place. They are P. W. No. 2, Rai Satish Chandra Sen Bahadur, P. W. No. 4, Nalini Kumar Choudhury, P. W. No. 5, Rajani Kanta De, P. W. No. 6, Biseswar Das, P. W. No. 7, Dhirendra Nath Moitra, P. W. No. 8, Rasik Chandra Bhattacharja, P. W. No. 9. H. L. Black, P. W. No. 10, D. W. N. Coulter and P. W. No. 12, Pramatha Kumar Das. P. W. No. 15, Dr. Chatterji, the Civil Surgeon, has deposed to the injuries revealed on *post mortem* examination on the body of the deceased and said that they were caused by revolver or pistol shots and pointed to three shots having been fired, and the shots having been fired at close quarters, that is to say, from a distance of not more than two feet. P. W. No 23, Mr. Howe, an employee of Messrs. Rodda & Co., on examining the discolouring round the two holes made by the shots in the shirt of the deceased, deposed that the distance of the muzzle of the pistol that fired the shirt would be over 3 and less than 18 inches from the shirt. Firing shots at such a close range unmistakeably indicates intention to cause death. Upon the evidence of P. W. No 15, Dr. Chatterji, the Civil Surgeon, and also of P. W. No. 22, Dr. Lees, the Chief Medical Officer of the A. B. Railway, it is clear that the journey to Dacca was undertaken as it was considered to afford the only chance of saving the life of the deceased and there are absolutely no circumstances in the case suggesting that he would not have died if he was not so removed.

The prosecution, in order to fix the guilt on the accused, have adduced evidence which falls into three groups: (1) Circumstantial evidence by which a motive is sought to be established for the crime; (2) evidence of witnesses who depose to the hearing of the shots and cries and who say that they came and saw the deceased and that the deceased then and there gave out the name of the accused as his assailant; and (3) the dying declaration of the deceased made before a Magistrate in which the details of the occurrence are given and in which is to be found a declaration alleged to have been made by the accused himself of his motive in taking the step that he was about to take.

So far as the first of the aforesaid items of evidence is concerned, the position is this. By an order (Ex. 6) passed by the Deputy Superintendent of Police, Chittagong, on the 5th January 1924, Prafulla Kumar Roy was deputed to Calcutta to assist in the arrest of four persons, amongst whom was the name of one Ananta Singh. From a Police Report [Ex. 7 (1)] it appears that he arrived at Calcutta on 7th January 1924 and two days later made a report to the effect that he had come to know that the accused Premananda Dutt associated with one Sachindra, a suspect. From entries in Police Diaries [Exs. 7 (4), 7 (3) and 7 (2)] dating from 7th February 1924 to 29th February 1924 it appears that the deceased met the accused during this time, and the latter

made appointment with him to meet him which he did not keep and also gave a false address where the deceased was unable to find him. These entries show that the deceased was anxious to be in touch with the accused, but the accused was avoiding the deceased. From the evidence of P. W. No. 15, Upendra Chandra Ghose, a Sub-Inspector of Police and P. W. No. 16, Jinnat Ali, a constable, it appears that the deceased, while in Calcutta, was watching premises No. 10-C Ward Institution Street, at Maniktola, along with other Police Officers, that they did so for the whole of February and up to the middle of March 1924 and two persons were arrested of whom one was the aforesaid Ananta Singh. It would seem that the object of the watch was to arrest absconders in a case which is described in the evidence as the Chittagong Robbery case in which Ananta Singh was an accused, and that in the course of the search of the aforesaid premises certain explosives were found which resulted in a case which is described as the Maniktola case. Apart from the dying declaration, which I shall deal with hereafter and in which the accused is said to have declared that the deceased was a dangerous man for what he had done in the matter of the aforesaid two cases, the only other evidence as to the previous connection between the two is to be found in the deposition of P. W. No. 11, Shama Charan De, who states that on Saturday the 24th May 1924 at 7 or 8 A. M. in the morning the deceased had asked him to tell the accused that he wanted the latter to meet him that afternoon. This request suggests that it was not an altogether unusual thing that the two would meet. There is also the statement of the deceased contained in his dying declaration that he had met the accused twice or thrice before. The learned Judge pointed out to the Jury that the name of the accused was not amongst those the deceased had been sent to Calcutta to enquire about, that there was no connection of a criminal nature proved between Ananta Singh and the accused, and there was nothing else beyond this that they were both political suspects, that they were friends and neighbours and both had been seen exercising together in a gymnasium. The learned Judge rightly warned the Jury that the evidence referred to above is of little or no value as indicating a motive strong enough to prompt the accused to take the life of the deceased. As the learned Judge put it to the Jury the "corner-stone of the prosecution case regarding motive" is the statement in the dying declaration, to which I have referred and for corroborating which the said evidence is only useful.

Turning now to the second group of evidence, it consists of the testimony of nine witnesses, namely, P. W. No. 2, Rai Bahadur Satis Chandra Sen, P. W. No. 4, Nalini Kumar Choudhury, P. W. No. 5, Rajani Kanta De, P. W. No. 6, Biseswar Das, P. W. No. 7, Dhirendra Nath Moitra, P. W. No. 8, Rasik Chandra Bhattacharjya, P. W. No. 9, H. L. Black, P. W. No. 10, D. W. N. Coulter and P. W. No. 12, Pramatha Kumar Das. Of these so far as can be made out from the evidence the first to arrive on the scene were P. W. No. 5 and P. W. No. 6, the two excise peons, who came from the house of the Excise Superintendent just on the east of the field and separated from it by a road intervening. Their evidence is to the effect that on hearing shots, after a little delay sufficient to fetch a light, they went to a group of trees, found the deceased lying on the ground there and carried him or assisted him on to the road. P. W. No. 5 says he asked the deceased what had happened and the deceased replied that Premananda had shot him, that he and P. W. No. 6 then raised him and asked him "which Premananda?" and the deceased replied, "son of Harish Dutt." P. W. No. 5 gives practically similar evidence and says that the deceased said: "Premananda has shot me, Premananda has shot me," and that as he and P. W. No. 5 were bringing the deceased along and while still in the field, he, *i. e.*, P. W. No. 6, asked him "which Premananda?" and the deceased replied, "Harish Dutt's son Premananda." Next came to the spot three witnesses—the exact order of their arrival being not very clear—P. W. Nos. 4, 7 and 8. These witnesses came from the house of Babu Manaranjan Moitra, the Personal Assistant of the Commissioner, which lies in a south-westerly direction from the alleged place of occurrence. Of these P. W. No. 4 is a clerk in the Traffic Manager's Office of the A. B. Railway, P. W. No. 7 is a gentleman who had then applied to be enrolled as a Pleader and P. W. No. 8 is the *Sadar Kanugoo* of Chittagong. They came to the spot and saw the deceased being either raised or helped along towards the road. P. W. No. 4 says that when he was helping the deceased to go

towards the road, when near some lowlying land, he said that Premananda had shot him, and that on the road some one asked him "which Premananda?" and he said "Premananda, son of Harish Dutt." P. W. No. 7 says that when the deceased was being taken along he followed the deceased, that the deceased sat down near a gate and then said Premananda had shot him, that he himself did not ask any question, but some one asked the deceased "who is Premananda?" and in answer the deceased said "son of Harish Dutt." P. W. No. 8 gives similar evidence. P. W. No. 2 appears to have arrived when the deceased was on the road. He is the Government Pleader of Chittagong and his house is to the east on the other side of the road, a little to the south of the Excise Superintendent's Bungalow. He says that he found the deceased lying on the road, bleeding and he was very much upset and said "what has happened?" and that the deceased replied that Premananda Dutt had shot him. P. W. No. 9 and P. W. No. 10 arrived almost together as appears upon the evidence of the former. P. W. No. 9 is an assistant of Messrs. Bulloch Brothers and came from his bungalow which is at some distance to the south, and P. W. No. 10 is the Town Inspector of Police whose bungalow is on the west of the field. When these witnesses came the deceased was lying on the road. P. W. No. 9 says that he as well as P. W. No. 10 asked the deceased the name of the assailant, that this they did before the carriage, into which he was put for removal to his bungalow, moved on, and that the deceased gave a name which he could not catch. P. W. No. 10 says that the deceased, when he was in P. W. No. 9's bungalow gave the name as "Premananda Dutt, son of Haris Chandra Dutt." He said that deceased had told him before that he had recognized his assailant and he had then asked for the name but before the deceased had time to reply he was in conversation with P. W. No. 9. The last of the witnesses is P. W. No. 12 who is the Sanitary Inspector of Chittagong and lives in a house behind the house of the Government Pleader. He arrived when the deceased was being helped into the *gharry* in front of the Excise Superintendent's house. He says he went up to the deceased and heard him say, "How often must I repeat this," and that he heard the name of Premananda only. The meaning of this last mentioned statement is not very clear. He says he remained beside the carriage till it was taken away, that he did not hear any question put to the deceased as to who his assailant was or his father's name and he did not hear mention of the name of Harish Chandra.

I have set out the evidence somewhat in detail in view of the contention which was put forward in the Court below and which has also been repeated before us to the effect that view of the discrepancies and conflicts that appear in the evidence as to the circumstances attending the mention of the names of Premananda and of his father it should be held that the deceased did not give out the names or that at any rate it is very doubtful that he did. So far as this question is concerned the chief argument of the defence has been directed to show that there are discrepancies and contradictions as to the exact place or places where the deceased gave the name of the accused or his father. The evidence of these witnesses has also been criticised in respect of other matters as well that are to be found in their depositions, notably the contradictions between P. Ws. Nos. 4, 7 and 8 on the one hand and P. Ws. Nos. 5 and 6 on the other, the latter apparently denying that the former came to the spot when they were helping the deceased to walk up to the road, the conflicts as to the persons who were carrying the lights and the uncertainty suggested by some of them as to whether there were two excise peons or one. On the other hand the witnesses, judging from their position and character, are persons to whom no suspicion of bias or prejudice can reasonably be attributed. Allowance must be made for the state of their mind, having regard to the suddenness and horror of the crime and the confusion that it naturally caused. On a consideration of all the circumstances and not forgetting at the same time the improbability of every single person coming up to the deceased and making him repeat the name and father's name of the assailant, I think, on the whole it may be safely held that the deceased did in fact give out the name of his assailant and his father's name as well.

It is convenient to deal here with some of the other arguments which appear to have been advanced on behalf of the defence in the Court below and some of

which were also put forward before us as to the naming of the assailant by the deceased at this time. It was argued that the deceased may have been inspired to give out the name, and that it was Inspector Coulter or some other Police Officer who was responsible for the inspiration. As for Inspector Coulter what is suggested in effect is this : that the occurrence took place not at the place where the three trees grow but at a place under a mango tree which is somewhere to the south of the Inspector's bungalow ; what basis there is for such a suggestion I propose to say later on ; that he was then helped to go or taken to the place where the three trees grow, and Inspector Coulter's apathy is criticised as suggesting that he had a hand in such removal in the course of which he had an opportunity to put the name into the mouth of the deceased. Reference in the connection was made to the fact spoken to by him in his evidence that he did not come to the spot till sometime after the occurrence and that he spent ten minutes in getting his rifle out of a box ; and comment has also been made on the fact that he did not display any anxiety to send the deceased to the hospital. The inference sought to be drawn is hardly justifiable and nothing appears on the record which would suggest that the charge levelled against the Inspector had the slightes foundation in fact. As regards the other Police Officers, the evidence is sufficiently clear to the effect that one of them, P. W. No. 21, Sub-Inspector Benimadhab Choudhury, was not at Chittagong at all on that night and the only two other officers stationed there, namely, P. W. No. 19, Sub-Inspector Sarafatulla and P. W. No. 20, Sub-Inspector Sachindra Kanta Bhowmik, were at the *thana* when the telephone message gave them the first intimation of the occurrence. Taking into account the evidence of P. W. No. 22, Dr. Lees, and also the other evidence on the record bearing upon this point, there can be no room for doubt that the name had been given by the deceased before these Police Officers even came to know of the occurrence. Certain circumstances were pointed out on behalf of the defence to show that P. W. No. 19, Sarafatulla and P. W. No. 20, Sachindra Kanta Bhowmik, were not at the *thana* at that hour; but to my mind, they do not lead to such a conclusion. Reading the evidence as a whole, there can be no doubt that the deceased did give out the name before any interested person could possibly have had any access to him.

This giving out of the name of the assailant, however, in the peculiar circumstances of the case and in the absence of anything further, would not necessarily show or conclusively prove that the shots were actually fired by the person who was so named. It is an admitted feature of the prosecution case that the deceased and the accused were to meet by appointment. Whatever conflict there is between the dying declaration on the one hand and the evidence of P. W. No. 11, Shama Charan Day, on the other as to the circumstances connected with this appointment—a conflict to which I shall refer when dealing with the dying declarations itself — there can be no question that the deceased was expecting to meet the accused at the *paltan* field at about 7 P. M. that evening. P. W. No. 14, Srikanta Chakravarti, Inspector of Police, says in his evidence that on the date in question at about 6·30 P. M., he went to the Police Club and met the deceased there, that he was with the deceased for 15 or 20 minutes and the deceased then went away after asking him if it was 7 P. M., and on his replying that it was nearly so, and that the deceased said he had to go and meet a gentleman. The deceased evidently came to the place and at the hour appointed and if after waiting for some time he came to be shot it is only natural that regard being had to the character of the man he was there to meet and for whom he was waiting—recognition or no rocognition—he would name the man as his assailant. It was not a moment when one, shot thrice on vital parts of his body, could be expected to calculate and discriminate between what one has seen with his eyes and what one honestly believes as being what must have happened. The name of the accused was uppermost in his mind and it is not unreasonable to hold that situated as the deceased then was he would not find it necessary to make a distinction between the man who had shot and the man who was responsible for the shooting. The evidence of P. W. No. 2, Rai Bahadur Satish Chandra Sen, is to the effect that it was a very dark night, the moon would rise about six hours after sunset and it was a cloudy night, the first part of the night was very dark and one could not identify another person without

a light within 2 or 3 feet. There is also a body of evidence on the record that many of the people that came to the spot did not start until they got their lanterns. To my mind, therefore, the mere fact that the deceased gave out the name and father's name of the accused does not carry the case very far, certainly not far enough to bring the offence home to the accused. The third item of evidence, to my mind, is the most material one. To that we must look, as affording an adequate motive for the offence, the details of the occurrence and the circumstances which would go to show that the deceased had opportunities to recognize and did in fact recognize his assailant. If this dying declaration can be relied upon the case becomes a clear one and no reasonable doubt can possibly arise as to the guilt of the accused. So far as the dying declaration is concerned the learned Judge has not clearly dissented from the opinion which the Jury formed of it. The Foreman of the Jury stated. "We find that the statements in the dying declaration are vitiated by these having been elicited as a result of question and answer." The learned Judge in his letter of reference observed with regard to this matter as follows:—"The point has been fully discussed in the charge to the Jury, and it is a finding against which I am diffident in expressing a contrary opinion." He makes his position quite clear in these words: "I consider it unnecessary to enlarge on this question as my position is that the statements of Prafulla Babu to the above-mentioned witnesses are sufficient to establish the guilt of the accused, and even if the evidentiary value of the statement recorded by the Sub-Divisional Magistrate is impaired or even altogether destroyed, by a conviction that it was mainly or entirely the result of leading questions, such a finding cannot alter the fact that those previous statements were made." He thus relies for his recommendation not upon the dying declaration but upon the statements made previously by the deceased to or in the presence of the witnesses. With this, I regret, I cannot agree. As I have said the dying declaration must be referred to for the solution of the difficulties as to motive and as to recognition. The learned Standing Counsel has asked us to rely upon such portions of the dying declaration as may be taken to have been made not in pursuance of any leading question, or such portions of it as are corroborated by other evidence. In my opinion a dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisement of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. In the case of a dying declaration which by the law of this country assumes a character very widely different from what it is under the English Law, which is relevant under the Indian Evidence Act, whether the person who made it was or was not at the time when it was made, under expectation of death, and the weight to be attached to which depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it, it becomes almost always a question of fact as to whether it should be relied upon or not. There is high authority for the proposition that "when a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases in which the person has no opportunity of cross examination. In the first place the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the Examining Magistrate, and how much was the production of the person making the statement." [*Per* Cave, J., in *R.* v. *Mitchell* (1).] The Sub-Divisional Officer Mr. Satish Chandra

(1) (1892) 17 Cox. C. C. 503.

Majumdar was examined as a witness, being P. W. No. 3. He stated that such unimportant words or questions as "go on" or "and then", "what else," "on what topic," may have been asked by him. He stated that very few questions and only the unimportant ones were left out. He stated that it was not necessary to put down all questions in recording a dying declaration, and he did not consider it necessary to put down a question "do you know so and so" or "have you met so and so." As to certain specific statements he was positive that they were not made in answer to any question of his, and he also said that before the deceased said that Shama Charan was a shop-keeper he may have put a question to him to elicit who this Shama Charan was. It is unnecessary to refer to other portion of his evidence. The Jury heard him and they had also the record of the dying declaration before them and it was a matter entirely within the province of the Jury as to what value they should attach to it. The matter could be left to the Jury in no better words than those of the learned Judge: "If you consider the statement was elicited as a result of leading questions, that is to say, questions suggesting answers, if you believe this against the word of the Sub-Divisional Officer then you are bound to regard the statement with the gravest suspicion, to the extent even of refusing to give it any credence at all, because unless such questions are recorded it is impossible for a tribunal sitting in consideration of the evidentiary value of the statement, to assess how much, if any, of it is the voluntary outcome of the man's own mind and volition, and how much is the result of such suggestion." The Jury, as I have said, had the record of the declaration before them. They had also before them the fact proved in this case that before the deceased made the statement, outsiders and Police Officers had ample access to him. If, therefore, the Jury were not prepared to rely upon the declaration it is hardly a matter upon which we can dissent from them when dealing with the case under s. 307, Cr. P. C.

There are also certain other arguments which have been advanced before us and to them I desire shortly to refer. It is urged on behalf of the defence that the dying declaration is at variance with the other evidence on the record, and it should not, therefore, deserve that sanctity which might otherwise attach to it as being the statement of a man who was about to die. In the first place it is pointed out that the deceased spoke of a mango tree as being the tree under which the shots were fired and it is pointed out that the only mango tree there was the one on the south-east corner of Inspector Coulter's house, and it is pointed out that the deceased upon his own statement knew the place very well and was hardly likely to mistake the three *jungly* trees for a mango tree. In support of this point, reference is also made to a passage in the deposition of P. W. No. 5 who says as follows:—"I saw a man run and fall down and another man running away to the north-west. I saw a figure fall and a figure in white running. I did not see actually a man fall. It looked like something falling." It is said that this lends support to the defence suggestion that the occurrence did not take place under the three trees. Next it is said that whereas the deceased said in his declaration that he was sitting under the tree and the accused shot him standing, P. W. No. 9, Black, in his evidence stated that the deceased had told him that the man who shot him was walking with him and talking with him on the golf maidan. It is next said that the statement of the deceased that he met the accused in front of Satish Babu's house at 7 P. M., is falsified by what has been spoken to by Satish Babu and the excise peons. It is urged that the accused was not in the habit of wearing shoes and in support of that reference is made to the evidence of P. W. No. 2 and P. W. No. 9. Comment is also made as to the non-examination of Mr. Kelly, Mr. Makean, Mr. Shallow, the coachman and some other witnesses. It is urged that the place is a much frequented one and also that the Rai Bahadur's horse is groomed there, so that it was not a likely spot to be used either for the crime or for the purpose of sitting on the ground. It is unnecessary to deal separately with these matters. Most of them to my mind present no real difficulty and are easily explicable.

There are, however, two matters which present some difficulty to my mind—I shall not say that it is altogether an insurmountable difficulty. The deceased said that the day before the accused sent information to him through Shama Charan he had business with him and had asked him to meet the accused at the spot. In answer

to a question as to what Shama Charan told him, he stated : " Babu, Premananda wanted you to meet him in that place." So there can be no mistake that the deceased meant to convey that the accused sought for an interview with the deceased through Shama Charan and requested him to be at the spot as that hour. P. W. No. 11. Shama Charan, is equally positive that no such thing took place. He is positive that he had no talk with the accused at any time on Sunday. He says that on Saturday, 24th May, he met the deceased about 7 or 8 A. M. in the morning and the deceased requested him to ask the accused to meet him that afternoon, *i.e.*, on Saturday. There is, therefore a conflict which it is hard to, reconcile. It may be that a satisfactory explanation of it is obtainable : but there it is and it may have weighed with the Jury. The next thing is this. If the accused sought for an interview with the deceased, and came there fully prepared and armed to shoot him to death, would he wait in the way suggested and be conversing with him all the time on various matters and then tell the deceased why it was that he was about to kill him and think it necessary to acquaint him with the fact that he was a dangerous man, that he had caused the Maniktola case to be detected and Ananta Singh arrested and then fire the shots. It is not altogether impossible that such a conversation took place but it is certainly somewhat improbable and may have seemed to be so to the Jury.

There remains to notice one further point which the defence sought to make in this case P. W. No. 11, Shama Charan, in his evidence stated that he met the accused on the evening of the occurrence at the time of candle-light just as the lights had been lit. He states that he then met him in front of his shop on the road, and there was a man, one Bimal Babu, with him. Bimal Babu was pushing a bicycle and the accused was walking slowly beside him. He also states that he met the accused again shortly before or shortly after 9 o'clock and that he came from his house towards his shop and stayed there a couple of minutes. He states further that before the accused came Benoy had come to his shop and purchased some cigarettes and that the accused came and took one from him. It is sought to be shown from this evidence that the accused could not have been at the place of occurrence at the time suggested by the prosecution and that Benoy Babu, who was a witness on the charge-sheet, was withheld by the prosecution. In the absence of any further data it is not possible to appreciate the exact significance of this evidence.

On the whole, therefore, there were matters before the Jury upon which they might have felt themselves unable to convict the accused and I am not prepared to hold that their verdict under the circumstances was an unreasonable one, such as would justify our refusal to accept the same. Most of the reasons given by the Foreman in support of the verdict may not commend themselves to us or may not be very convincing but the reasons that the Foreman gave need not necessarily be taken as constituting all the grounds which he and the other Jurors may have had for their verdict. It is well-known that even trained minds find it difficult when asked off-hand to formulate all the grounds which they may have in support of an opinion which they may have formed. After all, what we have got to find before we can refuse to accept the verdict of the Jury in a case under s. 307, Cr. P. C., is that the verdict is unreasonable. In the present case it is not possible to say that the verdict of the seven Jurors who sat at the trial was an unreasonable one.

The result is that in my opinion the verdict of the Jury should be accepted. The reference should be rejected and the accused should be released.

Greaves, J.— I agree.

Z. K. *Reference rejected.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 18 OF 1925.

February 26, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

YUSIFALLY LOOKMANJI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Karachi Port Trust (Act VI of 1866), s. 84—Cri-

minal Procedure Code (Act V of 1898), s. 386—Levy of Port Trust dues—Order directing issue of warrant—Revision, whether competent.

The order of a Magistrate directing a warrant to issue under s. 386 of the Cr. P. C. for recovery of an amount due to the Karachi Port Trust on application being made to him for the purpose under s. 84 of the Karachi Port Trust Act, is not a judicial order but an executive order which cannot be revised by the High Court.

Application to revise an order of the City Magistrate, Karachi, dated the 26th November 1924.

Mr. *Javharmal Vilaitrai*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—In this case it appears that Yusifali Lookmanji imported certain Soda water bottles which owing to disputes remained on the premises of the Karachi Port Trust and ultimately there became due, according to the finding of the Karachi Port Trust, a sum of Rs 68-12-0 against Yusifali Lookmanji in respect of that consignment. The Port Trust called upon Yusifali Lookmanji to pay, but Yusifali did not pay, therefore, under s. 84 of the Karachi Port Trust Act, the Port Trust applied to the City Magistrate to recover this money by summary proceedings in the manner provided in the Cr P. C. for the recovery of fine. The Magistrate gave notice to Yusifali Lookmanji and held a regular proceeding and coming to the opinion that the amount of Rs. 68-12-0 was actually due by Yusifali to the Port Trust and that the claim was not barred, ordered that amount to be recovered as a fine, in accordance with s. 386 of the Cr. P. C.

Yusifali now comes here asking us to exercise our revisional jurisdiction and we have heard both sides.

In our opinion the matter is not one for criminal revision. The Port Trust Act requires that the summary proceeding should be that held under the Cr. P. C. for recovery of fine. The only procedure which has been indicated to us as laid down in the Cr. P. C. for recovery of fine is s. 386. But s. 386 does not contemplate any sort of inquiry or order. It is, as a matter of fact, merely an action of the Court itself consequent on some previous orders. The Court, for instance, in the case of conviction for a hurt may impose a fine of Rs. 25 or one month's simple imprisonment and the person so sentenced may refuse to pay, the Court will send the recusant person to prison and then take action under s. 386 to levy the amount of fine from his property. That order, therefore, directing a warrant to issue is merely a consequential and ancillary order and the order which will have to be attacked by the accused, whether in appeal or revision would not be that order but the original judgment inflicting upon him a sentence under s. 323. Similarly in the present case the order of the learned City Magistrate is merely a consequential or an executive order passed for the purpose of carrying out the effective order of the Port Trust directing the applicant to pay a certain sum of money in consequence of his failure to pay their dues. It is that order of the Port Trust and not the order of the learned City Magistrate that is to be attacked. There is no machinary provided in the Cr. P. C., for attacking that order before us although there are, no doubt, weapons in the armoury of the Courts to prevent or to punish an attempt by the Port Trust illegally to assess damages. But as regards the order which we are not, asked to revise our opinion is that it is not a judicial order but merely an executive order and as such cannot, although for convenience it has been given the form of a final order in a proceeding between parties, be treated as if it were an order in a judicial proceeding, and so subject to revision.

We, therefore, dismiss this application.

P. B. A. *Application dismissed.*

RANGOON HIGH COURT.

CIVIL REFERENCE No. 3 OF 1924.

March 2, 1925.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Gyi.

MA OHN MAY—PETITIONER

versus

J. C. SUTHERLAND AND ANOTHER—RESPONDENTS.

Divorce Act (IV of 1869), ss. 7, 14, 17—Matrimonial jurisdiction—Principles to be followed—Petition for divorce—Petitioner guilty of adultery—Discretion of Court—Decree nisi, *confirmation of.*

The Courts in India in the exercise of their matrimonial jurisdiction are bound to act on the principles followed by the Divorce Court in England. [p. 1009, col. 1.]

Adultery on the part of a petitioner for divorce is very rarely condoned by the Court. Where, however, it appears that the adultery was committed in ignorance of fact as where a petitioner whose wife has left him marries again in the belief that his wife is dead, the Court may grant relief. Another ground is where a petitioner acts in ignorance of law, as where a man marries again after a decree *nisi* has been passed but before it is made absolute in the *bona fide* belief that his marriage has already been dissolved. Another class of cases in which a discretion may be exercised in favour of the petitioner is where a wife commits adultery in consequence of threat and personal violence by which she is coerced into committing the act. The last case is where the petitioner had committed adultery to the knowledge of the respondent which the respondent had long since pardoned and condoned. [p. 1009, col. 2; p. 1010, col. 1.]

Petitioner, who was a Burmese Buddhist, was married to the respondent who was a Christian. She had five children from him and was subsequently deserted by the respondent. Some years afterwards she sued the respondent for divorce on the ground of adultery coupled with desertion and obtained a decree *nisi*. Shortly before she obtained the decree she began to live with another man. On the decree coming up before the High Court for confirmation:

Held, that although there were several features in the case which accounted for the petitioner's guilty conduct they could not be taken to extenuate it and that the Court could not, therefore, exercise its discretion in her favour and must decline to confirm the decree *nisi*. [p. 1010, cols. 1 & 2.]

Civil reference for confirmation of decree for dissolution of marriage passed in Suit No. 22 of 1924 by the District Court, Insein.

JUDGMENT.—This is a Reference to confirm a decree *nisi* passed by the District Judge, Insein. The petition is based on adultery coupled with desertion for two years, and there is no question whatever that grounds have been proved entitling the petitioner to a divorce but it subsequently transpired that she herself had been guilty of adultery and the important question for consideration is whether we can under these circumstances exercise a discretion in her favour and nevertheless confirm the decree *nisi*. The facts of the case are that petitioner and respondent were married on the 3rd July 1911. Respondent is a Christian and they were married before a Registrar. Respondent was in the Government Educational Service. They were living at Insein. Five children were born to them. Respondent was then transferred to Tavoy and did not take petitioner with him because of the children who were at school. He occasionally visited her when he came back to Insein during the holidays. He once asked her to join at Tavoy but she could not leave the children. She heard rumours that he had taken another woman Ma Tun Sein. Respondent subsequently returned to Rangoon bringing with him Ma Tun Sein, and she has lived with him as his wife ever since his visit to Tavoy. Petitioner only then became aware of his *liaison* with this woman. He ceased to maintain her and she obtained an order for maintenance for herself and the children which has not been regularly paid. She even got him sent to gaol for non-payment and he was at the time of suit for maintenance in arrears. She then filed a suit for divorce on the 31st May 1924. The decree *nisi* was passed on the 17th July 1924. On the 3rd October 1924 respondent applied for the guardianship of the children and in the course of those proceedings petitioner made a statement. She said she was living in Insein in her grandfather's house and that she was pregnant by one Maung Po Kya. She said that she began to live with Maung Po Kya from the 15th July 1924. This was two days before the decree *nisi* was passed. The question is, whether on these facts we can excuse her adultery and confirm the decree *nisi*. This Court is bound to act on the principles followed by the Divorce Court in England. Adultery on the part of the petitioner is very rarely condoned by the Court, and the principles on which the Courts in England act, in the exercise of their discretion, are to be found in the cases of *Constantinidi* v. *Constantinidi & Lance* (1), *Wyke* v. *Wyke* (2) and *Tickner* v. *Tickner* (3). Where the adultery

(1) (1903) 19 T. L. R. 699; (1903) P. 246; 72 L. J. 82; 89 L. T. 340; 52 W. R. 190.

(2) (1904) 20 T. L. R. 193; (1904) P. 149; 73 L. J. P. 38; 90 L. T. 173.

(3) (1924) 40 T. L. R. 367; (1924) P. 118; 131 L. T. 159; 22 L. G. R. 692.

is committed in ignorance of fact, as where a petitioner whose wife had left him married again in the belief that his wife was dead, the Court may grant relief. Another ground recognised, is, where a petitioner acts in ignorance of law, as, where a man marries again after decree *nisi* has been passed, but before it was absolute in the *bona fide* belief that his marrirge had already been dissolved. Another class of cases in which discretion may be exercised is where the wife commits adultery in consequence of threats and personal violence by which she is coerced into committing a default. The last case is where the petitioner commits adultery to the knowledge of the respondent but which respondent long since pardoned and condoned. In *Constantinidi* v. *Constantinidi & Lance* (1) the Court accepted the pleadings that petitioner's adultery had been caused or condoned by the wilful neglect or misconduct of the respondent and this is the only ground that can possibly be urged for taking a lenient view of the present case. It is to be noted that petitioner's adultery was committed several years after she had been deserted by her husband. She had five children to support and educate and respondent's payment of maintenance decree was by no means regular. She, no doubt, had but little wherewith to support and educate her children and maintain herself, but, on the other hand, it appears that she had a home with her grandfather. She had, further, taken steps to obtain a divorce which would leave her free to contract a lawful marriage, but before the decision was given she committed adultery. There is one other fact which should be considered also and that is, that she is a Buddhist and she would probably believe that by the mere fact of desertion, the marriage would, according to Burmese Buddhist Law, be dissolved. On the other hand, she knew she had married a Christian and she knew that her marriage had been celebrated in accordance with the law applicable to Christianity. It may be a hard case and it is impossible not to feel a certain amount of sympathy for the petitioner, but these cases are not to be decided on grounds of sympathy, but on the judicial exercise of the discretion which the law confides to the Courts. There are no doubt, several features in the case which account for, but can hardly be taken to extenuate her guilty conduct, and having taken steps to obtain a legal decree, she did not even wait to know the result and had probably been committing adultery for some time before the decree *nisi* was passed. Under these circumstances, in my opinion, it is impossible to exercise our discretion in her favour and I would, therefore, decline to confirm the decree *nisi* with the result that the suit then stands dismissed.

Z. K. *Suit dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 202 OF 1924.

February 25, 1925.

Present:—Mr. Daniels, J. C.

IDOO AND OTHERS—DEFENDANTS—APPLICANTS

versus

NEHAL KHAN AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—Contract to extract lakh *from trees, money payable under, whether rent—Suit to recover money under such contract, whether cognizable by Small Cause Court.*

A contract for the extraction of *lakh* from trees is of the nature of a license and is not a lease. No interest whatever in the trees passes under such a contract, nor even the right to temporary possession of the trees. The contract is strictly limited to the particular purpose for which it is given. A suit to recover money payable under such a contract is not, therefore, a suit to recover rent within the meaning of Art. 8 of Sch. II to the Provincial Small Cause Courts Act and is not excluded from the cognizance of a Small Cause Court.

Revision against the judgment and decree of the Subordinate Judge, Bahraich, dated the 12th November 1924.

Mr. *Ghulam Hasan*, for the Applicants.

Mr. *B. N. Chakbast*, for the Opposite Party.

ORDER.—In my opinion the view taken by the learned Subordinate Judge is correct. A contract for the extraction of *lakh* from trees is of the nature of a license and not a lease. No interest whatever in the trees is given nor even the right to temporary possession of them. The contract is strictly limited to the particular purpose for which it is given. This was the view taken by Mr. Lindsay in Civil Revision No. 103 of 1913 and I agree with it. The revision is, therefore, dismissed with costs.

Z. K. *Revision dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 210 OF 1923.
February 17, 1925.
Present:—Mr. Justice Heald and Mr. Justice Chari.

A. S. A. VEERAPPA CHETTY, BY HIS NEXT FRIEND A. S. A. RAMAN CHETTY—APPELLANT

versus

MA TIN AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 8, 59, 70—"Things attached to the earth" what are—Machinery placed in building, whether attached to building—Equitable mortgage of house, whether includes machinery.

"Things attached to the earth" within the meaning of s. 8 of the Transfer of Property Act, include not only walls and building imbedded in the earth but also things attached to whatever is imbedded for the permanent beneficial enjoyment of that to which they are attached. Machinery brought into a building for the purpose of carrying on a business therein cannot be said to be attached to the building for the permanent beneficial enjoyment of the building. The important test in such a case is the intention with which an article is placed in the building. [p. 1011, col. 2.]

Where an equitable mortgagee of a house claims machinery installed in the house as part of his mortgage security by operation of law by virtue of the provisions of s. 8 of the Transfer of Property Act, the burden is on him to prove all the ingredients necessary to establish his case, for instance, that the machinery is attached to the building and that it is so attached for the permanent beneficial enjoyment of the building. [p. 1012, col. 1.]

In the case of an equitable mortgage by deposit of title-deeds the scope of the security is the scope of the title. [p. 1011, col. 2.]

Appeal against a decree of the District Judge, Bassein, in C. R. No. 12 of 1923.

Mr. *Clark*, for the Appellant.

Mr. *Anklesaria*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises, the plaintiff, A. S. A. Veerappa Chetty, claims a mortgage due in respect of land and house and a godown in Bassein Town. He also claims that his mortgage operated on an electric machine and electric equipment and also on an ice factory machine either installed or merely placed in the building which were subject to his mortgage. The mortgage was an equitable one by the deposit of title-deeds created on the 20th March 1921, the mortgagor being one Lok Ta Shway. He is dead and the defendants were sued as his legal representatives. The learned District Judge of Bassein gave the plaintiff a decree in respect of the lands and buildings, but rejected his claim in respect of the two sets of machinery. The plaintiff now appeals to this Court. According to the plaintiff the electric machinery was in existence at the date of the mortgage while the ice-making machinery was brought in after the mortgage. According to the defendants both sets of machinery were brought into the premises after the mortgage was created, but in the view we take of this case, it is not necessary to come to any finding on this point, since we are of opinion that the plaintiff's case must fail whether the two sets of machinery were brought before or after the mortgage. It will be noticed that, as the District Judge points out, there is no evidence whatever as to the purpose for which the electric machinery was used nor of the manner in which either set of machinery is attached to the building. The plaintiff's claim is that the electric machinery passed to him as part of the land which was mortgaged to him and the ice-making machinery passed to him as accession under s. 70 of the Transfer of Property Act. The mortgage in question is a mortgage by deposit of title-deeds. In the case of equitable mortgages by deposit of title-deeds it has been held that the scope of the security is the scope of the title [*Pranjivandas Jaggivandas Mehta* v. *Chan Mah Phee* (1).] The title-deeds unfortunately are not on the record but it is unnecessary to send for them. The sale-deeds of the property evidencing the sale to Lok Ta Shway are dated 1918. As Lok Ta Shway is alleged to have brought in the electric machinery himself there could not possibly be any reference to them in the title-deeds deposited. If they have passed at all, they could only pass as things attached to the earth by operation of s. 8 of the Transfer of Property Act. The Act's words "attached to the earth" are defined in s. 3 of the Transfer of Property Act. Things attached to the earth include not only walls or building imbedded in the earth but also things attached whatever is imbedded for the permanent beneficial enjoyment of that to which they are attached. There is, as we have said before, no evidence as to the manner in which the machinery is attached to the building. Under these circumstances it cannot be held that the machinery is attached to the land or any part of the building. Even if so attached, it cannot pass to the transferee by a mere transfer of the land, unless it is attached

(1) 35 Ind. Cas. 190; 9 B. L. T. 125; 43 C. 895; (1916) M. W. N. 443; 31 M. L J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 28 Bom. L. R. 664; 20 M. L. T. 242; 24 C. L. J. 314; 8 L. B. R. 458; 43 I. A. 122 (P. C.).

to the building for the permanent beneficial enjoyment thereof. The point in question was the subject of consideration in a recent case in the Madras High Court, *Narayana Sah* v. *Balaguruswamy Nadar* (2). In that case certain buildings were used for a distillery and it was contended that the distillery machinery attached to the building passed to the creditor. The learned Judge discussed the law at some length. He held that the technical English Law on fixtures did not apply in India. The learned Judge also explained the operation of s. 8 of the Transfer of Property Act, and held that the "primary consideration in determining whether the items claimed are fixtures under s. 8 of the Transfer of Property Act should be whether the articles are provided for the permanent use of the house, and whether they can be said to be articles which are necessary or which are provided for the more beneficial enjoyment of the property and I do not think that under that term machinery brought into the house for the purpose of carrying on business can be included." According to the learned Judge the important test in such cases was the intention with which the articles were put into the house. The electric machinery was in this case claimed by the plaintiff not to have been specifically mortgaged, but as having become part of the mortgage security by operation of law. The burden was on him to prove all the ingredients necessary to establish his case. He has given no evidence of the purpose for which the electric machinery was used. Under these circumstances it cannot be held that they were provided for permanent use in the house or for its more beneficial enjoyment. As regards the ice-making machinery even if it had been in existence at the time of mortgage it could not have passed to the mortgagor. It was presumably installed for the purpose of ice manufacturing business and the remarks in the Madras case [*Narayana Sah* v. *Balaguruswami Nadar* (2)] are distinctly applicable. In this view it is not necessary to consider the English and other cases cited before us. We, therefore, uphold the decision of the District Judge and for the reasons given, the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 75 Ind. Cas. 838; 33 M. L. T. 227; 45 M. L. J. 385; 18 L. W. 928; (1924) M. W. N. 43; (1924) A. I. R. (M.) 187.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 113 OF 1924.

March 2, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

RAGHUNATH PRASAD SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BASDEO PARSAD SINGH—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Partition—Jointness of members constituting one branch of family—Presumption—Burden of proof—Debts incurred by father—Pious obligation of sons, whether can be enforced during lifetime of father—Decree passed against father personally—Immoral obligation.

The sons of a Hindu are under a pious obligation to pay their father's debts even in his lifetime. [p. 1013, col. 1.]

Where a partition takes place of joint family property there is no presumption that a father and his sons constituting one branch of the family continue to remain joint *inter se*. The question is one of fact and the burden of proof is on those who allege jointness. [*ibid.*]

Where in a suit for partition of joint family property and for accounts against the manager of the family a decree for money is passed against the defendant personally, the fact that the decree is personal is not sufficient to prove that the obligation in respect of which the decree was passed was an immoral obligation so as to absolve the sons of the judgment-debtor from liability in respect of the decretal amount under the decree. [*ibid.*]

Appeal from an order of the Subordinate Judge, Saran, dated the 15th March 1924.

Mr. *S. K. Mitra*, for the Appellant.

Mr. *N. N. Sinha*, for the Respondent.

JUDGMENT.

Mullick, J.—The question in this appeal is whether the share of the appellants Raghunath Prasad Singh, Jagannath Prasad Singh and Gorakh Prasad Singh in the ancestral family property is liable to be sold in execution of a decree against their father Sham Narain Singh. The decree was made in a partition suit brought by the respondent Basdeo Parsad Singh. The Subordinate Judge ordered a partition of Basdeo's 8-annas share. Apparently a money lending business was part of the joint family property of which Sham Narain was the *karta*. As Sham Narain refused to produce any accounts, the Subordinate Judge valued Basdeo's share at Rs. 6,000 and gave a personal decree against Sham Narain for this sum. When the immoveable property assigned to Sham Narain and the three appellants jointly was attached in execution of the decree for this debt, the appellants objected, firstly, on the ground that they were not joint with their

father, and secondly, on the ground that the debt was immoral.

With regard to the first of these points, it now appears to be settled [*Brij Narain* v. *Mangla Prasad Rai* (1)] that the sons are under a pious obligation to pay their father's debt even in his lifetime. But it is contended that a partition of the joint family property having taken place, there is no longer any presumption that the branch to which Sham Narain and his three sons belong has continued to remain joint. That is perfectly true. There is no presumption of jointness and it is a question of fact whether Sham Narain and his three sons have remained joint. The burden of proof is on those who allege jointness and the Subordinate Judge has found that the respondent has discharged it. The appellant Raghunath Prasad gave evidence before the Subordinate Judge that he was joint with his father. He has been believed and there is no satisfactory evidence to the contrary. It has not been proved that Sham Narain was joint in food only and not in property with his sons.

With regard to the other point, it is contended that the Subordinate Judge would not have given a personal decree against Sham Narain unless he had been satisfied that it was an immoral debt not binding upon the joint family. The answer to this is that the Subordinate Judge did not find that the debt was immoral and it is conceivable that his opinion was that in this case the *karta*, though not guilty of criminal misappropriation, had otherwise incurred a liability not binding upon his co-parceners. I do not think that the passing of a personal decree alone is sufficient to prove immorality. Evidence was given that Sham Narain had wasted money on a dancing girl, but neither of the two witnesses has been believed upon this point by the Subordinate Judge. In any event the evidence is of such a vague kind that the learned Subordinate Judge was right in refusing to infer that the Rs. 6,000 in question was spent on this woman.

The appeal is dismissed with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 63; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 793 OF 1923.

May 15, 1925.

Present:—Mr. Justice Boys and Mr. Justice Ashworth.

SUNDAR RAI—PLAINTIFF—APPELLANT

versus

SURAJ BALI RAI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 19-A—Undue influence—Contract set aside—Restoration of benefit, whether can be directed.

Where the Court refuses to enforce a contract on the ground of undue influence it has power under s. 19-A of the Contract Act to annex such terms and conditions to its decree as may seem just; for instance, it may direct that any benefit received by the person at whose instance the contract has been avoided should be restored to the other party to the contract.

Second appeal from a decree of the District Judge, Azamgarh, dated the 16th February 1923.

Mr. *S. D. Sinha*, for the Appellant.

Mr. *S. P. Sinha*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff-appellant against the defendant-respondent for recovery of a half share in certain property. The plaintiff and the defendant entered into an agreement, whereby, in consideration of the plaintiff standing all the expense of litigation, the defendant would bring a certain suit for obtaining the property in question, and, if ultimately successful, would give the plaintiff a half share in that property.

The Munsif dismissed the suit on a finding that the plaintiff was in a postition to dominate the will of the defendant and that the transaction was on the face of it unfair. He, accordingly, held that the contract was a voidable one as induced by undue influence. The District Judge on first appeal upheld this decision.

The first question is whether there was evidence to justify the finding that the plaintiff was in a position to dominate the will of the defendant. The Munsif based his finding on the facts that the defendant was only just over minority, was inexperienced, had no money himself to carry on the litigation and had appealed in vain to at least one other person who had refused to help him. The District Judge supported this finding merely on the facts that the appellant was young and inexperienced, and did not, as a matter of fact, obtain independent advice. We are not disposed to

hold that there was nothing in fact on which the finding could be based, though if we were trying the case originally we should not be disposed to agree with the finding. As to the finding that the transaction was an unfair one, the District Judge has based his finding on the fact that the defendant had so good a chance of obtaining the property that there was little risk in financing him and that the agreement to give half the property, that is a half worth Rs. 600, for an expenditure which in fact only amounted to Rs. 200 was unfair. Here again we are not disposed to hold that there was no basis whatever for the finding.

It has, however, been urged by the appellant that the Courts below should at least have awarded him something under the second clause of s. 19-A of the Contract Act. That clause provides that when an agreement is liable to be set aside on the ground of undue influence, the Court may annex such terms and conditions as may seem just to any order for the contract being set aside. Our attention has been drawn to the last paragraph of the judgment of the District Judge. In this it appears that the District Judge suggested that the appellant should get the sum of Rs. 400 in consideration of the amount spent by him and the risk taken by him. The appellants rejected this suggestion and so the District Judge appears to have considered that there was no course open to him but to uphold the dismissal of the suit. We are inclined to think that the District Judge must have overlooked the second clause of s. 19-A of the Contract Act which enabled him, without the consent of the parties, to impose the suggestion which he made to the parties. Although the grounds of appeal in this case do not raise any question as to the propriety of the District Judge in not invoking this provision of law we consider that we are entitled to allow the point to be raised.

Accordingly we allow this appeal in part and decree that the defendants shall pay to the plaintiff within three months the sum of Rs. 400 (?). In the event of such payment the plaintiff's suit shall stand dismissed. In default of such payment the plaintiff's suit shall be decreed with costs. We make no other order as to costs.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 37 OF 1924.

June 19, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

THE HON'BLE Mr. SACHDHITANANDAN SINHA—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Income Tax Act (XI of 1922), ss. 23 (2), 33—Additional assessment, levy of—Procedure—Reasonable opportunity to assessee to be heard, what amounts to.

Where an order is passed by the Income Tax Commissioner under s. 33 of the Income Tax Act in circumstances where he is really exercising the duties of an Income Tax Officer under s. 23, sub-s. (2) of the Act and is in effect calling upon the assessee to give evidence to support the original return made by him, a week's notice to the assessee to show cause why additional assessment should not be imposed upon him without specifying any particular day on which the assessee could appear before the Commissioner and produce his evidence, does not amount to reasonable opportunity within the meaning of s. 33 of the Act. [p. 1015, col. 2.]

FACTS appear from 84 Ind. Cas. 792.

Messrs. *K. P. Jayaswal* and *A. P. Upadhya*, for the Appellant.

The Government Advocate, for the Crown.

JUDGMENT.

Miller, C. J.—The only question of any substance for determination in this case is whether the Commissioner of Income-tax was justified in the circumstances in ordering the Income Tax Officer to issue a supplementary demand upon the assessee purporting to act under s. 33 of the Indian Income Tax Act, 1922. What happened was that the assessee on the 25th May 1923 was assessed to income-tax. The Income Tax Officers ascertained subsequently that he owned certain house property and communications took place with the assessee calling attention to his house in Patna, a house which he had in Allahabad and another house which he had at Solon or in that neighbourhood in the Himalayas. Some correspondence took place between the Commissioner of Income-tax and the assessee in which the latter pointed out that he had only got into his house in Patna at the end of March 1923, that his house in the Himalayas was in a Native State and not subject to taxation in British India and that with regard to his house in Allahabad he understood that that being in another Province, was being taxed there and con-

sequently he had not included it in his return. In the result on the 13th December 1923 the Commissioner of Income Tax wrote to the assessee that it had been ascertained that the annual letting value of his house at Allahabad was Rs. 2,400 and he requested him to show cause under s. 33 of the Income Tax Act why a sum of Rs. 2,400 should not be added to his income for the purpose of assessment for the past financial year. It will be observed that in that letter, which is dated the 13th December, the Income Tax Commissioner gave Mr. Sinha exactly a week in which to reply to his letter. He did not make any appointment nor did he fix a place or time of meeting so as to give Mr. Sinha an opportunity of producing evidence before him or being heard within the meaning of s. 33 of the Income Tax Act and the question which we have to decide in this case is whether by that letter of the 13th December and by the subsequent order of the Commissioner made on the 22nd December the assessee was given a reasonable opportunity of being heard within the meaning of the Act. The section provides that the Commissioner may, of his own motion, call for the record of any proceeding under this Act which has been taken by any authority subordinate to him, or by himself when exercising the powers of an Assistant Commissioner, under sub-s. 4 of s. 5. The second clause of the section provides that on receipt of the record the Commissioner may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit. It must be conceded that an enquiry was made under sub-s. 2 of s. 33 and that enquiry, which consisted partly of correspondence with Mr. Sinha and partly of enquiries made from other sources resulted in the information that this house was of the annual value of Rs. 2,400, and that having been done, then it was within the competency of the Commissioner to pass such orders thereon as he thought fit. But there is a provision at the end of the section which says "Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard." What happened was this. On receipt of the letter of the 13th December Mr. Sinha, who is a member of the Executive Council of this Province, and who was on tour at the time, replied on the 20th December stating in effect that he was permanently residing in his house at Allahabad for many years and all payments in connection with his house used to be made there; that he had been under the impression that the same system continued but that a nephew of his was now living in the house and was looking after the establishment there "but if on the ground that Income-tax is to be paid by a person where he ordinarily resides the payment in Allahabad was stopped I shall have no objection to your assessing me on the assessed value of my Allahabad house." If the matter had ended there I think there might have been some ground for stating that the order passed by the Commissioner after the receipt of that letter was fair and reasonable but the letter goes on "I return to Patna on the 2nd January and shall then write to you definitely on the subject. In the meantime I have written to my nephew making enquiries about the matter." I may say at the outset that where an order is passed by the Commissioner under s. 33 in circumstances such as the present, that is to say in circumstances where he is really exercising the duties of the Income Tax Officer under an earlier section, namely, s. 23, sub-s. 2 of the Act, and is, in effect, calling upon the assessee to give evidence to support the original return made by him, then I think that a week's notice or 8 days' notice, as was the case here, is certainly not sufficient time, but it will be observed from Mr. Sinha's letter that he certainly considered that he would be given a further opportunity of considering this matter because he said that he would be back in Patna on the 2nd January and he would write to the Commissioner then defintely upon the subject. Therefore, he was certainly under the impression that he would be given a further opportunity of considering this matter and of definitely putting his views before the Commissioner. That opportunity, however, he was never given because on receipt of his letter which was written on the 20th the Commissioner passed the order on the 22nd directing the Income tax Officer to issue a supplementary demand. On the 19th January the demand having presumably been received Mr. Sinha wrote to the Commissioner of Income Tax in con-

tinuation of his previous letter and said that no assessment had been made recently on his Allahabad house for the purpose of Income-tax, and that whilst this was so, the facts and circumstances of the case were not yet fully made known to the Commissioner and Mr. Sinha was not quite sure that his Allahabad house was liable for assessment and he said that it would be in the interests of justice if the Commissioner would kindly give him an opportunity of stating his views before he passed any final orders on the subject. In answer to this the Commissioner wrote back and said that he had finally disposed of the matter on the 22nd December and he had no power to review his order and he refused to consider the matter any further. As I have already said it seems to me that the only question is whether the notice given on the 13th December and the subsequent order made on the 22nd December were justified having regard to the provisions of s. 33. I do not think that any reasonable opportunity was given at all to the assessee in this case either to present his case or to come and place his evidence before the Commissioner. He was given a week in which to reply. He said what in effect amounts to this that he had no objection to the assessment at the rate claimed but that he would write again definitely about the matter in a short time and meantime he would consult his nephew who was living in the house. On receipt of that letter the order was passed and no opportunity at all, certainly no reasonable opportunity within the meaning of s. 33, was, in my opinion, given to the assessee to put his case before the Commissioner, because the order was passed without informing the assessee what he proposed to do. The case of the assessee is that this house in Allahabad is really owned by him as a member of a Hindu joint family and under the provisions of s. 14 of the Act the tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family. It may be quite true that on the 13th December when Mr. Sinha wrote to the Income Tax Commissioner this matter was not present to his mind. The enactment is a recent one. It found place for the first time in the Act of 1922 but at the same time up to that time the assessee had had no reasonable opportunity of going into the matter and it is not surprising that at the end of a week only he did not discover that this house being owned not by himself in his personal capacity but as a member of a Hindu undivided family, was not subject to assessment as against him personally at all. As I have already stated I do not think that the notice given in this case was reasonable within the meaning of s. 33 and that an opportunity ought to be given to the assessee to place his case before the Commissioner before any order is finally passed. The sum is a small one in this case. In addition to the cost of printing the paper-book and the deposit which the petitioner is entitled to get back, I think that the hearing fee should be assessed at 5 gold *mohurs*.

Foster, J.—I agree.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEAL NO. 4 OF 1925.

March 31, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

KALIMUDDIN—JUDGMENT-DEBTOR—APPELLANT

versus

TATA INDUSTRIAL BANK, LTD., LUCKNOW—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI, r. 16, O. XXII, rr. 3, 4, 8, 10, 12—Execution of decree—Amalgamation of decree-holder Bank with another Bank—Application by latter for substitution, dismissal of—Application to execute decree under O. XXI, r. 16, maintainability of—Res judicata.

A decree was obtained by the Tata Industrial Bank, Ltd., but in the course of execution proceedings an application was filed by the Central Bank of India requesting that its name may be substituted in place of the Tata Industrial Bank on the ground that the latter Bank had merged in the Central Bank and all its rights and liabilities were represented by the Central Bank. This application purported to be under O. XXII of the C. P. C., and was dismissed on the ground that rr. 3 and 4 of that Order were not applicable to execution proceedings and that the case was not one of assignment during the pendency of execution proceedings so as to be covered by r. 10 of the Order. Subsequently the Central Bank of India applied for execution of the decree under O. XXI, r. 16 of the Code:

Held, (1) that the dismissal of the previous application which was made under O. XXII of the Code did

not bar the maintenance of the subsequent application under r. 16 of O. XXI of the Code ; [p. 1017, col. 1.]

(2) that on the amalgamation of the Tata Industrial Bank with the Central Bank of India there was a valid transfer of the decree from the former to the latter Bank and that the latter Bank was entitled to execute the decree. [p. 1017, col. 2.]

Appeal against an order of the Additional Subordinate Judge, Lucknow, dated the 18th December 1924, in Execution Case No. 107 of 1924.

Messrs. *Niamatullah* and *Ali Zaheer*, for the Appellant.

Messrs. *Bishambhar Nath Khanna* and *Ishwari Prasad*, for the Respondent.

JUDGMENT.—The Tata Industrial Bank Ltd., Lucknow had obtained a decree against one Kalim-ud-din. Execution was taken out by the Tata Industrial Bank and subsequently during execution proceedings an application was filed by the Central Bank of India requesting that its name may be substituted in place of the Tata Industrial Bank on the ground that the latter Bank had merged in the Central Bank and all its rights and liabilities were represented by the Central Bank. This application for substitution was taken to be under O. XXII, and the executing Court of the Additional Subordinate Judge, Lucknow, dismissed it on the ground that provisions of O. XXII, rr. 3, 4, and 8 did not apply to execution proceeding as laid down in r. 12 of that Order. It was also not a case of assignment during the pendency of the execution proceedings as would be covered by r. 10. The application was made on 15th December 1923 and dismissed on 19th January 1924.

Subsequently on 27th August 1924 the Central Bank of India Ltd. applied for execution of the decree under O. XXI, r. 16. This application was granted and hence Kalimuddin judgment-debtor has appealed. Two grounds of appeal were argued before us :—

(1) that the order of 19th January decided that the Central Bank of India had no right to execute the decree and that, therefore, the lower Court's present order was barred by the provisions of s. 11, C. P. C.

(2) that there had been no transfer of decree as is required by O. XXI, r 16.

The learned Subordinate Judge has explained why he dismissed the previous application on 19th January 1924. He did not consider it as one brought under the provisions of O. XXI, r. 16 and the question decided by him was one under O. XXII. There was, therefore, no previous finding such as is alleged by the appellant that the Central Bank, Ltd., was not entitled to execute the present decree.

We think that there has been a proper transfer. There was an agreement between the two Banks that the assets of the Tata Industrial Bank be transferred to the Central Bank. This agreement was confirmed by two resolutions (Exs. 1 and 2) of the Tata Bank. The effect of these resolutions is explained by the Bombay High Court in the case of *Kaikhushru Nusserwanji Chandabhoy* v. *Tata Industrial Bank Ltd.* (1). There was a conditional agreement of July 5th 1923 which provided for the transfer of the whole business of the Tata Bank to the Central Bank, provided the Tata Bank share-holders passed effective resolutions for the voluntary winding up of the Bank and the appointment of liquidators to carry out the transfer mentioned in the agreement. Under that agreement the whole of the assests of the Tata Bank were to be transferred to the Central Bank which undertook to satisfy all the liablities of the Tata Bank and to keep the Tata Bank, its liquidators and contributories, indemnified against all such liabilities. Exhibits 1 and 2 are the necessary resolutions passed by the share-holders of the Tata Bank for the voluntary winding up and by a separate resolution liquidators were appointed to adopt the conditional agreement and carry it into effect. The liquidation was to be carried out under the provisions of s. 213 of the Indian Companies Act and was of an entirely different nature to an ordinary liquidation in which the liquidators would have to realise the assets of the Company, and conduct other affairs of the Company until the surplus assets, if any, were distributed among the share-holders and a final dissolution could be declared. The resolution of the Tata Bank amounted to an assignment in writing of the decree against Kalim-ud-din.

The argument of the appellant's learned Counsel that the Tata Bank had still a separate existence and was represented by its liquidators must fail in view of the peculiar position of the liquidators who were given no authority by the share-holders to realize the assests of the Bank. The assets of the Company could be realized only by

(1) 80 Ind. Cas. 515; 48 B. 471; 26 Bom. L. R. 237; (1924) A. I. R. (B.) 339.

the Central Bank. In ordinary language the two Banks were amalgamated. A portion of s. 1007 Vol. 5 page 584 of Halsbury's Laws of England may be usefully quoted:—

"To constitute amalgamation there must be a blending of substantially two or more existing undertakings into one undertaking .....It is not necessary that a resolution for winding up should refer to amalgamation in order to constitute a winding up for the purpose of amalgamation, but the purpose of the winding up may be gathered from the whole of the circumstances which result in amalgamation."

In the present case the special resolution of winding up clearly indicates the result of an amalgamation of the Central Bank.

We are of opinion that the lower Court was correct in proceeding with execution on the application of the Central Bank and dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 43 OF 1925.

May 29, 1925.

Present:—Mr. Justice Sulaiman.

BHAKTA SHIROMANI *alias* BACHCHA DEFENDANT—APPLICANT

versus

SEETAL NATH—PLAINTIFF—OPPOSITE PARTY.

Master and servant—Discontinuance of service—Dismissal—Servant, whether entitled to wages.

When a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last payment of wages. [p. 1019, col. 1.]

The contract is that the servant should perform his part of the contract for the whole period for which wages are paid and if he fails to perform his part of the contract or is rightfully discharged at any intervening period between the dates when his wages are due, he can recover nothing for the broken period of service. [*ibid.*]

Civil revision from an order of the Judge of the Court of Small Causes at Allahabad, dated the 5th March 1925.

Mr. *Bhagwati Shanker*, for the Applicant.

JUDGMENT.—This is a revision from a decree of a Court of Small Causes. The plaintiff came to Court on the allegation that he was employed as a compositor in the defendant's press at a salary of Rs. 17 per month and that he was dismissed on the 20th of January 1925 without notice. He claimed the pay for the twenty days he served and an additional pay for fifteen days as he was dismissed without previous notice. The suit was contested by the defendant and all liability was denied. The learned Judge of the Court of Small Causes has granted the plaintiff a decree for his pay for twenty days and dismissed the rest of the claim.

The findings which I must accept are as follows:—The plaintiff worked in the defendant's press up to the 20th of January on which date at about 12 o'clock he having got fever disappeared from the press without applying for leave. He did not turn up for 5 or 6 days and as he had disappeared without leave or sanction and had left the work the defendant was much irritated and dismissed him. The Court below finds that the plaintiff committed default and the defendant was justified in dismissing him. In spite of this finding it has granted the plaintiff a decree for his wages for 20 days.

As I have said, it was admitted by the plaintiff in the plaint that he was engaged on a monthly salary of Rs. 17. On the findings he left the work without leave and without sanction of the defendant and did not turn up for 5 or 6 days. The defendant was justified in dismissing him. If the conduct of the plaintiff was such that it justified the defendant in dismissing him before the expiry of the month the plaintiff, in my opinion, was not entitled to his salary for even the broken period for which he had served.

In the case of *Rughoonath Doss* v. *Mr. T. Hall* (1) although the claim of the servant for wages for the broken period during which he had served was allowed it was pointed out that he would not have got it if the master could prove that the dismissal was justifiable.

In the case of *Ralli Brother* v. *Amluka Prasad* (2), Tudball, J., held that an office clerk engaged on a monthly salary was not entitled to any salary for the broken portion of the month in the course of which he left the service whithout the consent of his employer.

The present case is certainly distinguishable inasmuch as the plaintiff here did not

(1) 16 W. R. 60.
(2) 18 Ind. Cas. 699; 35 A. 132; 11 A. L. J. 104.

actually leave the service but left the work which justified the master in dismissing him. But the English Law governing the rules and liabilities of master and servant is to be found in Smith's Law of Master and Servant, Sixth Edition, pages 169-172. In the absence of any statutory provisions in India the Common Law of England, would prevail. It is there laid down that "when a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last payment of wages. That is to say if a servant whose wages are only due yearly, absconds from his master or is rightfully discharged before the expiration of the year he could recover nothing for services rendered previous to such departure or discharge. And the same principle would apply to the case of a quarterly monthly or weekly hiring." The governing principle seems to be that the contract is that the servant should perform his part of the contract for the whole period for which wages are paid and that if he fails to perform his part of the contract or is rightfully discharged at any intervening period between the dates when his wages are due he can recover nothing for the broken period of service. The learned author cites several English cases where it was held that servants who have been rightly discharged and have afterwards sued their late masters for wages have failed to recover anything.

I am, therefore, of opinion that in view of the findings of the Court below that the default was committed by the plaintiff and that his master was justified in dismissing him the plaintiff was not entitled to recover the wages for even twenty days during which he had served. The judgment of the Court below, therefore, is not according to law. I allow the revision and set aside the decree of the Court below and dismiss the suit. As the applicant professes to have contested the suit mainly on principle, I direct that the parties should bear their own costs of this application and in the Court below.

Z. K. *Revision allowed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 30 OF 1923.
February 5, 1925.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

FAZAL DAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UMAR BAKHSH AND ANOTHER—DEFENDANTS—RESPONDENTS

Appeal, second—Finding of fact whether binding.

A finding of fact based upon admissible evidence cannot be contested in second appeal. [p. 1020, col. 1.]

Letters Patent Appeal from the judgment and decree of Mr. Justice LeRossignol, dated the 11th December 1922.

Mr. *Mukand Lal Puri*, for the Appellants.
Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—Plaintiff-appellant sued his half brother, Umar Bakhsh, for possession of a plot of land which he claimed to be his property and upon which he said the defendant had built a house.

The Subordinate Judge dimissed the suit and on the 29th March 1921, Nawab Sadullah Khan dismissed the plaintiff's appeal. On the 28th June 1921 plaintiff filed an application for review before the same officer, who on the 3rd August, directed that notice should issue to the other side and, on the 20th February 1922 Mir Ghulam Yazdani granted the application for review and the appeal was re-heard and Lala Diwan Chand, his successor, on the 6th March 1922, accepted the appeal and decreed the plaintiff's suit.

From this order Umar Bakhsh filed a second appeal in this Court which was heard by a Judge in Chambers, who accepted the appeal as he was under the impression that the application for review had been made to a Judge other than the one who had passed the decree. From this order an appeal has been filed under cl. 10 of the Letters Patent.

It is urged that the Judge in Chambers made a mistake in thinking that the application for review was made to a Judge other than the one who had passed the order. As a matter of fact the application was made to the same Judge, namely, to Nawab Sadullah Khan, who himself directed notice to issue to the other side. The Judge in Chambers also incidentally remarked that the application for review was made one day late, but it appears that two days were occupied by the appli-

cant in obtaining a copy of the decree sought to be reviewed and he was entitled under s. 12 of the Limitation Act to deduct those two days in computing the period of limitation prescribed for his application for review. The application was, therefore, within time.

We have, therefore, heard Counsel argue the second appeal upon its merits. The review was granted on the ground that the Judge, who dismissed the appeal from the order of the Trial Court, had omitted to consider certain documentary evidence which was on the record. Lala Diwan Chand, who accepted the appeal and whose order we are considering has fully considered this documentary evidence and has based his decision thereon and upon the fact that the plaintiff's house is near the site in dispute whereas the defendant's house is at some distance from it.

The finding is one of fact, but Mr. Nanak Chand contends that the documentary evidence relied upon is inadmissible as against his client. No such objection was taken in the grounds of appeal. It is merely stated that the evidence is inconclusive, that the defendant-appellant is no party to the documents, and that they do not affect his title. In our opinion all these documents are admissible under s. 13 of the Evidence Act. The finding is, therefore, based upon evidence and cannot be contested in second appeal.

We, therefore, accept the appeal from the order of the Judge in Chambers and set aside his order and restore the order of Lala Diwan Chand with costs throughout.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 3 OF 1925.
May 20, 1925.
Present:—Mr. Justice Adami and Mr. Justice Kulwant Sahay.

HANSRAJ SANGECHI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS
versus
JOGESHAR PRASAD AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148, O. XXI, r. 90—Execution of decree—Sale, application to set aside—Compromise—Time fixed for payment, whether can be extended.

When in the course of proceedings taken by a judgment-debtor to set aside an execution sale, a compromise is arrived at between the decree-holder, the judgment-debtor and the auction-purchaser that on payment of the judgment-debt within a prescribed period the sale shall stand cancelled, while upon failure to make the payment within the period fixed the sale shall stand confirmed, time must be taken to have been made of the essence of the contract and the Court has no power to extend the time fixed for payment except by consent of all the parties concerned. [p. 1021, cols. 1 & 2.]

Appeal against an order of the District Judge, Monghyr, dated the 26th September 1924, confirming that of the Subordinate Judge, Monghyr, dated the 27th January 1923.

Mr. *Subal Chandra Mazumdar* for Mr. *Lal Mohan Ganguly*, for the Appellants.

Mr. *Brij Kishore Prasad*, for the Respondents.

JUDGMENT.

Adami, J.—On the 28th August 1924, while an appeal was pending before the District Judge of Monghyr, the parties came to terms, and it was agreed that, if the present appellant, the judgment-debtor, deposited in Court in favour of the decree-holder, the present respondent, the full amount of the decree including the costs of the appeal within 15 days from that date, that is to say, by the 13th September 1923 the appeal would be allowed and the sale held in the connected execution case would be set aside. If the money was not deposited within the time allowed, then the appeal would be dismissed and the sale would stand confirmed.

Accounts had to be made up and were ready on the 4th September. On the 13th September the date on which the sum should have been deposited by the judgment-debtor, the latter filed a petition asking for a short extension of time for the deposit of the amount. The order passed was that the petition should be put up on the 15th September, which was the date which had been fixed by the learned District Judge for dealing with the case. No deposit was made until the 19th September, when a petition was filed on behalf of the judgment-debtor paying that the sum of Rs. 823-1-9, which was brought to Court that day, should be ordered to be deposited with the *nazir*. The District Judge passed the order that the appellant might deposit the amount and produce a *chalan* by the 23rd September. On the 23rd September an order was passed that the case should be put up on the 25th. On this latter date an

order was recorded that the amount had been deposited on the 22nd as shown by a *chalan*. On the 26th the learned District Judge heard the Pleaders on both sides and held that, as the judgment-debtors had failed to deposit the money within the time ordered by the Court, the appeal must be dismissed with costs, and the sale must stand confirmed as had been ordered. It is against this order that the present appeal has been laid before this Court.

It is contended that the learned District Judge by his order of the 19th September and also by his order of the 13th September, allowed an extension of the time and that he had power so to order an extension, and, therefore, the depositing of the decretal amount on the 22nd September, fulfilled all the requirements of the agreement and the sale should have been set aside. In the order-sheet there is no order for extension of time; there are orders that an inquiry should be made whether the amount had been deposited or not, and when the appellant brought the money into Court and asked leave to deposit it, the learned District Judge allowed the deposit, but he did not express that by that deposit the terms of the agreement would be held to have been fulfilled. The question is whether the learned District Judge would in any case have jurisdiction to allow an extension of time having in view the terms of the agreement reached between the parties, and whether time was of the essence of the contract. Several cases have been put before us in which it has been held that, where there has been a consent between the parties the Court has power to grant relief against forfeiture and to extend the time for this purpose. But the present case is not a case of relief against forfeiture. In the case of *Kandarpa Nag* v. *Banwari Lal Nag* (1). Mookerjee, Acting C. J., laid down, after considering, the case-law on the subject, the principle which governs cases like the present one. From the cases he examined he laid down the principle that time is of the essence of the agreement, when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made among the decree-holder, judgment-debtor and execution-purchaser that on payment of the judgment-debt within a prescribed period, the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. He said, "in such cases, as the parties intended in the first conception of the agreement to make time the essence of the contract, the Court would not be competent to extend the time, except by consent of all the parties concerned." That principle must be applied in the present case, and I am of opinion that the District Judge had not the power to extend the time which had been settled and agreed upon by the petitioners. As I have said before, the cases relied on by the learned Vakil for the appellants are cases where the question was one of relief against forfeiture, and in the present case that question does not arise. I thus find that the learned District Judge was correct in finding that the appellants had not observed the terms of their agreement and, therefore, could not claim to set aside the sale.

Therefore, I would dismiss the appeal with costs.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 60 Ind. Cas. 864; 33 C. L. J. 244.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 192 OF 1924.

May 21, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

LAKHAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BABU RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 23, 25—Suit decided on merits—Appeal—Remand order, legality of—Procedure.

A case should not be remanded for re-trial when the Trial Court has really disposed of it on the merits. If in such a case the Appellate Court considers that it ought to have a finding on some issue or issues which the Trial Court has not docided, it can always remit issues under O. XLI, r. 25, of the C. P. C., but it is not legitimate for an Appellate Court to send back a case from its file merely because it differs radically from the conclusions of the Court below on the facts or because it considers that the discussion of the evidence in the Trial Court's judgment is inadequate. [p. 1022, col. 2; p. 1023, col. 1.]

A preliminary decree was passed in a redemption suit and thereafter the Trial Court went into the accounts and holding that the mortgagee had not kept complete or clear accounts accepted the accounts filed by the plaintiff which were prepared on the basis of the *Patwari's* papers. On appeal the Appellate Court thinking that the Court of first instance had not gone properly into the accounts and had decided the case in a summary and unsatisfactory manner remanded the case with the direction that the accounts should be gone into again and that the objections advanced

by the mortgagee should be decided after framing issues as regards them:

Held, that it was the duty of the Appellate Court to go into the question of accounts itself and to find out what amount was actually due to the plaintiff on the evidence that was before it, and that it had no power to remand the case after the first Court had already expressed its opinion clearly on the reliability of the account books produced by the mortgagee. [p. 1022, col. 2.]

First appeal from an order of the Additional District Judge, Bareilly, dated the 22nd September 1924.

Dr. *N. C. Vaish*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.

Sulaiman, J.—This is a plaintiffs' appeal arising out of an order making a decree final. The original suit was one for redemption and it was decreed with the direction that the accounts would have to be taken before the preparation of the final decree. Certain account-books have been filed by the mortgagee while the suit was pending and certain other statements of accounts were filed when the proceedings relating to the preparation of the final decree were started. The plaintiffs also filed copies of the *patwari's* papers. The learned Subordinate Judge came to the conclusion that the account-books relied upon by the mortgagee were absolutely unsatisfactory and unreliable. He criticised them as being no better than waste paper. He thought that the mortgagee had not kept complete or clear accounts at all. He found that the mortgagee had not placed before the Court any proper account showing the actual collections made by him. Then he held that in the absence of proper accounts he could not but accept the accounts as filed by the decree-holder which were prepared on the basis of the *patwari's* papers. He accordingly passed a decree in favour of the plaintiffs for a sum of Rs. 3,585-1-10 as being the amount due as soon as the mortgage-money was paid off. On appeal by the mortgagee to the lower Appellate Court the lower Appellate Court thought that the Court of first instance had not gone properly into the accounts and decided the case in the summary and unsatisfactory manner. It felt that it was unjust to the mortgagee that accounts should be prepared on the basis of the gross rental and it accordingly directed that the accounts should be gone into again and the objections advanced by the mortgagee should be decided after framing issues as regards them.

We are of opinion that the order of the lower Appellate Court cannot be upheld. The learned Subordinate Judge had not disposed of the matter on a preliminary point but had expressed his opinion clearly, even though he might have been wrong, and had disposed of the objections raised. When the learned Subordinate Judge was not satisfied that the accounts filed by the mortgagee were reliable and satisfactory, he was bound to accept the plaintiffs' accounts (which were based on the *patwari's* papers) unless there was something in the judgment or decree to the contrary. The lower Appellate Court if it had itself gone into the question may have come to the conclusion that the opinion of the learned Subordinate Judge was quite wrong, but that has not been done at all. It has simply said that the Court of first instance has not gone properly into the accounts and has decided the matter summarily. We cannot accept that to be correct. It was the duty of the lower Appellate Court to go into the question of accounts itself and find what amount was actually due to the plaintiffs on the evidence that was before it. It has no power to remand the cases when the First Court has already expressed its opinion clearly on the reliability of the account-books produced by the mortgagee. It would not be fair to the First Court to ask it to re-consider its opinion and decisions.

We, therefore, think that this appeal must be allowed We set aside the order of the lower Appellate Court and remand the case to that Court for disposal according to law. Costs of this Court will be costs in the cause including fees on the higher scale.

Daniels, J.—I concur. I should like to add a word of caution to lower Appellate Court against remanding cases for re-trial when the Trial Court has really disposed of them on the merits. In such case if the Appellate Court considers that it ought to have a finding on some issue or issues which the Trial Court has not decided it can always remit issues under O. XLI, r. 25, but it is not legitimate for an Appellate Court to send back the case from its file merely because it differs radically from the conclusions of the Court below on the facts or because it considers that the discussion of the evidence in the Trial Court's judgment is inadequate.

Z. K.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

ORIGINAL SUIT No. 445 OF 1923.

February 25, 1925.

Present:—Mr. Justice Buckland.

HARI MOHAN GHOSE—PLAINTIFF

versus

SOURENDRA NATH MITTER AND OTHERS—DEFENDANTS.

Practice—Suit on promissory note—Original cause of action, whether can be relied on.

In a suit based on a promissory note the plaintiff can be allowed to raise an issue proceeding upon the original cause of action in the alternative provided no prejudice would be caused to the defendant. [p. 1034, cols. 1 & 2.]

Sir *B. C. Mitter* and Mr. *S. C. Bose*, for the Plaintiff.

Messrs. *Langford James*, *A. K. Roy* and *R. N. Sarkar*, for the Defendant Sourendra.

Messrs. *H. D. Bose* and *Pankridge*, for the widow Tarubala.

Messrs. *S. N. Bannerjee* and *N. C. Chatterjee*, for the other Defendants.

JUDGMENT.—This suit is to recover Rs. 42,858-5-1 the amount of principal and interest due on a promissory note dated the 9th December 1914. The promissory note is said to have been executed by Charu Chunder Mitter as *karta* of the joint family, of which he was and the defendants were members. The defendants consist of Sourendra Nath Mitter, Satya Santi Mitter and Khokalal Mitter, nephews of Charu Chunder Mitter, and Srimati Tarubala Dassi, widow and administratrix of Charu Chunder Mitter.

Stated broadly, the defences on the facts are as follows:—The defendants, other than the widow, deny that Charu Chunder Mitter executed the promissory note as *karta* and say that he did so on his own account and consequently they are not liable. His widow supports the plaintiff and says that Charu Chunder was acting as *karta* in the transaction. if, on the other hand, the Court finds that he was not so acting but borrowed the money on his own account, then the widow submits that Sourendra Nath Mitter who is alleged to have become the *karta* upon the death of Charu Chunder Mitter, had no authority to pay interest on her account and that the suit is barred by limitation.

The point which I have now to decide has arisen upon issues being formulated by the learned Counsel. On behalf of the defendant Sourendra Nath Mitter, Mr. Langford James submitted the following issues:—

1. Can the defendants Nos. 1, 2 and 3 be held liable on the promissory note?

2. If so (*a*) was the promissory note executed by Charu Chunder Mitter as *karta* of the family and (*b*) did he make the representations alleged in para. 2 of the plaint?

3. Had Sourendra Nath Mitter authority to pay interest either (*a*) on behalf of the family or (*b*) on behalf of Tarubala Dassi?

4. If the plaintiff is entitled to recover on the basis of the promissory note, on what basis is the consideration for the promissory note to be calculated? On behalf of the widow Mr. H. D. Bose submitted this issue.

(1) If Tarubala Dassi as representing the estate of Charu Chunder Mitter alone may be liable, is the suit barred by limitation?

And on behalf of the other defendants, Mr. Bannerjee submitted a further issue under that numbered 2, *viz*:—

(2c). Are such alleged representations binding upon the defendants Nos. 2 and 3: and the additional issue?

(6). Are the defendants Nos. 2 and 3 personally liable?

The argument has originated by reason of the first issue raised by Mr. Langford James which is based upon the denial in the written statement of Sourendra Nath Mitter that the plaintiff ever had or has any cause of action against him. There are also statements in the written statement of the other defendants which would support such an issue. That issue has been put forward to support the contention that upon the decision of the Judicial Committee of the Privy Council in *Sadasuk Jankidas* v. *Kishen Pershad* (1) among other authorities, no one but the legal representative of Charu Chunder Mitter can be made liable upon this promissory note. Sir Binod Mitter has argued that that decision does not preclude him from proving that the promissory note was signed by Charu Chunder Mitter as *karta* and on behalf of the joint family, and that the money was borrowed on their account, and in support of that contention he has referred me to *Krishna Nand Nath Khare* v.

(1) 50 Ind. Cas. 216; 46 C. 663; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 258; 36 M. L. J. 429; 21 Bom. L. R. 605; 1 U. P. L. R. (P. C.) 37; (1919) M. W. N. 310; 23 C. W. N. 937; 10 L. W. 143; 46 I. A. 33 (P. C.).

Raja Ram Singh (2) and *Baisnab Chandra De* v. *Ramdhan Dhor* (3).

It is unnecessary that I should decide that question now, but in order further to meet the point, Sir Binod asked to be allowed on behalf of his client to raise the following issue:

Was the advance made by the endorsement on the Government promissory notes of the face value of Rs. 35,000 referred to in the plaint made by Charu Chunder Mitter as *karta* of the family?

The discussion thereupon proceeded upon the point as to whether or not upon the pleadings as framed, it was open to the plaintiff to proceed upon the original cause of action as so expressed. It has been contended that the plaint does not justify such an issue, but I have been referred on behalf of the plaintiff to *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (4) in which Mr. Justice Kennedy drew attention to the great power given in this country of raising the true issues between the parties and refers to the general principle that the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration if the pleadings are properly framed for that purpose. Another more recent case cited is *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi* (5). The suit was brought on a *hundi* to recover Rs. 675 and Rs. 35 as interest. It was alleged that the *hundi* had been dishonoured and lost. The suit was decreed upon the original consideration. On appeal the District Judge confined the plaintiff to the *hundi*, which he said was the original cause of action, and he refused to allow the plaintiff to recover on the basis of the original consideration. On second appeal, it was held by the High Court of Bombay that it was open to the plaintiff to prove the loss independently of the note. So far as I can ascertain from the reports what the pleadings were in those cases, they appear to support the plaintiff.

Those cases were cases where the note was inadmissible in evidence. There is no question of the note being inadmissible in evidence in the case which I shall have to try. The matter which I have now to consider is, whether upon the plaint the plaintiff is entitled to rely on the alleged original cause of action. Whether there is a cause of action independently of the promissory note, is a further point which has been touched upon but will have to be decided hereafter, should the matter be permitted to be gone into.

In the case cited, the Judicial Committee of the Privy Council pointed out that it would have been open to the plaintiffs to have framed their case in an alternative form and to have sued both on the *hundis* and alternatively upon the consideration. It was alleged by the appellants that the plaint in face embraced both these forms, but their Lordships were unable to accept their contention, which did not appear to have been raised in the Courts below. In their opinion, the plaint was confined to an action brought upon the *hundis* themselves.

This passage seems to indicate, in some slight degree, that their Lordships of the Judicial Committee would look with disfavour upon the rigorous application of technical rules of pleading and that had the case been raised in the Courts below they would not have been averse from considering it upon final appeal. I cannot feel that the defendant would be prejudiced, and it does not appear that there are any further facts which should be pleaded, or perhaps I should put it in this way, that learned Counsel does not desire any opportunity to amend the plaint, and has not made any such application, though he has indicated that it might be otherwise were I to hold that on the pleadings as framed he was not entitled to raise this issue.

I cannot say that there is nothing in the plaint upon which this issue can be based, and I will allow it.

As already observed, it is further objected that even though the plaintiff may be deemed to have pleaded the original cause of action, he cannot rely upon it, in support of which I have been referred to the judgment of Sir Richard Garth, C. J., in *Sheikh Akbar* v. *Sheikh Khan* (6), but that point is one which will have to be considered after I have heard the case.

Z. K. *Issue allowed to be raised.*

(2) 66 Ind. Cas. 150; 44 A. 393; 20 A. L. J. 233; (1922) A. I. R. (A.) 116.

(3) 11 C. W. N. 139.

(4) 3 C. 314; 2 C. L. R. 112*n*; 2 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 787.

(5) 24 B. 360; 2 Bom. L. R. 25; 12 Ind. Dec. (N. S.) 773.

(6) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 713.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 445 OF 1923.

March 6, 1925.

Present:—Mr. Justice Buckland.

HARI MOHAN GHOSE—PLAINTIFF

versus

SOURENDRA NATH MITTER—AND OTHERS—DEFENDANTS.

Negotiable Instruments Act (XXVI of 1881), ss. 26, 27, 28—Promissory-note, suit on—Person whose name does not appear on note, whether liable—Debt borrowed by manager of joint Hindu family—Members of family, liability of—Hindu Law—Joint family—Partition—Guardian of minor co-parcener, appointment of, effect of.

The appointment of a guardian of the property of a minor member of a joint Hindu family does not operate automatically as a disruption of the family. [p. 1026, col. 1.]

It is of the utmost importance that the name of a person or a firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document. It is contrary to all established rules that in an action on a Bill of Exchange or a promissory-note against a person whose name properly appears as party to the instrument it should be open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. Therefore, where a person is to be bound by a negotiable instrument made by his agent on his behalf his name must appear upon the instrument as a person to be bound thereby. [p. 1026, cols. 1 & 2.]

The members of a joint Hindu family whose names do not appear upon a promissory-note cannot be made liable on it merely because the note is signed by a person who is the *karta* of the joint family. [p. 1027, col. 2.]

The *karta* of a joint Hindu family has the same authority to acknowledge a debt on behalf of the family as he has to incur it and the acknowledgment need not be expressed as having been made in his capacity of *karta*. [p. 1028, col. 2.]

In a suit to recover the amount of a promissory-note signed by the *karta* of a joint Hindu family it is open to the plaintiff to claim on an alternative cause of action that the money was borrowed by the *karta* for the benefit of the family and that the other members of the family are liable for re-payment of the money. [p. 1027, col. 2.]

In such a case an oral agreement by the *karta* to support the alternative cause of action may be proved inasmuch as the agreement being not reduced to writing s. 91 of the Evidence Act has no application to such a case. [p. 1028, col. 1.]

Sir *B. C. Mitter* and Mr. *S. C. Bose*, for the Plaintiff.

Messrs. *Langford James, A. K. Roy, R. N. Sircar, H. D. Bose, Pankrige, S. N. Banerjee* and *N. C. Chatterjee*, for the Defendants.

JUDGMENT.—All that need be said by way of introduction is to be found by my earlier judgment* on the questions which arose when learned Counsel submitted the issues to be tried.

The principal points argued are embodied in issues Nos. 1 and 7, but they will be more conveniently considered later.

There is no doubt whatever in my mind that Charu Chunder Mitter entered into the transaction with the plaintiff as *karta* of the family.

Nor have I any doubt that the liability after his death was treated as a liability of the family which had the use of the money.

In support of these conclusions there is the oral evidence of the plaintiff as to the circumstances in which the loan was made, there are the payments by Sourendra Nath of interest endorsed on the note, and the corresponding entries in the family accounts, there are a series of statements made by the parties contained in judicial records, and there are Sourendra's own letters.

I do not propose to state the material exhaustively nor need I consider it in detail. To my mind it is overwhelming, and as against all this the defendants have produced nothing; they have not given evidence on their own behalf, and as regards the defendant Sourendra he has not even the excuse that at the time of the advance he was a minor.

On behalf of his clients Mr. Banerjee has argued that at the time of the transaction the family was no longer joint. They certainly so regarded themselves and continued to do so till the 22nd March 1923 as the letter bearing that date from the Solicitor to the widow of Charu Chunder Mitter, to Sourendra Nath Mitter and the plaint in the suit for partition establish.

But notwithstanding these matters the point has been persisted in and upon the ground that certain members of the family were minors, and guardians of their property had been appointed under the Statute before the execution of the promissory-note in suit. The Statute places certain limitations upon a guardian's power of disposing of the ward's property. It is contended that the incompatibility of the rights of a *karta* of a Hindu joint family to bind the minor members with the limitations imposed by the Statute upon a guardian's power of disposing of the ward's property is such that *ipso facto* the minor ceases to be a member of the joint family.

This is to me an entirely novel doctrine, and to do learned Counsel justice he admitt-

*See 88 Ind. Cas. 1023—[*Ed.*]

ed that the proposition could not be supported by authority. I cannot conceive that a doctrine involving automatic disruption of the family upon the appointment of a guardian of the property of a minor member would not long ere this have found judicial expression were it one that was well-founded in law.

The further argument advanced on behalf of the defendants in support of the contentions embodied in issues Nos. 2 (*b*), (*c*) and 6 is based upon the doctrine as to necessity, but it is not one which in the circumstances of the case can carry any weight.

In the absence of any evidence to contradict it I have no hesitation in accepting the plaintiff's contention as to what took place at the time when the transaction was entered into. Such evidence as regards necessity as the plaintiff gives is hardly required for it does not admit of argument, in view of the mass of evidence, that the money went into the family coffers was so entered in its books, and that interest was paid by the *karta* who succeeded Charu Chunder Mitter.

In my opinion the foregoing contentions furnish no grounds upon which the defendant can avoid liability.

A more substantiated plea is based upon the terms of the promissory-note. It has been argued that the plaintiff is not entitled to recover on the basis of the promissory-note except as regards the estate of the deceased executant in which case his widow alone would be liable as representing his estate. The solution to this question depends upon the principles governing liability upon a promissory-note, and whether be such principles what they may, the *karta* of a Hindu joint family may bind the members of the family by his signature alone, no other names appearing upon the document as those of persons to be charged.

The leading authority on the point relied upon on behalf of the defendants is *Sadasuk Janki Das* v. *Kishan Pershad* (1). That was a case in which it was sought to make the respondent liable upon a *hundi* accepted by his agent. Their Lordships of the Judicial Committee stated in the clearest possible terms that it is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, and that it is contrary to all established rules that in an action on a Bill of Exchange or promissory-note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. In the course of the argument I was referred to ss. 26, 27 and 28 of the Negotiable Instruments Act and it was suggested that as s. 23 of the Bills of Exchange Act had not been reproduced in the Indian Act those sections permitted a person to be bound by a promissory-note signed by his agent even if his own name did not appear upon it. Any such suggestion is disposed of by this judgment of the Privy Council for the passage which I have read had reference to those very sections which their Lordships declared contained nothing inconsistent with the principle enunciated. This I take to mean that notwithstanding those sections where a person is to be bound by a negotiable instrument made on his behalf by his agent his name must appear upon it as a person to be bound thereby.

Vithalrao Sheshgirirao v. *Vithalrao Soudekar* (2), is a case directly in point. The claim was against the members of a joint Hindu family upon a promissory-note signed by the manager in his own name. The decision depends upon the view taken as to the pleadings enabling the plaintiff to succeed upon the debt, but the judgment proceeds upon the footing that the claim upon the note cannot succeed.

On the other hand there is a direct authority in support of the plaintiff in *Krishnanand Nath Khare* v. *Raja Ram Singh* (3), *Sadasuk Janki Das* v. *Kishan Pershad* (1), was distinguished on the ground that the principle upon which the Judicial Committee decided has no application to the case of a Hindu joint family which it is sought to make liable through the signature of the managing member thereof. I confess I am unable to agree with the conclusion which with all respect appears to be based upon convenience.

(1) 50 Ind. Cas. 216; 46 C. 663; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 258; 36 M. L. J. 429; 21 Bom. L. R. 605; 1 U. P. L. R. (P. C.) 37; (1919) M. W. N 310; 23 C. W. N. 937; 10 L. W. 143; 46 I. A. 33 (P. C.).

(2) 72 Ind. Cas. 242; 25 Bom. L. R. 151; (1923) A. I. R. (B.) 244.

(3) 66 Ind. Cas. 150; 44 A. 393; 20 A. L. J. 233; (1922) A. I. R. (A.) 116.

Krishna Ayyar v. *Krishnasami Ayyar* (4), may be an authority in favour of the plaintiff on this point unless the comment upon it to be found in the judgment of the learned Chief Justice in *Vithalrao Sheshgirirao* v. *Vithalrao Sondekar* (2) that the judgments were based on the fact that all the members of the family were liable for the debt which was due under the promissory-note in suit, represents the correct view to be taken of that decision. This also seems to have been the view taken in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (5) where the same principle as the Privy Council enunciated later was stated though from the point of view of the payee or endorsee. Referring to the case last cited the judgment of the Court states that the decision in *Krishna Ayyar* v. *Krishnasami Ayyhr* (4) as to the liability of the other members of a joint family on a bill accepted by the managing member proceeded upon considerations of Hindu Law and does not affect the present question.

Lastly, I will refer to *Baisnab Chandra De* v. *Ramdhon Dhor* (6). There, too, the claim was against the members of a joint family who were not all parties to the notes, and the decree of the lower Appellate Court was affirmed. The learned Judges referred to *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (7), a somewhat similar case, and to *Krishna Ayyar* v. *Krishnasami Ayyar* (4), with which I have already dealt.

The decisions apart from *Krishnanand Nath Khare* v. *Raja Ram Singh* (3), are only in conflict if all possibility of the judgments having been for the amounts of the several debts as distinct from the claims on the notes themselves is excluded. Without examining the pleadings in each case it is not possible to say with confidence that that was not present to the minds of the learned Judges. So far as the authorities support the view that in the circumstances in question all the members of the family may be made liable no principle is enunciated justifying a conclusion in the case of a Hindu joint family which would not be entertained were the case one in which a member of an ordinary trading partnership alone had signed a promissory-note in respect of a loan made to the firm of which he was a member. Merely to state the principle, that the *karta* has authority to bind the members of the family, given certain conditions immaterial for the present purpose, does not carry the matter to a point which it is necessary to reach before the members of the family can be held liable on a promissory-note signed by the *karta* alone and not bearing the name of any one of them.

The principle upon which a person can be made liable upon a promissiory note is so clear that I am quite unable to reconcile it with any conclusion which would have the effect of charging members of a Hindu joint family whose names do not appear upon the note.

In my opinion the defendants other than the widow are not liable upon the promissory note in suit.

This brings me to the issue which learned Counsel for the plaintiff submitted. The defendants are sought to be made liable upon the advance.

The argument advanced on behalf of the defendants other than the widow is that independently of the note there is no cause of action, and that even if any such independent cause of action can be established any terms to be found in the note, can only be established by the note itself.

This argument has been supported by deference to a series of cases of which *Sheikh Akbar* v. *Sheikh Khan* (8), is. that chiefly relied upon in which owing to failure to comply with the provisions of the Stamp Act the promissory-note sued upon was not admissible in evidence and the plaintiffs were compelled to resort to the original cause of action in order to recover independently of the note.

It is assumed that because in those cases, and in this, the plaintiff cannot recover upon the promissory-note itself, they all stand upon the same footing and that the same line of reasoning is applicable.

But that assumption and argument are based upon a fundamental error. They introduce confusion between inadmissibility of the note in evidence and the constitution of a cause of action by the note. In the cases cited the note furnished a cause of action, but could not be proved, in this

(4) 23 M. 597; 8 Ind. Dec. (N. S.) 819.
(5) 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 508.
(6) 11 C. W. N. 139.
(7) 7 C. W. N. 725.

(8) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 713.

case the note may be, and has been, proved, but for reasons already stated furnishes no cause of action against those defendants.

I may at once go further and say that no question under s. 91 of the Evidence Act can arise because by reason of what I have already decided, which for the purpose of argument was assumed those defendants did not become parties to, or bound by, this note, and such agreement as was entered into by Charu Chunder Mitter on their behalf was not reduced into writing, for he made no written agreement on their behalf capable of being enforced.

The case is not one of resorting to the original consideration; an inappropriate form of expression. The cause of action is entirely distinct from that upon the note upon which the plaintiff never had nor has any cause of action against any person other than Charu Chunder Mitter or his estate.

The only question, therefore, which arises is whether the plaintiff has established the cause of action which is embodied in issue No. 7:

I have already decided that the plaintiff may make such a case without amendment. At that time I was influenced by the view that the defendants would not be prejudiced if the issue were allowed, even if strictly it were not so fully pleaded as might have been done.

Now that the hearing is concluded I find that my anticipations have been justified. The defendants have had every opportunity of meeting this case and have called no evidence. In *Vithalrao Sheshgirirao* v. *Vithalrao Sondekar* (2) the learned Chief Justice discussed the distinction in procedure between a suit on a promissory-note and a suit for the debt and pointed out the different course the trial may take in either case. The state at which the question was raised has given the defendants every opportunity of adopting the course indicated by the learned Chief Justice of Bombay.

I see no reason for not accepting the evidence of the plaintiff to the fullest extent. He has proved the advance and the promise made by Charu Chunder Mitter as manager of the family to re-pay Rs. 35,000 with interest at 6½ per cent. per annum, Charu Chunder Mitter undoubtedly bound himself by the promissory note, but it is not necessary for the plaintiff to rely upon it except for such corroboration as it provides of the evidence which he has given in the witness-box having the effect of charging the defendants generally. The payments of interest endorsed on the back of the note were undoubtedly payments made not merely in respect of interest due on the note itself, but in respect of interest due from the other persons as well. If the plaintiff's evidence as to the advance is accepted this must follow. That the payments were made in respect of the liability of the members of the family by Sourendra as manager is also shown by the entries in the books of account relative to the respective payments endorsed on the note.

The authority of Sourendra to make such acknowledgments has been questioned, though more particularly on behalf of the widow, but that does not arise. It has been held that the *karta* has the same authority to acknowledge a debt as he has to incur it and that the acknowledgment need not be expressed as having been made in his capacity of *karta*: *Chinnaya Nayudu* v. *Gurunatham Chetti* (9), *Har Prosad Dass* v. *Bakshi Bindeswari Prosad Singh* (10), authorities from which it has not been argued that I should differ.

The last of such acknowledgments if all such were within three years of that immediately proceeding, is dated the 16th February 1920. This suit was filed on the 12th February 1923, and within the period of limitation as intended thereby.

There will be judgment for the sum claimed and interest on Rs. 35,000 pending suit until realization at 6 per cent. per annum.

Judgment in this case will be against the defendants as members of the joint family, the amount to be paid out of the joint family property. I see no reason for differentiating the case of the other defendants from that of Sourendra Nath Mitter, and in my opinion, as I have held, in all he did he acted as *karta* of the family in succession to Charu Chunder Mitter.

As regards costs, an order for the costs of the suit and the hearing will go against all the defendants other than the widow. As regards the widow, the position is that she supported the plaintiff on the point on which he has succeeded. She had in reserve a defence which it was not necessary to consider. Most of the time occupied at the

(9) 5 M. 169; 2 Ind. Dec. (N. S.) 118.
(10) 31 Ind. Cas. 30; 19 C. W. N. 860.

trial has been occupied in deciding the question as to which she raised no defence. Consequently, she will only be liable for the general costs of the suit and the costs of the first day's hearing.

Z. K. *Suit decreed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 320 OF 1923,
December 16, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

BISHUNATH—DEFENDANT—APPELLANT

versus

RAM PARSHAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit with liberty to bring fresh suit—Order passed by Appellate Court—Appeal, whether lies.

No appeal lies from an order passed by a Court of First Appeal under O. XXIII, r. 1 of the C. P. C., permitting the plaintiff to withdraw his suit with liberty to bring a fresh suit.

Second appeal against the order and decree of the Subordinate Judge, Unao, dated the 4th October 1923, preferred against that of the Munsif, Purwa, dated the 21st February 1923.

Mr. *Ram Bharosey*, for the Appellant.

Mr. *K. P. Misra*, for the Respondents.

JUDGMENT.—This is the appeal of the defendant No. 2. The object of the suit, out of which this appeal arises, is to obtain a declaration that a certain alienation made by a Hindu widow was not binding. In defence the plaintiffs' right to challenge the alienation was questioned and legal necessity was put forward in support of the alienation. The Court of first instance dismissed the suit. On appeal by the plaintiffs the learned Subordinate Judge of Unao, after briefly discussing the merits of the case, allowed an application of the plaintiffs to withdraw the suit with liberty to bring a fresh suit on certain conditions. So many of those conditions as were required to be performed before the order of permission to bring a fresh suit was made final were complied with by the plaintiffs. The result was that the appeal was not decided on the merits but the suit was allowed to be withdrawn with liberty to sue again.

At the hearing of the appeal a preliminary objection was taken on behalf of the respondents that no appeal lay from the order passed by the lower Court under O. XXIII, r. 1, of the C. P. C. The objection is obviously sound and was not contested by the learned Pleader for the appellant. It was, however, argued that the appeal might be treated as an application in revision under s. 115 of the C. P. C. But I am not prepared to accede to this argument in the present case. The order of the lower Appellate Court is eminently a reasonable one in the circumstances of this case and I see no defect in the exercise of the jurisdiction.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL SUIT No. 358 OF 1924.
May 18, 1925.

Present:—Mr. Justice C. C. Ghose.

HOGARTH SHIPPING CO., LTD.—PLAINTIFFS

versus

MITSUI BUSSAN KAISHA LTD.—DEFENDANTS.

Arbitration Act (IX of 1899), s. 19—Charter-party—Damages, suit for—Order staying suit—Reference to arbitration—Substitution of real plaintiff in place of apparent plaintiff, effect of—Award, validity of.

A charter-party was made between *G* as agent for the owners of a vessel and the defendant. The names of the owners of the vessel were not disclosed in the charter-party. A suit was brought against the defendant to recover damages for the detention of the vessel and after the institution of the suit defendant applied under s. 19 of the Arbitration Act for an order for stay of proceedings in the suit, inasmuch as the charter-party contained an arbitration clause, and obtained a stay order. The matter then went to arbitration and in the course of the proceedings before the arbitrators it transpired that the owners of the vessel were not the plaintiffs but another firm. Thereupon an application was made on behalf of the original plaintiffs for an order that the real owners of the vessel should be either added as co-plaintiffs or substituted as plaintiffs in the place of the original plaintiffs and that the cause title and register of the suit may be amended accordingly, and an order was made in the terms of the application. An award was made in the arbitration proceedings and it was contended on behalf of the defendant that the award was bad inasmuch as there had been no stay of proceedings in the suit to which the real plaintiffs were parties, and as no arbitrators had been appointed to decide any dispute between the present parties to the suit. It was further contended that assuming that the

arbitrators had been validly appointed, the award was bad owing to the pendency of the suit:

Held, that the effect of the substitution order made by the Court was that the real plaintiffs were entitled to take advantage of and to proceed under the stay order made under s. 19 of the Arbitration Act and that consequently the arbitration proceedings were rightly continued and the award could not be attacked on the ground that there had been no valid stay of proceedings or that the arbitrators had not been validly appointed. [p. 1031, cols. 1 & 2.]

Messrs. *L. P. E. Pugh* and *W. W. K. Page*, for the Plaintiffs.

Messrs. *N. N. Sircar* and *S. M. Bose*, for the Defendants.

JUDGMENT.—This is an application on behalf of the defendants Messrs. Mitsui Bussan Kaisha, Limited, for an order that it may be declared that an award made on the 14th March, 1925, by Messrs. A. O. Brown and L. Edwards, arbitrators, is null and void and that the said award may be set aside and cancelled, and that the respondents, the Hogarth Shipping Co., Ltd., should pay to the petitioners the costs of and incidental to this application.

The facts are as follows:—On the 1st February, 1924, Samuel Crawford Hogarth, Hugh Hogarth, Barclay Hogarth and John Baird Henderson, carrying on business in co-partnership as shipowners under the name, style and Firm of H. Hogarth and Sons at No. 24 St. Enoch Square in Glasgow, instituted a suit in this Court being Suit No. 358 of 1924, against the Mitsui Bussan Kaisha, Limited, praying for the recovery of a sum of Rs. 10,333-5-4 as damages for detention of a certain vessel named "Baron Jedburgh" and of a further sum of Rs. 31,666-10-8 as demurrage. The said suit was based on a charter-party, dated the 26th November 1920, and made between Messrs. Graham & Co. as agents for the owners of a vessel, the name of which was not then declared, and the defendant Company. In the said charter-party, the name of the owners was also not disclosed. The agreement was that a first class steamer to carry 6,500 tons cargo, 10 per cent. more or less, should receive on board at Calcutta at such dock, place or wharf as the charterers might direct, from the said charterers or their order, a full and complete cargo of coal in bulk, and being so loaded, should with such cargo proceed with all possible despatch under steam to Colombo and should there deliver the said cargo. By the said charter-party the defendant Company agreed to ship or cause to be shipped the said cargo and also agreed that the said cargo would be shipped at Calcutta and despatched to the port of destination within 18 weather working days (Sundays and holidays excepted), such lay days not to count until the said steamer should be in berth as ordered by shippers, provided that the usual 24 hours' notice of readiness had previously been given by the Master or Agents, the said steamer having been duly entered at the Custom House, but not before 1st February 1921, unless with the said charterer's consent, and the steamer being ready. The name of the vessel (Baron Jedburgh) was declared at a later date. The defendants after the institution of the said suit applied under the provisions of s. 19 of the Indian Arbitration Act for an order for stay of proceedings in the suit, inasmuch as the charter-party contained an arbitration clause. This application was opposed by the then plaintiffs, but an order was made on the 8th April, 1924, by this Court staying all proceedings in the said suit. The matter then went to arbitration. In the course of the proceedings before the arbitrators, it transpired that the owners of the vessel "Baron Jedburgh" which, as stated above, had been declared in terms of the charter-party, were the Hogarth Shipping Co., Ltd. and not Messrs. H. Hogarth and Sons, who were the plaintiffs on record in the suit. The discovery came about in this manner. On the 25th September 1924, Messrs. Orr, Dignam and Co., the Attorneys for the defendant Company, informed Messrs. Pugh and Co., the Attorneys for the plaintiffs, by a letter bearing that date, that they had inspected the register of the said S. S. "Baron Jedburgh," which was then in the port of Calcutta, and that such register showed that the owners of the said vessel were the Hogarth Shipping Co., Ltd. The said charter-party was expressed to be made between Messrs. Graham and Co. as agents for the owners of the good steamer called a first class steamer etc., and the defendant Company as charterers and it was at first believed that H. Hogarth and Sons were the owners of the vessel. On the said discovery being made, it became necessary to consider the position and on or about the 8th January, 1925, an application was made to this Court on behalf of the original plaintiffs for an order that the real owners of the vessel, the Hogarth Shipping Co., Ltd., be either added as co

plaintiffs, or be substituted as plaintiffs in the place of the plaintiffs above-named and that the cause title and register of the suit may be amended accordingly. Upon the said application being made, the following order was made on the 14th of January 1925: "It is ordered that the said plaint and the register of the suit be amended by striking out from the cause title thereof the names and descriptions of the plaintiffs and substituting in lieu thereof the following words. 'Hogarth Shipping Co. Ltd., a Company registered under the English Companies Acts and having its registered office in Glasgow in Scotland' and by making such other amendments in the body of the plaint as may be necessary in consequence of the aforesaid amendment." At the time the said order was made, learned Counsel for the applicants made it quite clear that the applicants wanted the order at their own risk as to questions of limitation and otherwise. Thereafter the defendant Company treating the suit as being a new one with new plaintiffs and being desirous of having the questions raised determined by the Court, tendered a written statement which was ordered to be filed subject to all just exceptions. This was on the 28th January 1923. Thereafter the arbitration proceedings went on and at the meeting of the arbitrators held on the 30th January 1925, the defendant Company's Solicitors questioned the jurisdiction of the arbitrators in view of the events which had happened. The arbitrators, however, decided to proceed with the arbitration and they made their award on the 14th March 1925.

It is now contended on behalf of the defendant Company that the said award is bad, inasmuch as there had been no stay of proceedings in the suit in which the Hogarth Shipping Co., Ltd., were the plaintiffs, and as no arbitrators had been appointed to decide any dispute between the present parties to the suit, and secondly, that assuming that the arbitrators had been validly appointed, the award is bad owing to the pendency of this suit, [See *Doleman* v. *Ossett Corporation* (1)], and thirdly, that there was no legal evidence before the arbitrators upon which they could have made the award.

Now, it appears to me on an examination of the entire record of this suit that owing to a *bona fide* mistake, the names of the partners in the Firm of H. Hogarth and Sons had been inserted as the plaintiffs, whereas the real plaintiffs ought to have been the Hogarth Shipping Co., Ltd. (See in this connection the affidavit of D. H. Wilmer dated the 8th January 1925), and that it is because of this mistake that the Court was induced to make the order of the 14th January, 1925, referred to above. The result, therefore, was that after the order of the 14th January, 1925, the Hogarth Shipping Company, Ltd. were, subject to questions of limitation, to be treated as if they had been described as plaintiffs in this suit from the very start. If I am right in this conclusion, it follows that the Hogarth Shipping Co., Ltd. were entitled to take advantage of and proceed under the order of the 8th April, 1924. [See *Duke of Buccleuch* (2).] The cause of action arose under the charter-party dated the 26th November 1920 in which the names of the real owners were not mentioned and though the names of the partner in the Firm of H. Hogarth and Sons who, I am informed, were the agents were originally by mistake put on the record as plaintiffs, the real owners of the vessel "Baron Jedburgh" were still the real plaintiffs. It follows also that looking into the substance of the thing and having regard to the events which had happened, the arbitration clause could only have reference to a dispute between the real owners of the vessel, "Baron Jedburgh" and the defendants (the existence of the dispute is beyond question on the materials before me) and that it is this dispute that Messrs. Brown and Edwards had been appointed to decide. In this view of the matter, I must hold against the applicants and find that the said arbitration proceedings were rightly continued after the order of the 8th January 1925, and that the award cannot be attacked on the first two grounds referred to above. As regards the third ground, it appears on the evidence that the arbitrators were asked to award damages at the demurrage rate and that there was no evidence on behalf of the charterers to show that the demurrage rate should not be adopted for the assessment of damages for detention. The third ground taken also fails and the result, therefore, is that the application must be

(1) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76; J. P. 457; 10 L. G. R. 915.

(2) (1892) P. 201.

dismissed. There will, however, in the peculiar circumstances of the case, be no order for costs.

Z. K. *Appeal rejected.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1063 OF 1922.
May 13, 1925.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

Maharaja PRATAP UDAI NATH SAHI DEO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAHABIR SAHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Chota Nagpur Landlord and Tenant Procedure Act (I of 1879), s. 10 (b)—Chota Nagpur Tenancy (Amendment) Act (V of 1903), s. 5—Landlord and tenant—Transfer by raiyat, *validity of—Transfer, invalid—Title to holding, whether affected—Encumbrance created by tenant—Surrender, validity of.*

A transfer by a *raiyat* falling within the purview of s. 10 (*b*) of the Chota Nagpur Landlord and Tenant Procedure Act of 1879 effected between the 1st day of January 1903 and the 4th day of November 1903, the latter date being the date on which the section was introduced into the Act by s. 5 of the Chota Nagpur Tenancy (Amendment) Act, 1903, comes within the operation of the section and is invalid. [p. 1033, cols. 1 & 2.]

Where a *raiyat* makes a transfer of his holding which is invalid under the provisions of s. 10 (*b*) of the Chota Nagpur Landlord and Tenant Procedure Act of 1879, the title remains in the tenant himself or after his death in his heirs. [p. 1034, col. 1.]

A tenant who has created an encumbrance upon the holding is not prevented from making a surrender of the holding. [*ibid.*]

Appeal against a decision of the Judicial Commissioner, Chota Nagpur, dated the 24th June 1922.

Messrs. *S. M. Mullick* and *B. C. De*, for the Appellants.

Messrs. *Ray Guru Sharan Prasad* and *Anand Prasad*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendants Nos. 1 and 5 and arises out of a suit brought by the plaintiffs for a declaration of their title to and recovery of possession of certain plots of land. It appears that one Jagdam had a holding in *Mauza* Okhar Garha of which the defendant No. 5, the Maharaja of Chota Nagpur, is the proprietor. On the 7th May 1903 Jagdam executed two deeds in favour of *Musammat* Mango. One of these deeds was a *zerpeshgi* deed for Rs. 159 in respect of a portion of the holding and the other was a *rehan* deed for Rs. 57 in respect of another portion of the same holding. *Musammat* Mango took possession of the lands given to her under the *zerpeshgi* and the *rehan*. The plaintiffs Nos. 1 to 3 purchased the interest of *Musammat* Mango under a deed of sale dated the 13th December, 1916. They were, however, dispossessed by defendant No. 1 who claimed the holding of Jagdam under a Settlement from the defendant No. 5 on the allegation that Jagdam had abandoned the holding and the Maharaja had taken direct possession of the land and settled the same with the defendant No. 1 in November 1917. There was a criminal case which was decided against the plaintiffs in May, 1919 and the plaintiffs stated that they were dispossessed as the result of this criminal case. The suit was brought by the plaintiffs Nos. 1 to 3 who are the purchasers of the interest of *Musammat* Mango and by the plainitffs Nos. 4 and 5 who are the sons of Jagdam. The suit was contested by the Maharaja, the defendant No. 5 and by the defendant No. 1 and their case was that the original tenant Jagdam had abandoned the holding and that the Maharaja had taken possession thereof. It was further alleged that the transfer by Jagdam to *Musammat* Mango was invalid under the provisions of the Chota Nagpur Tenancy Act. After the filing of the plaint and before the filing of the written statement, the plaintiffs Nos. 4 and 5 filed a petition on 6th May 1920 in which they alleged that certain proceedings taken by the defendant No. 5 under s. 73 of the Chota Nagpur Tenancy Act were correct and legal and they admitted that their father Jagdam had ceased to have any right to the disputed land and that these plaintiffs, namely, Nos. 4 and 5, had no claim to the land and they asked that their claim might be dismissed and they might be exonerated from the liability of paying costs. The Munsif who tried the suit held that there was no abandonment and that the transfer to the plaintiffs Nos. 1 to 3 was not invalid under the provisions of the Chota Nagpur Tenancy Act. He refused to give effect to the application of the plaintiffs Nos. 4 and 5 and made a decree in favour of plaintiffs Nos. 1 to 3. On appeal by the defendants Nos. 1 and 5 the learned Judicial Commissioner has affirmed the decree of the Munsif.

The principal question for decision in

the present case is whether the transfer by Jagdam to *Musammat* Mango under the two deeds of the 7th May 1903 was valid having regard to the provisions of the Chota Nagpur Tenancy Act. The Act in force at the time the transfer was made was the Act of 1879 as amended by Bengal Act V of 1903. By s. 5 of Act V of 1903 s. 10 (*b*) was inserted in the Act of 1879. This s. 10 (*b*) has been re-enacted in Act VI of 1908 and is now s. 46 in the latter Act. Act V of 1903 came into operation on the 4th November 1903. Section 10 (*b*) which was enacted by s. 5 of Act V of 1903 provided that no transfer by a *raiyat* of his right in his holding or any portion thereof by mortgage, or lease, for any period exceeding five years, or by sale, gift or any other contract or agreement shall be valid to any extent. Clause (5) of this section provided that nothing in this section ahall affect the validity of any transfer not otherwise invalid of a *raiyat's* right in his holding or any portion thereof made *bona fide* before the first day of January, 1903. The transfer in the present case took place on the 7th May, 1903, that is after the 1st of January 1903 and before the 4th November 1903. The question is as to whether a transfer of a *raiyati* holding effected between these two dates comes within the mischief of the section. It has been held by the learned Judicial Commissioner that s. 10 (*b*) had no retrospective effect and that although the transfer in question in the present case was made after the 1st of January, yet inasmuch as it was before the 4th November, 1903, when the Act came into operation, the transfer was valid. Now, in order to put this interpretation upon the wordings of the section the learned Judicial Commissioner had to introduce certain words into the section. He was of opinion that the words "made after this Act comes into operation" have to be added to cl. (1) of s. 10 (*b*). In other words, he was of opinion that it is only transfers made after the Act came into operation that would be invalid under the provisions of this section. I am, however, of opinion that it is not permissible to add words to the section in order to construe it. We must construe the section as it stands and having regard to the language used, it is clear that all transfers, whether made before the Act came into operation or not, provided they were made after the 1st of January 1903, would come within the provisions of this section. Clause (5) of the Act clearly saves transfers made *bona fide* before the 1st day of January 1903. That shows the intention of the Legislature. That is, it is clear from cl. (5) of the section that but for this exception all transfers even of a period prior to the 1st day of January 1903 would have come within the operation of this section and the Legislature has deliberately saved transfers made *bona fide* before the 1st day of January, 1903, otherwise there appears to be no object in enacting cl. (5) of the section. The learned Judicial Commissioner says that unless some such words, as he intends to add to the section, are added, the meaning of the first clause of the section would become absurd. In my opinion there is no absurdity in the section. Clause (1) provides that no transfer shall be valid if it purports to create an interest for a period exceeding five years and cl. (3) of the section provides that no transfer in contravention of sub-s. (1) shall be registered, or shall be in any way recognized as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction. On reading the different clauses of the section I am of opinion that it was cleary intended by the Legislature to provide that all transfers for the period exceeding five years of *raiyati* holding would be invalid and the Courts were enjoined to refuse to recognise such transfers as valid. By cl. (5) *bona fide* transfers and not all transfers were saved if made before the 1st day of January 1903. The section is no doubt silent as regards the fate of the transfers between the 1st day of January and 4th November 1903 but the meaning to my mind is plain and such transfers would come within the operation of the section.

Reliance has been placed upon certain decisions of this Court and of the Calcutta High Court. The case of *Mrs. Vesta Cliffon Sebastian* v. *Kuloda Prasad Deogharia* (1) referred to a case in Manbhum.

The Chota Nagpur Tenancy Act was introduced in Manbhum by a Notification of the Government dated the 22nd December 1909. In that case a deed of sale had been taken by the petitioner to the High Court on the 19th August 1909 that is before the Act was extended to Manbhum and it was held that the deed of sale which was taken before the Act was extended to Manbhum did not come within the operation of s. 46

(1) 7 Ind. Cas. 763; 15 C. W. N. 43.

of the present Act which corresponds to s. 10 (*b*) of the Act of 1879 as amended by Act V of 1903. This case was followed by a Division Bench of this Court in *Braja Lall Dutta* v. *Kenaram Pal* (2). That was a case from Ranchi in Chota Nagpur where the Act came into operation in November 1903. In *Ganpta Mahto* v. *Chotan Ram* (3), the question related to the effect of s. 47 of the present Chota Nagpur Tenancy Act. In that case a sale of a holding had been ordered by the Court before the Act came into operation and their Lordships held that the Act did not apply to an order already passed by a Court. The present case is distinguishable from all these cases and upon a plain reading of the section itself I am of opinion that the transfer by the original tenant Jagdam to *Musammat* Mango by the deeds of the 7th May 1903 was invalid and by their purchase of the 13th December 1916, the plaintiffs Nos. 1 to 3 acquired no valid interest in the holding. The transfer to *Musammat* Mango and to the plaintiffs Nos. 1 to 3 being invalid, the title would remain in the heirs of the original tenant, namely, plaintiffs Nos. 4 and 5. The plaintiffs Nos. 4 and 5 by their petition expressly asked the Court to dismiss the claim so far as they were concerned. Having regard to the petition filed by these two plaintiffs, it is clear that the Court could not make a decree in their favour. The claim, therefore, of the plaintiffs must be dismissed.

In this view of the case the other questions referred to in the judgment of the learned Judicial Commissioner and argued by the learned Advocates on both sides do not arise. As regards the effect of the application filed by the plaintiffs Nos. 4 and 5 it was contended that it amounted to a surrender. The learned Judicial Commissioner relied upon the decision of the Calcutta High Court in *Syed Mohsenuddin* v. *Baikuntha Chandra Sutradhar* (4) which held that a tenant having created an encumbrance could not by an act of surrender derogate from the encumbrances created by him. This decision of the Calcutta High Court has been expressly dissented from by a Full Bench of this Court in *Sheoraji Kuer* v. *Dhani Mian* (5).

(2) 50 Ind. Cas. 515; 4 P. L. J. 411.
(3) 42 Ind. Cas. 387; 2 P. L. W. 149.
(4) 61 Ind. Cas. 443; 25 C. W. N. 29; 48 C. 605; 32 C. L. J. 286.
(5) 75 Ind. Cas. 794; 4 P. L. T. 581; 1 Pat. L. R. 402; (1923) Pat. 305; (1924) A. I. R. (Pat.) 1; 3 Pat. 1.

As regards the finding of the learned Judicial Commissioner that the evidence on the record showed that there was no abandonment by the original tenant, that is a finding on a question of fact which is not open to us to interfere with in second appeal. But as I have said this question does not properly arise in view of the interpretation placed on s. 10 (*b*) of the Chota Nagpur Tenancy Act of 1879 and upon that interpretation the plaintiffs are not entitled to a decree.

The result is that the appeal will be allowed and the suit dismissed with costs.

ROSS, J.—I agree.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 164 OF 1924.
March 31, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

BAI SAMJU AND OTHERS—APPELLANTS
versus
LALLUBHAI TALSIBHAI—RESPONDENT.

Bombay Bhagdari and Narvadari Act (V of 1862), s. 1—Narva land—Sale of portion for building purposes—Remainder, whether constitutes recognized sub-division.

Where the proprietor of a recognized sub-division of a *narva* in a *bhagdari* village, with the permission of the Collector, separates a small portion of land for building purposes unconnected with the preservation of the homestead and sells that portion, the rest of the share retained by him constitutes a recognized sub-division of a *narva* within the meaning of the Bombay Bhagdari and Narvadari Act and is liable to the process of a Civil Court. [p. 1035, col. 2.]

First appeal from a decision of the First Class Subordinate Judge, at Nadiad in Darkhast No. 91 of 1923.

Mr. *H. V. Divatia*, for the Appellants.
Mr. *M. H. Mehta*, for the Respondent.

JUDGMENT.—The Trial Judge has held that the property sought to be attached is a recognized sub-division of a *narva* and is, therefore, liable to the process of the Court under the provisions of Bombay Act V of 1862. On the evidence produced before the Judge, it appeared that the judgment-debtor Manibhai, now represented by the appellants, originally was the proprietor of a recognized sub-division

of a *narva* measuring Re. 0-1-1. Twelve years ago eight *gunthas* were separated from that land for the purpose of building a bungalow. These eight *gunthas* were separately assessed, and Manibhai sold the site with the bungalow without any objection being raised thereto by the Revenue Authority. In fact, we may take it that the Revenue Authority recognized that site as being separately assessed and capable of being transferred by itself. The judgment-debtor, however, contends that it still remains a part of the *narva*, so that the land still remaining to him after the separation of eight *gunthas* can no longer be considered a recognized sub-division of *narva* village. The Judge rejected this contention and directed the sale proclamation to be issued.

In appeal, it has been urged that the separation of eight *gunthas*, even though they were separately assessed, cannot prevent the original holding of the tenant being still considered as the recognized sub-division. What is a recognized sub-division of a *narva* is not defined in the Bhagdari and Narvadari Act V of 1862. The object of the Act was to prevent anything else than a recognized sub-division of a *bhag* or share in a *bhagdari* or *narvadari* village being attached or sold by a process of a Court. Now we have the Manual published under the orders of Government to enable the Revenue Officers to understand what should be done with regard to these *narvas*, and under Government Resolution No 7241 of July 26, 1909, it was directed as follows:—

"Section 1 of Act V of 1862 was inserted only in order to preserve the *narva* homestead and was not directed towards buildings erected for unconnected purposes. The Collector is at liberty to recognize any sub-division he thinks fit. The fact that land required for building purposes forms part of a *narvadari* holding does not act as a bar to its acquisition by a non-*narvadar*. A sharer in a *narvadari* village may, with the Collector's permission, relinquish any portion of his share and allow it to cease to be *narva* land. When a plot of *narvadari* land is acquired by a non-*narvadar* for building purposes the liability for the enhanced assessment should be thrown on the purchaser by the formal resignation of the land by all the *narvadars* concerned."

Now in this case the Collector has recognized the separation of these eight *gunthas* for building purposes, and we may take it that such separation in no way derogated from the constitution of the *narva* homestead, and that as the Collector was, in the circumstances of this case, at liberty to recognize any sub-division, these eight *gunthas* must be considered as having been recognized as a sub-division, so that the balance of the judgment-debtor's share in the *narva* would necessarily also constitute a recognized sub-division. Otherwise, if the contention of the judgment-debtors were to succeed, it would follow that if a sharer in a *bhagdari* village with the permission of the Collector separated a small portion of land for building purposes unconnected with the preservation of the homestead, and sold that portion, then the rest of the share would, under no circumstances, be a recognized sub-division and would not be liable to the process of a Civil Court. We do not think that was intended by Act V of 1862. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 107 OF 1924.

April 21, 1925.

Present:—Justice Sir B. K. Mullick, Kt., and Mr. Justice Ross.

Babu Syed DILJAN ALI—PLAINTIFF —APPELLANT

versus

Bibi AKHTARI BEGUM—DEFENDANT—RESPONDENT.

Religious Endowments Act (XX of 1863), s. 14—Civil Procedure Code (Act V of 1908), ss. 9, 92—Specific Relief Act (I of 1877), s. 42—Religious endowment—Suit for declaration that mutwalli *is liable to dismissal and has been dismissed for neglect of duty, nature of—Procedure.*

Section 14 of the Religious Endowments Act applies to endowments created both before and after the Act came into force. [p. 1037, col. 2.]

Reliefs which can be claimed under s. 14 of the Religious Endowments Act are slightly different from those which can be claimed under s. 92 of the C. P. C. The power of appointing a new trustee and of framing a scheme for the administration of the trust property is restricted to s. 92 only. [p. 1035, col. 2; p. 1038, col. 1.]

Section 92 of the C. P. C. is mandatory and the reliefs specified in the section can only be enforced by resort to the procedure laid down in the section.

Neither the founder of a trust nor his heirs are entitled to sue for the removal of a trustee and the appointment of a new trustee, if a breach of trust is alleged or directions are required for the administration of the trust, unless the procedure specified in the section is followed. [p. 1038, col. 1.]

Plaintiff brought a suit for a declaration that he being the heir of the founder of a trust was entitled to dismiss the defendant from the post of the *mutwalli* on the ground of misappropriation, slackness and negligence under the terms of the deed of endowment, that the defendant had committed acts of misappropriation, etc., and was liable to be dismissed from the post of *mutwalli* under the terms of the said deed and that he had been so dismissed by the plaintiff:

Held, (1) that the suit as it stood was not one which fell within the purview of s. 9 of the C. P. C. or of s. 42 of the Specific Relief Act; [p. 1037, col. 1.]

(2) that in essence the suit was for the removal of the trustee and for the administration of the trust and to protect the endowment against misfeasance, breach of trust or neglect of duty by the trustee and that consequently the suit fell within the purview of s. 14 of the Religious Endowments Act or of s. 92 of the C. P. C., and that the procedure laid down in those sections must be followed. [p. 1037, cols. 1 & 2.]

Appeal from an order of the Subordinate Judge, Bhagalpur, dated the 24th March 1924.

Mr. *Muhammad Hasan Jan*, for the Appellant.

Messrs. *S. Sultan Ahmad, S. M. Naim, N. C. Roy, Khursed Husnain* and *Syed Ali Khan*, for the Respondent.

JUDGMENT.

Mullick, J.—The Subordinate Judge of Bhagalpur having on the 24th March 1924 returned the plaintiff's plaint dated the 30th April 1923 for presentation to the proper Court, this appeal is preferred by the plaintiff under r. 1, cl. (*a*) of O. XLIII, of the C. P. C. The litigation arises out of a *wakfnamah* executed by Mir Imam Bux in the year 1874 who dedicated certain immoveable property for the maintenance of a certain *masjid* and *khankah* at Bhagalpur and appointed the plaintiff's father Syed Mehdi Hussain to be the *mutwalli* thereof. The plaintiff's case is that Mehdi Hussain was succeeded as *mutwalli* by his widow Bibi Umda Begum who upon her death left only one daughter Bibi Muhammadi Begum who was of unsound mind. The defendant is one of the surviving daughters of Muhammadi Begum and upon her mother's death she took possession of the trust properties on the allegation that she was entitled to succeed thereto as *mutwalli*. The plaintiff, however, denied her claim alleging that he was entitled to be the *mutwalli* as the heir of Mir Imam Bux upon the failure of the line of Syed Mehdi Hussain and on the 13th March 1914 he instituted a suit in the Court of the Subordinate Judge of Bhagalpur for a declaration of his title to the *mutwalliship* and for recovery of possession. The suit was dismissed in the Trial Court but was decreed in the High Court on the 5th March 1919. The defendant Bibi Akhtari Begum thereupon appealed to the Privy Council who on the 30th December 1922 set aside the judgment of the High Court and restored that of the Subordinate Judge. Thereupon application having been made on the 20th April 1923 to execute the decree of the Privy Council the plaintiff in order to avoid making restitution of the trust properties of which he had taken possession since the High Court decree, he thought himself of filing on the 30th April 1923 the plaint out of which this appeal arises. In this plaint he alleges that under the powers reserved to the founder or his heirs by the *wakfnamah* he on the 28th February 1923 has dismissed the defendant from the post of *mutwalli* on the ground of misappropriation, slackness and negligence, and he asks for the following reliefs:—

"(*a*) That the Court may be pleased to decide that the plaintiff being the heir of the donor is entitled to dismiss the defendant from the post of *mutwalli* on the ground of his misappropriation, slackness and negligence (*kheanat, susti, [gaflat)* under the terms of the deed of endowment aforesaid.

(*b*) That the Court may be pleased to decide that the defendant has committed acts mentioned in paras. 23 to 32 of this plaint and was and is liable to dismissal from the post of *mutwalli* under the terms of the deed of endowment aforesaid.

(*c*) That on adjudication of above matters the Court may be pleased to decree in favour of the plaintiff declaring that the defendant has been dismissed from the post of *mutwalli* of the mosque and *khankah* situated at *Takiya* Shah Mohammad Saidque Jafri and of the endowed properties appertaining thereto."

An application was made after the institution of the suit for an interlocutory order for an injunction to restrain the execution of the Privy Council decree, or in the alternative for the appointment of a Receiver. Both prayers were rejected and possession was duly delivered.

Thereafter objection having been taken to the maintainability of the suit, the Subordi-

nate Judge on the 24th March 1924 held that he had no jurisdiction to entertain the plaint on the ground that it was in effect an application for the removal of a *mutwalli* for misfeasance or breach of trust or neglect of duty and that by reason of s. 14 of the Religious Endowments Act (XX of 1863) the proper Court for presentation was the principal Civil Court of the District.

On behalf of the appellant it is contended that his suit is neither under s. 14 of the Religious Endowments Act nor under s. 92 of the C. P. C., but one for the enforcement of a civil right cognizable by a Civil Court under the general law as declared by s. 9 of the C. P. C.

The first question, therefore, is, what is the meaning of the plaint and the reliefs claimed therein. As it stands the plaint does not expressly ask for any relief of a civil nature or for the adjudication of any contest as to a right of property or an office. It is not understood why any Court should decide whether the plaintiff is entitled to dismiss the defendant or declare that the defendant was and is liable to dismissal from the post of the *mutwalli* or that she has in fact been dismissed. If the *wakfnamah* creates a right in the plaintiff to dismiss the defendant the plaintiff is at liberty to exercise that right without the intervention of the Court and there is no reason why the Court should be asked to declare that he has in fact exercised that right. If the defendant accepts the dismissal, there is nothing further to be done. If she does not, then it is open to the plaintiff to ask for the administration of the trust and for her removal and the suit would then be one cognizable under s. 9 of the C. P. C. by the Civil Court.

The declarations asked for by the plaintiff cannot even be construed as coming within the purview of s. 42 of the Specific Relief Act. If the plaintiff had desired a declaration as to some legal character, which had been denied, and if consequential relief had not been possible, the Subordinate Judge would have had jurisdiction to take cognizance but here there is no such case.

The fact is that in essence the plaint is one for the removal of the trustee and for the administration of the trust. When he asks the Court to declare that the defendant has been duly dismissed he means either that the Court is required to remove her in the event of refusal to vacate, or otherwise arrange for the administration of the trust. It is inconceivable that a person of the plaintiff's experience in litigation would have filed a plaint which does not ask for any relief of a civil nature and, in my opinion, the Subordinate Judge was right in holding that the object of the suit being to protect the endowment against misfeasance, breach of trust or neglect of duty, s. 14 of the Religious Endowments Act is applicable.

But it is said that this section cannot apply because the Act has no application to trusts established after 1863. It is said that the authorities, which hold that s. 14 of the Act is general and that it applies to endowments created both before and after 1863, were *obiter dicta*, but it is clear that this contention cannot be accepted. See *Dhurrum Singh* v. *Kishen Singh* (1), *Fakurudin Sahib* v. *Ackeni Sahib* (2), *Sheoratan Kunwari* v. *Ram Pargash* (3) and *Sivayya* v. *Rami Reddi* (4). By Regulation XIX of 1810 all public endowments in this Province were declared to be under the control and superintendence of the Board of Revenue which was entitled to take charge of their properties and to administer the same, although it sometimes did not do so. In respect of some of the endowments the Local Government had the power to nominate or confirm the manager or superintendent. In others the Local Government did not appoint but had powers of supervision. Act XX of 1863 made rules for the management of both these classes. Regulation XIX if not repealed would have been applicable to endowments created after 1863 also and it is reasonable to suppose, therefore, that Act XX of 1860 which repealed it was intended to have the same scope, and that while some parts of it provided for endowments over which the Local Government were then exercising control, s. 14 was intended to have wider scope and to apply to endowments coming into existence in the future.

It is to be noticed that the reliefs granted under s. 14 of Act XX of 1863 are slightly different from those accorded under s. 92 of the C. P. C. The power of appointing a new trustee and of making a scheme for the administration of the property is restricted to s. 92 only and in the present case if the

(1) 7 C. 767; 4 Shome L. R. 206; 9 C. L. R. 410; 3 Ind. Dec. (N. S.) 1042.
(2) 2 M. 197; 4 Ind. Jur. 280; 1 Ind. Dec. (N. S.) 409.
(3) 18 A. 227; A. W. N. (1896) 37; 8 Ind. Dec. (N. S.) 858.
(4) 22 M. 223; 8 Ind. Dec. (N. S.) 159.

object of the plaintiff is to provide for the administration of the estate after the removal of the defendant, s. 92 would appear to be the proper machinery of securing it. The respondent, therefore, contends that the plaintiff should first obtain the sanction of the Advocate General and join some other person with him as plaintiff as required by the provisions of s. 92. I agree that this would have been the proper course, but if the plaintiff chooses to adopt the procedure of s. 14 of Act XX of 1863 rather than s. 92 of the C. P. C., the risk is his and the Court cannot make any objection. The Subordinate Judge appears to have thought that as the plaintiff was suing alone and had not obtained the sanction of the Advocate General or other officer empowered to give sanction under s. 92, C. P. C., it was his intention to cast the suit as one under s. 14. Probably the learned Judge was right but even if he had held the suit to be one under s. 92, C. P. C., then also would he have been compelled to return the plaint.

But the appellant's reply is that he has a right to sue independently of the Religious Endowments Act and s. 92 of the C. P. C. He contends that so far as Act XX is concerned it is cumulative and not restrictive and that so far as s. 92 of the C. P. C., is concerned it deals only with suits brought in a representative capacity, and that it does not affect a suit to enforce a right conferred by the deed of endowment itself. He relies upon cases decided previously to 1908 and in particular upon *Budree Das Mukim* v. *Chooni Lal Johurry* (5) in which it has been held that the founder of an endowment or his heirs have the right to sue the trustees for the due performance of the trust and to remove them and to appoint new trustees without invoking the aid of s. 92. These cases, however, are no longer law and the second clause of s. 92 makes it clear that the section is mandatory and the reliefs specified in the section can only be enforced now by resort to the procedure of the section. Neither the founder nor his heirs is now entitled to sue for the removal of the trustee and the appointment of a new trustee if he alleges a breach of trust or requires directions for the administration of it. The jurisdiction of the High Court over suits relating to the management of trust property has been derived from the Supreme Court and was in the first instance independent of the C. P. C. As for the *mofussil* Courts, their jurisdiction appears to have been based upon justice, equity and good conscience. But that jurisdiction in respect of both sets of Tribunals is now affirmed and controlled by Act XX of 1863 and s. 92 of the C. P. C. The fact is that the trustee, though by a legal fiction, is vested with the legal ownership of the property and the Legislature will not allow the Civil Court to divest him unless and until certain preliminaries have been strictly observed. In one sense a suit for the removal of a trustee may not strictly speaking be a suit of a civil nature, and perhaps for that reason the Legislature has removed all doubts by enacting the Statutes above referred to and has declared that no such suit can now be instituted except under the special jurisdiction conferred thereby.

It is contended that *Venku Chettiar* v. *Doraisami Chettiar* (6) is authority to the contrary. But that case was one between an admitted trustee and one who was not a trustee for the recovery of trust property and submission of accounts. Such a suit would obviously be cognizable by the ordinary Civil Court without any preliminary formalities. So would a suit for the establishment of the right to act as *mutwalli*. But it is otherwise where the appointment of a trustee has been recognized and it is sought to remove him for a breach of trust. But, says the appellant: "I may not wish to sue for breach of trust and I may have the right to dismiss the *mutwalli* for mere misconduct not amounting to a breach of trust. Why may I not enforce my right to remove him?" The answer is that we are not concerned now to discuss a hypothetical case and whether in certain events a declaratory suit will lie. What we have to decide here is whether the plaint as it stands is one which can be entertained by the Subordinate Judge. I have no doubt that the answer is in the negative. The Subordinate Judge has held the plaint to be an application within the purview of s. 14 of Act XX of 1863. It is for consideration whether if and when the application has been admitted, the principal Civil Court will be able to give the relief which the plaintiff seeks. If the Court is not competent to appoint or cause to be appointed a new trustee, he will probably not remove the defendant and will probably direct the appellant to sue under s. 92 of the C. P. C. Therefore it is for consideration whether the plaintiff

(5) 33 C. 789; 10 C. W. N. 581.

(6) 62 Ind. Cas. 761; 14 L. W. 38; (1921) M. W. N. 430.

will be better advised to adopt the procedure under s. 92, C. P. C. instead of that under s. 14 of Act XX of 1863. However, it is not for us to advise the plaintiff as to how he should proceed. All that we can do is to affirm the Subordinate Judge's order and to dismiss the appeal with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 337 OF 1924.

February 16, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

TARA PRASANNA SINHA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

JNANENDRA NARAYAN BAGCHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 22 —Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Notice to judgment-debtors—Uninterested judgment-debtor.

The object of the notice under O. XXI, r. 22, C. P. C., is to enable the judgment-debtor to show cause why the decree should not be executed, and also to give him an opportunity of satisfying the decree. [p. 1039, col. 2.]

Where one of several judgment-debtors has no interest whatever in the property affected by the decree, the failure to serve the notice under O. XXI, r. 22, C. P. C., on him does not vitiate the execution proceedings. [*ibid.*]

Gurudas Biswas v. *Thakamani Dasi*, 64 Ind. Cas. 476; 25 C. W. N. 972, referred to.

Per *Suhrawardy, J.*—Under Art. 182 of Sch. I to the Limitation Act, an execution application against some of several judgment-debtors is to be treated as one against all of them. Therefore, it is not necessary that notice under O. XXI, r. 22, C. P. C., should be served upon all the judgment-debtors. [p. 1040, col. 1.]

Krishnaiyah v. *Gajendra Naidu*, 40 Ind. Cas. 608; 40 M. 1127; 22 M. L. T. 20; 6 L. W. 290; 33 M. L. J. 533, relied on.

Appeal against an order of the Subordinate Judge, Birbhum, dated the 27th of May 1924.

Babu *Probodh Chandra Chatterjee*, for the Appellants.

Sir *Provash Chandra Mitter*, Babus *Hiralal Chakravarti* and *Shyamadas Bhattacharjee*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This appeal is by all the judgment-debtors, except judgment-debtor No. 3, against an order passed by the Subordinate Judge of Birbhum, dated the 27th May 1924, overruling the objections made by the judgment-debtors to the execution under s. 47, C. P. C. The main objection which has been pressed before us is that no notice under O. XXI, r. 22 having been served on judgment-debtor No. 3, who is not an appellant before us, the entire execution proceedings are void and without jurisdiction and, therefore, the sale effected in these proceedings must be set aside. The decree obtained was for rent in respect of a *darpatni* under the plaintiffs who are the *putnidars*. The *darpatni* was held by Tara Prasanna, Shyama Prasanna and Bazrangi Prosad. On the death of Bazrangi Prosad his widow Sabitri Kumari Barmani (judgment-debtor No. 3) was treated as his representative. But it is the case of the appellants that the share of Bazrangi Prosad was sold by him to the appellants by a *kobala* dated the 8th *Chaitra* 1327. Sabitri Kumari, therefore, had no subsisting interest in the *darpatni*. The decree-holders described her as one of the judgment-debtors in the execution proceedings probably out of abundant precaution. Notice under O. XXI, r. 22 was not served on Sabitri Kumari. There is no other flaw in the execution proceedings except want of service of notice on Sabitri Kumari. It is urged before us, whether she was or was not a proper party to the execution proceedings, execution having been sought against her, it was the duty of the decree-holders to serve her with notice under O. XXI, r. 22, and their failure to do so vitiated the entire proceedings. No authority has been placed before us in support of this untenable contention of the appellants; but reliance has been placed upon cases where it has been held that failure of service of notice under O. XXI, r. 22 takes away the jurisdiction of the Court to execute a decree and all subsequent proceedings are null and void. There cannot be any doubt with regard to the correctness of this view. But as has been pointed out in the case of *Gurudas Biswas* v. *Thakamani Dasi* (1), the object of the notice evidently is to enable the judgment-debtor to show cause, if any, why the decree should not be executed and also to give him an opportunity of satisfying the decree. This object could not be achieved in the present proceedings as Sabitri Kumari had no sub-

(1) 64 Ind. Cas. 476; 25 C. W. N. 972.

sisting interest in the property at the time of the execution and she was not a person who could show cause against execution or could satisfy the decree. Moreover, subsequent to the order appealed against and passed by the Court below she joined with the other appellants to make four applications for time to pay the judgment-debt in which the judgment-debtors waived their right to take any objection under O. XXI, r. 22. Time was granted with the consent of the decree-holder on these applications and had the judgment-debtor No. 3 herself been the appellant, she might have found it difficult to succeed in these circumstances. As she is not an appellant and as she has no interest in the property against which execution is sought, I think the judgment-debtors have no right to question the execution on the ground that no notice was served on her.

Reference may also be made in this connection to Art. 182 of the Indian Limitation Act. There was no notice on judgment-debtor No. 3 and the present application may be taken as an application for execution against the other judgment-debtors and under Art. 182 such an application is treated to be an application against all the judgment-debtors, and, therefore, it is not necessary that notice under O. XXI, r. 22 should be served upon them all. See the case of *Krishnaiyah* v. *Gajendra Naidu* (2).

Exception has been taken to the execution on another ground, namely, that the decree having been obtained for rent against the original tenants and some of the transferees of the original tenants, it cannot be considered as a decree under the Bengal Tenancy Act. I do not see any reason why this mere fact will deprive the decree of its character as one under the Bengal Tenancy Act. Besides, the appeal is not directed against the validity of the sale but against the order overruling the objections under s. 47, C. P. C.

This appeal accordingly fails and is dismissed with costs four gold *mohurs*.

Let the record be sent down as early as possible.

Duval, J.—I agree with the order which my learned brother proposes to make. The decree arose out of a rent suit and was passed on the 13th December 1922. Among the judgment-debtors Sabitri Kumari, the present judgment-debtor No. 3, was included; but it appears from the petition dated the 27th May 1924, on which the order now objected to is made, that she had not at the time of the passing of the decree any interest in the property as any interest she might have had from her husband had been sold before her husband's death. When execution was taken out in Rent Execution Cases Nos. 4 of 1923 and 46 of 1924 (the previous execution cases) it appears that she was not mentioned as one of the judgment-debtors against whom the decree was sought to be executed. Consequently it is argued that when she was included in the present application which is dated the 3rd April 1924 which was made a year and five months after the passing of the decree, it was necessary that notice under O. XXI, r. 22 should be served on her. This no doubt would have been absolutely necessary and the absence of such notice would have made the whole proceeding void, if, as a matter of fact, any relief in actual effect was possible against the lady. But on the admission of the other judgment-debtors, no such relief was possible; nor does she herself object to the execution of the decree. It was a rent-decree and execution was sought by attachment and sale of the property and she could not, therefore, be affected by anything which took place in the Execution Court. She, therefore, raised no objection though subsequently after this order was passed she was induced to join with the other original judgment-debtors in making applications for delaying the sale. As she had no interest in the property. the want of service of notice on her would not affect her in any way and so there can be no ground for allowing the appeal. I agree with my learned brother also on the point as to the decree being a rent and not a money-decree. I, therefore, agree that the appeal should be dismissed.

N. H. *Appeal dismissed.*

(2) 40 Ind. Cas. 608; 40 M. 1127; 22 M. L. T. 20; 6 L. W. 290; 33 M. L. J. 533.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 6 OF 1925.

March 17, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice B. B. Ghose.

HARI MATI DASI—1ST PARTY

versus

HARI DASI DASI—2ND PARTY.

Criminal Procedure Code (Act V of 1898), s. 147 (2)—Dispute concerning immoveable property—Mandatory order, whether can be issued—Jurisdiction of Magistrate.

Under sub-s. (2) of s. 147 of the Cr. P. C. a Magistrate has power only to issue a prohibitory order restraining any person from doing any act interfering with the right of another person when the Magistrate finds that such right exists. The power given to a Magistrate under this sub-section is analogous to the power of a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but the sub-section does not authorize a Magistrate to make an order in the nature of a mandatory injunction directing a party to perform a certain act, for instance, an act directing a party to demolish a wall that has been built by him. [p. 1041, col. 2; p. 1042, col. 1.]

Reference made by the District Magistrate, Howrah, dated the 7th January 1925, for setting aside an order of the Deputy Magistrate, Howrah, dated the 2nd January 1925.

Babu *Punchanan Chowdhury*, for the 1st Party.

Mr. *Narendra Kumar Bose* (with him Babus *Probodh Chandra Chatterjee* and *Sudhansu Sekhar Mukherjee*), for the 2nd Party.

JUDGMENT.—This is a Reference under s. 438 of the Cr. P. C., by the District Magistrate of Howrah recommending that an order passed by the Deputy Magistrate under s. 147 (2) of the Code be set aside.

The facts are that the first party complained that the second party raised a wall on her own land blocking the windows in the house of the first party and thereby shut out light and air from the western room in that house. The Deputy Magistrate found that the first party was enjoying the right of access to light and air through the windows in question for the last two years, and as the putting up of the wall by the second party was admitted he held that it was not necessary for him to discuss the evidence in the case. The only point that he considered to be important was whether there was likelihood of a breach of the peace and he held under the circumstances, although there was no direct evidence in support of his finding, that there was likelihood of a breach of the peace. In conclusion he made an order to this effect: "I, therefore, direct that the second party Hari Dasi Dasi do demolish the new wall within the period of one month from this date and that she shall not put up another wall blocking the windows in the north wall of Hari Mati's house till she had been adjudged by a competent Court to have the right to do so." The learned Magistrate does not find that the first party had acquired a right of easement under the law to light and air over the land of the second party through the windows in dispute.

The question, however, is whether having regard to the provisions of s. 147 (2), Cr. P. C., the Magistrate had jurisdiction to order the second party to demolish the wall which she has raised on her own land. The learned Vakil for the first party contends that in view of certain rulings of this Court the Magistrate had such jurisdiction, and it is sufficient for us to refer only to the first of the cases cited *Pasupati Nath Bose* v. *Nando Lal Bose* (1) in support of his contention. In that case it was held that an order directing that an obstruction to the right of taking water by one of the parties by the erection of a *bandh* should be removed was within the competency of the Magistrate having regard to the words in s. 147 of the Code of 1898, that the Magistrate could "Direct that such things shall not be done." There is some divergence of judicial opinion on the question to which it is unnecessary to refer, as s. 147 has been amended by Act XVIII of 1923, and the language has been altered. We have to construe the section as it now stands. Sub-s. (2) of s. 147 runs thus: "If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right." It appears to us that those words do not give the Magistrate any power of directing one of the parties to do a positive act by way of mandatory injunction as has been done in this case by directing the second party to demolish the wall that has been built by her. It seems that the power given to a Magistrate under sub-s (2) of s 147 is analogous to the power of a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but that this sub-section does not authorize the Magistrate to make an

(1) 5 C. W. N. 67; 28 C. 734.

order in the nature of a mandatory injunction directing a party to perform a certain act. The order of the Magistrate under that section may be declared to be erroneous by a Civil Court. Sub-section (4) of s. 147, Cr. P. C., runs thus: "An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction." If we are to hold that the Magistrate has the jurisdiction to pass an order by way of mandatory injunction the party against whom such an order is made would be driven to the Civil Court for establishing the right that he is not bound to perform the act directed by the Magistrate. In the present case if the order of the Magistrate were to stand the second party would have to bring a suit for a declaration that she has the right to re-build the wall after demolishing it in obedience to the order of the Magistrate, which would be a suit of a somewhat novel character in which even if successful the plaintiff can get no relief for the loss caused by the demolition. A Civil Court grants a mandatory injunction with great care and caution and we think that it was never intended that a Magistrate should exercise the power of making such an order by a summary procedure. We may also refer in this connection to Form No. 24 in the Fifth Schedule of the Code which gives a form of the order under s. 147 Cr. P. C., which merely contains a direction that the person against whom the order is made shall not do certain things. We are, therefore, of opinion that this change in the wording of s. 147 was made with a view to make it clear that the Magistrate has only the power to issue a prohibitory order restraining any person from doing any act interfering with the right of another when the Magistrate finds that it exists and we hold that the Magistrate has no jurisdiction to direct the 2nd party to demolish the wall.

On these grounds we accept the Reference and direct that the order, passed by the Deputy Magistrate dated the 12th December 1924, be set aside.

Z. K. *Reference accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 200 OF 1925.

July 9, 1925.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Simpson, A. J. C.

EMPEROR—APPELLANT

versus

MAIKU LAL—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 252 (2) —Warrant case—Prosecution evidence, production of —Duty of Magistrate—Necessary witness not produced, effect of.

Clause (2) of s. 252 of the Cr. P. C. throws upon the Magistrate, in a warrant case, the duty of seeing that all the evidence essential to the prosecution case is before the Court. It is not open to a Magistrate to acquit the accused in a warrant case on the ground that the prosecution has failed to produce a necessary witness. [p. 1043, col. 1.]

Appeal against an order of the Magistrate, First Class, Unao, dated the 13th December 1924.

The Government Pleader, for the Crown.

Mr. *S. M. Ahmad*, for the Respondent.

JUDGMENT.—This is an appeal by Government against an acquittal. The person acquitted was Maiku Pasi. The charge was under s. 60 (*a*) and (*f*) of the U. P. Excise Act IV of 1910. The case for the prosecution is that Mr. Shambhu Nath Misra, Excise Inspector, received information from an informer, whose name is not disclosed, that Maiku had manufactured liquor over night. He recorded his reasons for dispensing with the warrant, which were that Maiku would have an opportunity of making away with the liquor, and the instruments of distillation. He then went to Maiku's village, accompanied by Maqbul Aziz, Sub-Inspector of Police, a Head-Constable and two Constables, and one excise peon. When they reached the village, they picked up two witnesses, Bhawani who is the *mukhya* of the village, and Lalla, *bania*. The party proceeded to Maiku's house where they found Maiku's wife. She said that Maiku had gone to Unao. The search took place in her presence, and one full bottle of country liquor and one bottle half full were found. There was also a basket of *mahwa* flowers, a still, a still-head and a pipe. The pipe was concealed in the roof. The other things were in a room which was fastened with a chain. The two bottles were in a box which was locked. The key was obtained from Maiku's wife. The still itself was built of *pukka* bricks

The Excise Inspector, the Sub-Inspector, and the witness Bhawani, who is the headman of the village, have been examined. The other witness, Lalla, *bania*, was not produced by the prosecution. Maiku accused said that he was not present at the time, but he denied that the things were found in his house. He also denied the presence of his wife. He produced two witnesses in his defence, Sheo Din Lodh, who said that he was present at the time of the search, and that nothing was found except an earthen pot and a frying pan outside the house. The witness said that neither Maiku nor his wife was present, and he said "I saw dispute arising between the village headman and the accused for pigs who destroy fields." This last statement, of course, is quite insufficient to establish any enmity between the headman and Maiku. Neither time nor place is given of the supposed quarrel. No cross-examination was addressed to Bhawani on the point. The other witness Debi is a Pasi, as Maiku is. His deposition is not clear. He says that Maiku and his wife were not there at the time, but, as he also says that no search took place at all, it is not clear to what occasion he is referring. The learned Magistrate states in his judgment that the Excise Inspector, the Sub-Inspector and the *mukhya* fully support the prosecution story. He has acquitted, largely because the other witness Lalla *bania* was not produced by the prosecution. We desire to call the attention of the Magistrate, and through him of all Magistrates, to the exact wording of s. 252 (2) of the Cr. P. C. This was a warrant case.

"The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case, and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary."

The duty of seeing that all the evidence, essential to the prosecution case, is before the Court is thrown by the Code upon the Magistrate himself. It is not open to a Magistrate to acquit on the ground that the prosecution has failed to produce a necessary witness. We have not thought it necessary to send for Lalla *bania*. We see no reason to suppose that the Excise Inspector, the Sub-Inspector and the headman of the village have concocted an entirely false case against Maiku, and that is what the defence amounts to. The discrepancies pointed out by the learned Magistrate in his judgment do not appear to us to be of any importance. On the question where the two witnesses, joined the search party there is no real discrepancy if the evidence is rightly understood. On such points as what clothes Maiku's wife was wearing, and whether her baby was directing his efforts to the left breast or the right one, a truthful witness may fail to remember.

We accept the appeal, set aside the acquittal, and convict Maiku under s 60 (*a*) and s. 60 (*f*). Under s. 60 (*a*) we sentence him to a fine of Rs. 10. In default he will suffer one month's rigorous imprisonment. Under s. 60 (*f*) we sentence him to two months' rigorous imprisonment. If the fine is not paid the sentences of imprisonment will be consecutive.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1105 OF 1924.

March 12, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

Sheikh MANIK—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 360—Commitment proceedings—Deposition read over to witness during examination of other witnesses, effect of.

Reading over to a witness his deposition while other witnesses are being examined is not sufficient compliance with the provisions of s. 360 of the Cr. P. C., since the object of that section is that the accused may have the opportunity of ascertaining that the evidence has been correctly recorded. This is of great importance in an enquiry with a view to commitment, since under certain circumstances the evidence then taken may be used as evidence against the accused at the trial.

Criminal revision against an order of the Sub-Divisional Magistrate, Jamalpur, dated the 18th September 1924.

Babu *Profulla Chandra Nag*, for the Petitioner.

JUDGMENT.—No one appears to oppose this Rule It appears that at the hearing of the case before the Committing

Magistrate though the depositions of the witnesses were read over to them as required by s. 360, Cr. P. C., but this was done while the other witnesses were being examined. This we have held is not sufficient compliance with the provision of s. 360, Cr. P. C., since the object of that section is that the accused may have the opportunity of ascertaining that the evidence has been correctly recorded. This is of great importance in an enquiry with a view to commitment, since under certain circumstances the evidence then taken may be used as evidence against him at the trial. The objection was taken in the Sessions Court before the accused was called in to plead. Under these circumstances we think we shall make the Rule absolute, and we accordingly quash the commitment of the petitioner and direct that the case be re-heard before the Committing Magistrate according to law.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 271 OF 1925.
March 20, 1925.
Present:—Mr. Justice Broadway.
NAND LAL AND ANOTHER—PETITIONERS
versus
EMPEROR—RESPONDENT.

Opium Act (I of 1878), s. 9 (c)—Illegal possession of opium—Shop owned by two brothers jointly—Presumption.

Two brothers were joint owners of a shop in which opium was sold, the license being in the name of the elder brother. After the expiry of the license a quantity of opium was found in the shop:

Held, that the presumption may safely be made that the possession of opium was that of the elder brother and that the younger brother was not, therefore, guilty of an offence under s. 9 (c) of the Opium Act.

Mehr Singh v. *Emperor*, 60 Ind. Cas. 672; 22 Cr. L. J. 272, relied on.

Application for revision of an order of the Sessions Judge, Jhelum, dated the 4th November 1924, modifying that of the Magistrate, First Class, Gujrat, dated the 30th September 1924.

Mr. *Harbhajan Das*, for Mr. *Anant Ram*, for the Petitioners.

JUDGMENT.—Nand Lal and Diwan Chand, sons of Sada Dial, have been found guilty of an offence under s. 9 (c) of Act I of 1878 (Opium Act), and have been sentenced to imprisonment and payment of fines. An appeal by them resulted in their convictions being maintained, but their sentences of imprisonment were reduced to those already undergone while Nand Lal was sentenced to pay Rs. 500 fine and Diwan Chand Rs. 200. They have come up to this Court in revision, and it has been urged on their behalf that the conviction was wrong. So far as Nand Lal was concerned, I am satisfied that he was, undoubtedly, in possession of this opium and has been rightly convicted.

The case of Diwan Chand, his younger brother, is on a different footing. Admittedly Nand Lal had had a license to keep opium. That license had expired and under the rules Nand Lal should have returned any surplus opium that he might have had in his possession. It is clear that he did not do so. The learned Sessions Judge appears to have held that, as the brothers were the joint owners of the shops, the mere fact that the license had been in the name of Nand Lal alone, did not render Diwan Chand immune from punishment. It was held, however, in *Mehr Singh* v. *Emperor* (1) that where illicit liquor is found in a house which is occupied by two brothers, the presumption is that the elder brother was in possession of the liquor. In that case there was, in addition to the discovery of the liquor, other evidence to show that he (elder brother) had been concerned in the manufacture of it. In the present case there is evidence to show that the elder brother Nand Lal had had possession of opium under a license, and I, therefore, think that here too the presumption may safely be made that the possession of the opium was that of the elder brother and that, therefore, Diwan Chand should not be held guilty of the offence with which he is charged.

I, therefore, accept the petition so far as Diwan Chand is concerned and set aside his conviction and sentence. The fine, if paid, will be refunded. The petition of Nand Lal is dismissed.

Diwan Chand's revision accepted;
Z. K. *Nand Lal's dismissed.*

(1) 60 Ind. Cas. 672; 22 Cr. L. J. 272.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 66 OF 1925.
March 23, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

SUDHAMOY DAS—ACCUSED—PETITIONER
versus
THE CHAIRMAN KRISHNAGAR MUNICIPALITY—RESPONDENT.

Motor Vehicles Act (VIII of 1914), s. 16—Rules framed under Act, r. 19—Motor vehicle plying for hire—Rules for imposing tax not framed—Tax, whether can be imposed.

Rule 19 of the rules framed under the Motor Vehicles Act was passed for the protection of the roads and it was not intended that a prohibition under this rule should distinguish between private vehicles and vehicles plying for hire. Where no rules have been framed under the Act to enable a Municipality to impose a tax on motor vehicles plying for hire, the Municipality cannot take advantage of r. 19 to impose the tax.

Criminal revision against an order of the District Magistrate, Nadia, dated the 8th January 1925, confirming that of the Deputy Magistrate, Krishnagar, dated the 20th December 1924.

JUDGMENT.—The petitioner has been convicted under s. 16 of the Motor Vehicles Act for having contravened an order of the Chairman of the Krishnagar Municipality prohibiting the plying of motor taxis and lorries for the purpose of gain within the jurisdiction of that Municipality on all its roads without the special permission of the Chairman. It is not disputed that this special prohibition was issued in order to enable a tax of Rs. 25 to be levied on motor taxis. It appears that up to now no rules have been passed under the Motor Vehicles Act to enable Municipalities outside Calcutta at any rate to impose a tax on motor vehicles plying for hire. We are told that such legislation or rule making is contemplated. But until such taxation is sanctioned by law the Municipalities cannot take advantage of r. 19 to impose this tax. Rule 19 is in the following terms:—"No motor vehicles shall be driven on any street or other public place where the use of motor vehicles is prohibited in the case of a Municipal area by the Municipal Commissioners, and in the case of areas outside Municipal limits by the District Board of such areas." It is obvious that this rule was passed for the protection of the roads, and it is not intended that a prohibition under this rule should distinguish between private vehicles and vehicles plying for hire.

We make the Rule absolute. We set aside the conviction and sentence passed on the petitioner and direct that the fine if paid will be refunded.

Z. K. *Rule made absolute.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 143 OF 1925.
June 15, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir Jwala Prasad, KT.

DAROGA GOPE—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 182, 211—Criminal Procedure Code (Act V of 1898), s. 195 (b)—False information to Police—False charge in Court—Prosecution for false charge—Complaint by Court; whether necessary—Conviction for false information, legality of.

Where a person makes a false charge to the Police and subsequently institutes a prosecution in Court on the basis of the same charge, the offence of making a false charge under s. 211 of the Penal Code must be deemed to have been committed in relation to a judicial proceeding instituted in Court and before the person making the charge can be prosecuted for such offence a complaint in writing must be made by the Magistrate in whose Court the criminal case was instituted under cl. *b*) of s. 195 of the Cr. P. C. [p. 1047, cols. 1 & 2.]

An offence under s. 211 of the Penal Code must always include an offence under s. 182 of the Code and where a person is prosecuted in respect of an offence under the former section but it appears that the prosecution is illegal owing to the absence of a complaint in writing by the Court before whom the false charge was made, it is open to the Court to convict the accused under s. 182 of the Penal Code. [p. 1047, col. 2.]

Every false charge made to the Police is not necessarily an offence under s. 211 of the Penal Code. If the intention to injure is absent then the offence falls under s. 182 of the Code and there is no reason why if the prosecutor is unable or unwilling to prove intention, that is to say, malice, he should not be permitted to take a conviction under s. 182. [*ibid.*]

Application against an order of the Sessions Judge, Patna, dated the 13th March 1925, affirming that of the Sub-Divisional Magistrate, Patna, dated the 6th February 1925.

Mr. *Nawadwipa Chandra Ghosh*, for the Petitioner.

Mr. *H.L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—On the 5th January 1925

the petitioner Daraga Gope laid an information before the Police complaining that his landlord Bajrangi Singh and others had forcibly carried off 9 maunds of paddy from his house because he had refused the landlord's request for the customary gift of milk and curds. Previous to this on the same day a counter-information had been lodged before the Police by the landlord against the petitioner charging him and his brothers with wrongfully seizing and confining the landlord's ploughman while the latter was passing the petitioner's house. It was alleged that previously there had been a quarrel between the petitioner's party and the *zemindar's* servants about the sowing of some paddy and that the *zemindar's* servant was seized in order to annoy the *zemindar*.

The Police investigated both cases and reported that the *zemindar's* complaint was true and the petitioner's complaint was false. The *zemindar's* information, which was numbered by the Police as Case No. 1 of 1925, has ended in the conviction of the petitioner and is now under appeal.

On the 15th January the officer, who investigated into the petitioner's information submitted his final report declaring it to be false and on the 3rd February under the orders of the Inspector he submitted a formal complaint to the Sub-Divisional Magistrate of Patna charging the petitioner with offences under ss. 182 and 211, Indian Penal Code. In the meantime on the 5th January the petitioner, finding that the Police had reported his case to be false, filed a formal complaint before the Sub-Divisional Magistrate repeating the allegations made in his information to the Police and on the 6th February, 1925, the Sub-Divisional Magistrate, after perusing the Police report above referred to, dismissed the complaint under s. 203, Cr. P. C. On the same day he passed the following order on the Sub-Inspector's written complaint of the 3rd February; "Summon Daroga Gope under ss. 211/182, Indian Penal Code for 21th February 1925."

We are now asked in revision to set aside this order on the ground that the prosecution of the petitioner cannot proceed without the written complaint of the Magistrate who took cognizance of the petitioner's complaint of the 25th January.

Now cl. (*b*) of s. 195 of the Cr. P. C. directs that no Court shall take cognizance of any offence punishable under the following sections of the Code, namely, ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. In the present case the recording of the complaint of the 25th January was a judicial proceeding, and the first question is whether laying a false information before the Police on the 5th January was an offence committed in, or in relation to, the complaint which was lodged by the petitioner before the Sub-Divisional Magistrate on the 25th January.

Admittedly the offence was not committed in the judicial proceeding. But was it committed "in relation" to it? This raises a point upon which there has been some diversity of opinion but the tendency seems to be to give the words of s. 195 (*b*) as wide an application as possible It is clear that some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. False evidence, for instance, may be fabricated for a contemplated suit or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if the judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question.

With regard to a false information to the Police, it may be argued that the offence is a contempt which cannot possibly be said to have been committed "in relation to" any subsequent contempt, each repetition being a separate independent and complete act. On the other hand if two offences are even remotely connected by the relationship of cause and effect, then the first may be said to have been committed in relation to the second. It may be that the commission of the latter offence may never have been intended, but if it is in fact the consequence of the former offence, then s. 195 applies. Here it may be said that the laying of the false charge on the 5th January caused the Police to submit a report against the petitioner which in its turn caused the petitioner to institute a judicial proceeding before the Sub-Divisional Magistrate by lodging the complaint of the 25th January and that, therefore, the offence of the 5th January was committed in relation to a judicial proceeding.

This was the line of reasoning in *Hardwar Pal* v. *Emperor* (1). On the other hand in *Jagat Chandra Mazumdar* v. *Queen-Empress* (2), the offence of fabrication of false evidence was said to have been committed by a Police Officer in the course of an investigation; but it does not appear that any judicial proceeding followed as a result of that investigation and, therefore, it was held that no sanction under the Cr. P. C. of 1898 was required. In *Brown* v. *Ananda Lal Mullick* (3), a charge of theft was laid before the Police and was followed up by a complaint in Court upon which process was issued and a trial held. After the discharge in this trial the accused sought to prosecute the complainant for laying a false charge before the Police and it was held that this could not be done without a complaint under cl. (*b*) of s. 195, Cr. P. C. from the Court which discharged the accused. In *In re Parameswara Nambudri* (4), the difference between cl. (*c*) and cl. (*b*) of s. 195 was pointed out and it was held that cl. (*b*) was applicable in a case where the offence of fabricating false evidence was committed in respect of a promissory note before the institution of a civil suit for its enforcement, and where the application to prosecute the offender under s 193, Indian Penal Code was made after the institution of such suit. In *Muhammad Yassin* v. *Emperor* (5), a complaint was lodged before the Magistrate after the Police had reported the information lodged by him to be false. It was sought to prosecute the complainant for laying a false charge before the Police without a complaint in writing by the Magistrate who took cognizance of the complaint. It was held that s. 195 applied.

I think, therefore, that in the present case the order of the Sub-Divisional Magistrate of the 3rd February summoning the petitioner under s. 211, Indian Penal Code, was without jurisdiction on the ground that the offence was committed in relation to a judicial proceeding instituted before the Sub-Divisional Magistrate on the 25th January and that the complaint in writing of the Court was necessary under cl. (*b*) of s. 195.

The next question is whether even if the proceedings in respect of s. 211, Indian Penal Code are bad, a prosecution under s 182, Indian Penal Code can continue. On this point it is urged on behalf of the petitioner that if the offence of the 5th January was one falling under s. 211, Indian Penal Code, the Magistrate cannot split up the offence so as to give himself jurisdiction.

It is true that the Bombay High Court has taken this view in *Empress* v. *Arjun* (6) but the Calcutta High Court in *Bhokteram* v. *Heera Kolita* (7) has held that it is open to the Court to convict under the minor offence under s. 182, Indian Penal Code, even though the major offence under s. 211, Indian Penal Code has been committed. It is clear that an offence under s. 211 must always include an offence under s. 182 and I do not see why the Court should not convict of the minor offence if it so chooses. Reliance is placed by the learned Vakil for the petitioner on *Giridhari Naik* v. *Empress* (8). In that case it was held that a false charge of theft having been laid before the Police there should be a prosecution under s. 211 and not under s. 182. The decision purports to have been based on *Karim Baksh* v. *Queen-Empress* (9), but with the greatest respect it does not appear that the Full Bench in that case laid down any such proposition. What the Full Bench decided was that a person who sets the Criminal Law in motion by making a false charge to the Police of a cognizable offence institutes criminal proceedings within the meaning of s. 211 of the Penal Code. The difference between an offence under s. 182 and an offence under s. 211 was noticed in *Raghavendra* v. *Kashinathbhat* (10). Every false charge made to the Police is not necessarily an offence under s. 211. If the intention to injure is absent, then the offence falls under s 182 and there is no reason why, if the prosecutor is unable or unwilling, to prove intention, that is to say, malice, he should not be permitted to take a conviction under s. 182.

(1) 16 Ind. Cas. 510; 34 A. 522; 10 A. L. J. 61; 13 Cr. L. J. 702.
(2) 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103.
(3) 36 Ind. Cas. 857; 20 C. W. N. 1347; 18 Cr. L. J. 25; 25 C. L. J. 59; 44 C. 650.
(4) 31 Ind. Cas. 161; 39 M. 677; 18 M. L. T. 322; 16 Cr. L. J. 721.
(5) 86 Ind. Cas. 825; 6 P. L. T. 457; (1925) A. I. R. (Pat.) 483; 4 Pat. 323; 26 Cr. L. J. 889.
(6) 7 B. 184; 4 Ind. Dec. (N. S.) 124.
(7) 5 C. 184; 2 Ind. Dec. (N. S.) 728.
(8) 5 C. W. N. 727.
(9) 17 C. 574; 8 Ind. Dec. (N. S.) 922.
(10) 19 B. 717; 10 Ind. Dec. (N. S.) 480.

In the present case, therefore, although the Sub-Divisional Magistrate will have no jurisdiction to take cognizance of the offence under s. 211, he will be competent to investigate the complaint as regards s. 1 2 which does not require the complaint in writing of the Magistrate who took cognizance of the complaint of the 25th January.

It appears, however, that the petitioner has already been convicted in the counter-case and the necessity for prosecuting him for making a false charge is not clear. If the Appeal Court maintains the sentence of imprisonment which we learn has been passed upon the petitioner, there is little object in punishing him again for giving false information to the Police.

The application in revision is dismissed.

Jwala Prasad, J.—I agree.

Z. K. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 356 OF 1925.

July 8, 1925.

Present :—Mr Simpson, A. J. C.

LALTA AND OTHERS—ACCUSED—APPLICANTS

versus

ZAHOOR AHMAD—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 526—Transfer of case—Accused, inability of, to secure services of Counsel, whether ground for transfer—Legal Practitioner—Refusal of brief on ground of partisanship.

The fact that an accused person is unable, owing to the influence of persons interested in the prosecution, to secure the services of a competent member of the local bar for his defence is a sufficient ground for the transfer of the case to some other District.

A lawyer has no right to reject a brief when offered to him on payment of a fee agreed upon between the parties, on the ground of partisanship for a party to the litigation.

Application under s. 526, Cr. P. C., for transfer of a criminal case from the Court of the Magistrate, Bahraich.

Mr. *H. D. Chandra*, for the Applicants.

Mr. *Hakimuddin* and The Government Pleader, for the Opposite Party.

ORDER.—This is an application for the transfer of a criminal case. The complainant is Zahoor Ahmad, *karinda* of M. Ghulam Husain, an Honorary Magistrate in Bahraich. The complaint was filed sometime in April 1925, and it came up for hearing on the 23rd April, but was then postponed, because all the prosecution witnesses were not present. It came up again on the 7th May, and this time it was postponed at the request of the Pleader for the accused. It does not appear on what grounds this postponement took place. In the application, two grounds are given for the transfer. One, in para. 6, is that M. Ghulam Husain is an intimate friend of the Trying Magistrate. The Trying Magistrate is Syed Mohammad Abbas Saheb, the Sub-Divisional Officer. There is no affidavit in support of this allegation. It is denied by the Magistrate, and has consequently been abandoned by Counsel before me. The other reason is that the applicant cannot secure the services of any of the senior members of the Bahraich Bar. This statement is supported by an affidavit, in which it is stated that the declarant with the accused went to almost each and every Vakil and Pleader of the Bahraich Bar, with the papers relating to the case, and every one declined to take the case on some excuse or other. It is also stated that three of the eminent criminal practitioners in Bahraich have been engaged on behalf of the other side, and that the only person available for the applicant is a junior Civil Court practitioner. There is a counter-affidavit in which this is denied, but no names are given either, in the affidavit, or by Counsel before me, of any practitioner in Bahraich, who is ordinarily employed in criminal cases, who is willing to act for the applicant. I accept the statement in the affidavit, and I consider that it is a sufficient reason for transfer. I wish also to express my concurrence with the views of the then Judicial Commissioner, in *Allahabad Bank Ltd., Fyzabad* v. *Thakur Baksh Singh* (1), that a lawyer has no right to reject a brief, when offered to him on payment of a fee agreed upon between the parties, on grounds of partisanship for a party to the litigation. If the affidavit before me expresses the facts, the facts are discreditable to the Bahraich Bar. I transfer the case to the Court of the District Magistrate of Gonda. The District Magistrate will either try the case himself or will transfer it to any competent Court in the Gonda District.

Z. K. *Case transferred.*

(1) 80 Ind. Cas 826; 1 O. W. N. 279; 10 O. & A. L. R. 459; 11 O. L. J. 337; (1924) A. I. R. (O.) 372; 27 O. C. 401.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 144 OF 1925.

April 27, 1925.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Mukerji.

MOTI LAL—APPLICANT

versus

EMPEROR THROUGH KANHAIYA LAL—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 441, 448—Criminal trespass, what amounts to—Intention—Possession taken of empty house with intent to assert title—Offence.

Intimidation, insult or annoyance within the meaning of s. 441 of the Penal Code can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as for instance, the actual owner, his wife, agent, licensee or other person. These results much more naturally follow when premises are occupied than when they are vacant. A person who takes possession of a house which is absolutely empty at the time and is not in the actual physical possession of anybody cannot be held to be guilty of an offence under s. 448 of the Penal Code. [p. 1049, col. 2; p. 1050, cols. 1 & 2.]

A conviction under s. 448 of the Penal Code cannot follow merely because the Court can pronounce with certainty that the accused must have been known that his act would as one of its inevitable incidents cause annoyance. There must, in order to sustain a conviction under that section, be found an intent to cause intimidation, insult, or annoyance. [p. 1050, col. 2.]

A person who takes possession of a house with the intention of asserting his title to the house and of gaining and holding possession of it as against a rival claimant, cannot be convicted of an offence under s. 448 of the Penal Code inasmuch as it cannot be said that his intention was to cause intimidation, insult or annoyance to the person in possession. [*ibid.*]

Criminal revision from an order of the Sessions Judge, Cawnpore, dated the 2nd February 1925.

Dr. *K. N. Katju*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Mr. *J. M. Banerji*, for the Opposite Party.

JUDGMENT.—One Moti Lal has applied in revision to this Court against his conviction and sentence by a First Class Magistrate. The conviction and sentence were upheld by the learned Sessions Judge of Cawnpore on appeal. Moti Lal was convicted of an offence under s. 448 of the Indian Penal Code, and the contention of his learned Counsel is that on the facts found by the Courts below the conviction cannot be supported. The facts are briefly these:—One *Musammat* Basanti was in possession of her husband's property which consisted *inter alia* of some shops. On the death of the lady there were two claimants to the property, one Kanhaiya Lal, a cousin of her late husband, and the other the applicant before this Court. He claimed to be an adopted son. The property immediately in question was a shop which was in the occupancy of a tenant, Yusuf. Both Kahaiya Lal and Moti Lal claimed rent from Yusuf. Kanhaiya Lal sued Yusuf and Moti Lal appeared as a witness in support of Yusuf's defence. The defence failed and Kanhaiya Lal got a decree. Subsequently there was another suit for rent by Kanhaiya Lal which was again successful. Yusuf thereafter gave a notice to Kanhaiya Lal of his intention to vacate the premises and eventually left them on the 2nd of October 1924. The same day and before Kanhaiya Lal had been able to take possession of the shop Moti Lal occupied it and locked it up. On these facts the learned Magistrate and the learned Sessions Judge were of opinion that an offence under s. 448 of the Indian Penal Code had been committed. The learned Sessions Judge from certain other circumstances, namely, that Moti Lal was trying to induce the tenants to pay rent to him by offering to accept one half of the ordinary rent and the fact that Moti Lal did not attempt to obtain a declaration from the Court that he was an adopted son of the deceased, came to the conclusion that Moti Lal's object in locking up the shop "must obviously have been to annoy Kanhaiya Lal, the rightful owner."

In this Court the learned Counsel for Moti Lal has urged two points, (1) that the house was not in the possession of Kanhaiya Lal within the meaning of s. 441 of the Indian Penal Code, and (2) that the intention of Moti Lal was only to assert his own title and right to possession and that it was not his intention to annoy Kanhaiya Lal.

If, therefore, the applicant is right on either of these points, he is entitled to have the conviction set aside. Section 441 as far as material is as follows:—"Whoever enters into or upon property in the possession of another with intent to commit an offence, or to intimidate, insult or annoy any person, in possession of such property...is said to commit criminal trespass."

First of all it is to be remarked that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of some

body, as for instance, the actual owner, his wife, servant, agent, licensee or other person. They are at all events results which more naturally follow when premises are occupied than when vacant. The point as to actual possession being essential is not a new one, and indeed there is direct authority upon it. The earliest case on the point to which our attention has been called is that of *In the matter of the petition of Gobind Prasad* (1). On the facts of the case it was abundantly clear that there could be no successful prosecution for criminal trespass. But the law was discussed by Straight, J., and he expressed his deliberate opinion that possession must be "actual in the sense and meaning of s. 530 of the Cr. P. C." Section 530 of the Cr. P. C. of 1872, related to maintenance of possession in case of apprehended breach of peace. The person who was in actual occupancy of a property, whether he has any title in him or not, is to be maintained in possession, in case of an apprehended fight over the property Thus, Straight, J., was clearly of opinion that the person to be annoyed must be on the premises, otherwise there could be no criminal trespass. At page 467* he remarks :— "But with intent to annoy whom? 'Any person in possession of such property.' Then the question arises what sort of possession is here intended, express or implied, constructive in the sense of 'legally entitled to,' or actual as contemplated in s. 530 of the Cr. P. C." Then the learned Judge came to the conclusion already stated.

This case was followed in *Kunji Lal* v. *Emperor* (2). In this case the alleged offenders had taken possession of the *zemindar's* property, but the property itself was in the immediate possession of a person, who did not object to possession being taken of it. It was held that the constructive possession of the *zemindar* was not enough to sustain a conviction for criminal trespass.

Applying the law to the facts of this case, it is clear that Kanhaiya Lal was not in possession of the house at the moment the trespass was committed, either by himself or through any other person. The house was absolutely empty. He no doubt had the legal right to possession, but that is different from being "in possession" within the meaning of s. 441 of the Indian Penal Code. We, therefore, are of opinion that as regards the first point, that has been made good by the applicants.

That in itself is sufficient to dispose of the case, but we wish also to deal with the question of intent.

On the facts we have no doubt whatever that Moti Lal's intention in doing the act complained of was to assert his title and gain and hold possession of the premises as against Kanhaiya Lal. The fact that he was holding 7 out of 8 adjoining shops against the will of Kanhaiya Lal points strongly to his conclusion and we accept the principles of the decisions to which we have been referred. They are *Vullappa* v. *Bheema Row* (3) and *Gaya Bhar* v. *Emperor* (4).

In our opinion the words of the section must be closely adhered to and there must in all these cases be found an intent to cause intimidation, insult or annoyance. A conviction cannot, in our opinion, follow merely because one can pronounce with certainty that the accused must have known that his act would as one of its inevitable incidents cause annoyance.

Indeed in the ordinary case where a man steals into a house by night to carry on a secret intrigue with say, a widowed woman of age, he must be well aware that his conduct would cause great annoyance to the other members of her family who may at the time be within the house. If that is the only state of facts he cannot be convicted under this section as his presence in the house was in consequence of a purpose and intent quite other than of annoyance. Therefore upon this ground also we are of opinion that the contention put forward on behalf of Moti Lal was right

In the circumstances we allow this application in revision and we set aside the conviction and sentence, and if Moti Lal has, in fact, paid the fine that amount must be refunded to him.

Z. K. *Application allowed.*

(1) 2 A 465; 1 Ind. Dec. (N. s. 866.

(2) 21 Ind. Cas. 681; 12 A. L. J. 151; 14 Cr. L. J. 633.

(3) 43 Ind. Cas 578; 41 M. 156; 6 L. W. 794; 33 M. L. J 729; (1918) M. W. N. 81; 19 Cr. L. J. 162.

(4) 35 Ind. Cas. 979; 38 A. 517; 14 A. L. J. 719; 17 Cr. L. J. 419.

*Page of 2 A.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 52-B OF 1924.

February 24, 1925.

Present:—Mr. Baker, J. C.

DIGAMBAR—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

***Penal Code** (Act XLV of 1860), ss. 467, 471—Forgery—Use of forged document as genuine—Conviction of forger for use of document, legality of.*

A person, who, being the forger of a document, has used it as genuine, cannot be punished under s. 471 of the Penal Code for the use of the forged document as well as for the forgery. [p. 1052, col. 2.]

Appeal against an order of the First Class Magistrate, Yeotmal, dated the 24th November 1924, in Criminal Case No. 10 of 1924.

Mr. *R. G. Mundle*, R. B., for the Appellant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The appellant has been convicted by the First Class Magistrate of Yeotmal with s. 30 powers of forgery of a valuable security and using as genuine a false document and sentenced to five years' rigorous imprisonment on each charge the sentences to run concurrently.

The facts are set out in the judgment of the Magistrate. The appellant claimed to be the reversioner of his cousin Narayan and brought a suit against Parwati and Gaju who are the widows of deceased sons of Narayan. Among other reliefs the appellant sued for specific performance of sale of her husband's property by Parwati, based on an agreement dated the 20th February 1919. The period fixed in the agreement was either 11 days or 11 months, but the word following the figure 11 has been torn out of the document. The suit would have been barred by time if the words had been days.

The appellant contended that the time was 11 months. The defendant contended it was 11 days. The Subordinate Judge, who tried the case, held that the original agreement was for 11 days that the word had been deliberately torn out and the appellant had, therefore, committed forgery by fraudulently altering the document after it had been executed, and took proceedings against the appellant under s. 476, Cr. P. C.

The sole question in this appeal is as to the missing word in the document. As the accused admits that the document was throughout in his possession, the tear cannot have been made by anybody else.

It is contended on behalf of the appellant that the direct evidence falls far short of proving forgery and that the circumstantial evidence is not conclusive.

The first evidence consists of the statements of Parwati (P. W. No. 1) her brother Rajaram (P. W. No. 4) who attested the document, and the writer (P. W. No. 3). The writer does not remember whether the word was "days" or "months."

It is contended that the evidence of Parwati is vague, as she says the document was not read over to her. She is illiterate and does not know what the original word was, whether months or days, while Rajaram gave evidence in the civil suit that the word was "months" which he now admits to be false, so he is unworthy of credit.

Parwati states that the agreement was for 11 days and this seems more probable. Her second marriage admittedly took place on 1st March 1919 within 9 days of the agreement, and though it is contended that the *pat* was admittedly not fixed at the date of the agreement, it is obvious that she intended to re-marry, and as she would lose all interest in her first husband's property from the date of her re-marriage it seems very improbable that such a period as 11 months would be fixed for the performance of the contract.

The evidence of Rajaram (P. W. No. 4) is contrary to that he gave in the civil suit. It is explained by the Magistrate that he was induced by the accused to give evidence in his favour as a fictitious debt said to be due to him was included among the debts of Parwati's husband to be paid by the accused as consideration for the sale-deed. Rajaram, however, must be regarded as unreliable.

One other attesting witness (D. W. No. 1) has been examined for the defence. I do not think any reliance can be placed on him either, as he says he attested at Pusad, while the document on the evidence appears to have been written at Bhojlu, and it seems very unlikely that a person who had no interest in the document would after 5½ years remember whether the word was days or months. The document is dated the 20th February 1919 and he gives evidence on 31st October 1924. He does not remember other documents

The circumstantial evidence is in favour of the prosecution case. In the first place there can be no doubt that the tear is intentional and not accidental. It would be

very remarkable if an accidental tear removed only the one word about which there was a dispute. The shape of the tear also shows that it has been intentionally made so as to remove the vowel sign above the line. There is no other tear in the document. There is a small round hole, probably made by an insect. Also the tear is in the very centre of the document and not at the edges.

Next, as the Magistrate has pointed out, the shape of the tear is such as to indicate that the vowel sign above the line was above the first and not the second letter. The *Marathi* words in question are *mahinya* and *divsa*. In the first of these the vowel sign is over the second letter, and in the other over the first. The last letter of the word *che* remains and a portion of the preceding letter. The Subordinate Judge and the Magistrate are both of opinion that the preceding letter was *sa* and not *na*. *Marathi* is the mother tongue of both of them. On examining the document I am of the same opinion that the word was *divsa* days.

The circumstantial evidence coupled with the fact that Parwati was a young widow who was likely to re-marry, and did, as a matter of fact, re-marry within a few days of the agreement corroborates her statement that the word in the agreement was "days" and not "months". Parwati has no interest in giving false evidence. She has re-married and lost all interest in her first husband's property, which is now in possession of his brother's widow Gaji. She did not appear to contest the civil suit which was defended by Gaji alone.

The suit was brought on the last day of limitation, assuming the word to be months, but it was of course barred by limitation if the word was "days" as limitation would begin to run from the 11 days after the agreement.

The evidence of P. W. No. 10, the accused's Pleader in the civil suit, does not carry us much farther. He filed a written statement for the accused in a former suit in which the period for the agreement was said to be 11 months, but as the document itself was not filed it is uncertain whether this statement was made on instructions from his client or from an actual inspection of the document.

I am satisfied that the missing word was deliberately torn out of the document with the object of removing the bar of limitation and that the view of the Magistrate is correct. The appellant has, however, been separately convicted and sentenced under ss. 467 and 471, Indian Penal Code, though the sentences run concurrently. This cannot be done under the ruling in *Queen-Empress* v. *Umrao Lal* (1), where it was held that a person, who, being himself the forger thereof, has used as genuine a forged document, cannot be punished under s. 471, Indian Penal Code, for the use of the forged document as well as for the forgery.

The conviction under s. 471, Indian Penal Code, must, therefore, be set aside and that under s. 467, Indian Penal Code, confirmed.

The sentence also of five years' rigorous imprisonment is rather severe in the circumstances of this case, as I have recently had a case in which a forgery of a more serious character was punished with a much lighter sentence by a Sessions Judge.

The sentence will accordingly be reduced to one of two years' rigorous imprisonment under s. 467, Indian Penal Code.

The appellant must surrender to the District Magistrate, Yeotmal, his bail-bond being cancelled.

G. R. D.

Z. K. *Sentence reduced.*

(1) 23 A. 84; A. W. N. (1900) 205.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCES NOS. 190 AND 191 OF 1924

WITH

CRIMINAL REVISION NO. 865 OF 1924.

November 3, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

EMPEROR—PROSECUTOR

versus

ABDUR RAHIM AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 215, 360—Commitment proceedings—Deposition of witnesses not read over—Commitment, whether can be quashed at instance of Crown—Application opposed by accused, effect of.

The provisions of s. 360 of the Cr. P. C. were enacted for the benefit of the witnesses as also for that of the accused persons. Where the provisions of the section are not complied with by a Committing Magistrate and also with respect to some of the witnesses in the Sessions Trial, the commitment to the Sessions Court will not be quashed on the application of the Crown where it is opposed by the accused who do not complain of any inaccuracy in the commitment record or in the record of the Sessions Court. [p. 1053, col 2.]

References made by the District and Sessions Judge, Sylhet, dated the 12th September 1924, recommending the orders of the Extra Assistant Commissioner of Sylhet, dated the 21st January 1924 and 22nd February 1924.

Babu *Manindra Kumar Bose*, for the Crown.

Babu *Birendra Kumar De*, for the Accused.

JUDGMENT.—These are two References made by the Sessions Judge of Sylhet recommending that two commitments by which 44 and 8 accused persons respectively were committed to the Court of Session for trial under ss. 120B, 489A, 489B, 489C and 489D of the Indian Penal Code be quashed and a fresh enquiry preliminary to commitment ordered on the ground that the provisions of s. 360, Cr. P. C., were not complied with in the enquiries that were held.

It appears that after the respective commitments in which altogether over 300 witnesses were examined, the two cases were made over to the Assistant Sessions Judge and on trial being commenced by him, 102 witnesses for the prosecution were examined but the provisions of s. 360, Cr. P. C., were not complied with in respect of any of them; that thereafter the attention of the learned Assistant Sessions Judge being drawn to the decision of this Court in the case of *Hira Lal Ghosh* v. *Emperor* (1), the procedure of complying with the said provisions was adopted in respect of prosecution witnesses who were thenceforward examined, and in this way about 38 more prosecution witnesses were examined and their depositions were duly recorded in accordance with the said provisions.

These References have been made by the learned Sessions Judge on the basis of a petition filed by the Public Prosecutor before him by which the Public Prosecutor prayed for a withdrawal of the case to his own file from that ot the Assistant Sessions Judge on various grounds, and for obtaining an order for a *de novo* trial. The learned Judge withdrew the case to his own file, purporting to act under s. 528 (1), Cr. P. C. and then made these References under the provisions of s. 438, Cr. P. C.

Forty-three out of the accused persons have appeared before us; and they have filed a petition praying that the References be rejected and that the case be re-transferred back to the file of the Assistant Sessions Judge for the trial to be proceeded with in his Court. They have challenged the *bona fides* of the course adopted by the Public Prosecutor.

We have looked into all the relevant papers and have heard the learned Vakil appearing on behalf of the accused persons who have entered appearance in these References and also the learned Vakil on behalf of the Crown.

Now, in the case of *Hira Lal Ghosh* v. *Emperor* (1), it has been clearly pointed out by this Court that the provisions of s. 360, Cr. P. C., were enacted for the benefit of the witnesses as also for that of the accused persons. There is no question here so far as any of the witnesses are concerned and the accused persons do not complain of any inaccuracy in the commitment record. The trial has commenced, and any application by the accused persons for setting aside the commitment on the ground of non-compliance with the provisions of s. 360, Cr. P. C., during the enquiry preliminary to commitment, apart from the fact that it has not yet been made by them, will not be of any avail if made hereafter. In fact those of the accused who have appeared before us, do, as we have said, strongly oppose the quashing of the commitment. Questions, no doubt, may arise as to the admissibility of the depositions if they are sought to be put in under s. 288, Cr. P. C., but such difficulties may perhaps be avoided. In any event we do not see any reason why at the instance of the Crown we should quash the commitments and direct a *de novo* enquiry to be held, seeing that even in the petition which was filed by the Public Prosecutor about a month after the ruling aforesaid was published, it was not suggested that that course should be adopted, but only that a *de novo* trial should be held on the commitments already made. Then there is the fact which stares us in the face that most, if not all, of the accused persons are in *hajat*, and some of them have been in *hajat* for about a year and a half or so. Having regard to all these matters, even if the Crown anticipates any difficulty in the matter of using the depositions recorded by the Committing Magistrate, of which, however, we can see nothing at present, we decline to subject the accused persons to the harassment of a fresh commitment enquiry.

We have considered the matter carefully

(1) 83 Ind. Cas. 905; 28 C. W. N. 968; (1924) A. I. R. (C.) 889; 26 Cr. L. J. 201; 41 C. L. J. 224; 52 C. 159.

in all its bearings, and we think we shall not be justified in accepting these References in their entirety. Our order is that the case be re-transferred to the file of the Assistant Sessions Judge in whose file it was, that he do re call the witnesses in respect of whom the provisions of s. 360, Cr. P. C., were not complied with and take steps to comply with those provisions so far as these witnesses are concerned and then proceed with and finish the trial in accordance with law.

The References are accepted in part only.

Z. K. *References accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 26 OF 1925.
July 14, 1925.

Present:—Mr. Simpson, A. J. C.

EMPEROR THROUGH GOPI NATH SONAR —COMPLAINANT—APPLICANT

versus

PARTAB NARAIN—ACCUSED—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), s. 562 (1) (a)—Previous conviction not proved, effect of—Character and antecedents of accused, consideration of.

The law is no respecter of persons and the members of a District Board are liable for their criminal acts like other people.

The terms of s. 562 (1) (*a*) of the Cr. P. C. are wide enough to entitle the Court to take into consideration the character and antecedents of the accused person.

Semble.—Section 562 (1) (*a*) of the Cr. P. C. is applicable to the case of an accused person against whom no previous conviction is proved, although as a matter of fact such a conviction exists.

Reference made by the Officiating Sessions Judge, Fyzabad, dated the 28th May 1925.

Mr. *R. D. Sinha*, for the Applicant.

Mr. *K. P. Misra*, for the Opposite Party.

JUDGMENT.—This is a Reference by the learned Sessions Judge of Fyzabad. As the case is in revision, I take the facts from the judgment of the lower Appellate Court. It appears that the complainant Gopi is a petty *zemindar* of village Surmau and the accused Pandit Pratab Narain is his tenant. Gopi asked Partab Narain to pay some arrears of rent. This request was made in the bazaar of Sultanpur. Partab Narain answered that the rent would be set off as usual against the interest due to him on a loan. The result was a quarrel in the course of which Gopi Nath alleges that Partab Narain hit him three times on the head with a shoe while Partab Narain states that Gopi Nath caught him by his clothes and abused him. It was Partab Narain who reported the matter to the Police and the Police sent up a case of affray. Both accused have been discharged in that case. Partab Narain's case also resulted in a discharge. Gopi Nath filed a complaint and the Bench of Honorary Magistrates convicted Partab Narain under ss. 323 and 504 and sentenced him to pay a fine of Rs. 10. It is not specified under which section this sentence was imposed but in the Reference of the learned Judge it is considered to have been under s. 323. Partab Narain appealed to the Deputy Commissioner and he took note of the fact that Partab Narain is also a member of the District Board and a *prohit* of certain worthy people in the town of Sultanpur. The learned Deputy Commissioner declined to interfere with the conviction but looking at the antecedents of Partab Narain and the fact of his membership of the District Board he applied s. 562 (1) (*a*) and released Partab Narain after due admonition. Gopi Nath then applied to the Sessions Judge in revision and the Sessions Judge has sent the case to me.

The procedure of the learned Deputy Commissioner is impugned on two grounds: The first is that Partab Narain has a previous conviction and, therefore, it was not open to the Court to pass order under s. 562. The second is that the fact of Partab Narain's membership of the District Board ought not to have been taken into account.

As regards the first point the conviction referred to was under s. 143 and took place 20 years ago. No doubt it would have been a technical bar to the order if it had been proved in the trial. It is difficult to say what procedure the Legislature intended in this respect. The section is headed first offenders and is intended primarily for first offenders; but the words used are "and no previous conviction is proved against him" which seem to preclude the idea of an inquisition into the past of the accused. At the time when the learned Deputy Magistrate passed his order, no previous conviction had been proved against Partab

Narain. I do not think I ought to interfere in revision merely because a conviction of this type is discovered afterwards.

The next point has some force. The law is no respecter of persons. Members of the District Board are liable for their criminal acts like other people. But the terms of s. 562 (1) (*a*) are wide. Character and antecedents may be taken into account. The learned Deputy Commissioner had a discretion, and I am not prepared to use the revisional powers of this Court to upset his order.

I, therefore, do not accept the Reference.

Z. K. *Reference rejected.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 469 OF 1924.

January 8, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

ABDUL RAHIM AND OTHERS—ACCUSED —APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 164, 298, 535—Criminal trial—Conviction for offence not charged—Charge, absence of, whether curable—Statement made by accused person duly recorded, whether admissible—Sessions trial—Charge to Jury, contents of—Duty of Judge.

Section 535 of the Cr. P. C. is not limited in its application to a trial where no charge at all has been framed. It is also applicable to cases in which no charge has been framed of the offence of which an accused person has been convicted. [p. 1055, col. 2; p. 1056, col. 1.]

The word "statement" in s. 164 of the Cr. P. C. is not limited to a statement by a witness but includes a statement made by an accused person which does not amount to a confession. An exculpatory statement made by an accused person and duly recorded in accordance with the provisions of s. 164 is admissible in evidence. [p. 1056, col. 2.]

In the heads of a charge to a Jury the Judge should state how he explained the various relevant sections of the Penal Code to the Jury and should not content himself with a statement that the sections had been read and explained. In explaining the sections he should do so by applying them to the facts of the case and should tell the Jury what is necessary for them to find with reference to the facts in order to give a verdict of guilty on the various charges framed. [*ibid.*]

Criminal appeal against an order of the Additional Sessions Judge, Bakarganj, dated the 22nd July 1924.

Mr. *J. K. Roy* and Babus *Radhikaranjan Guha* and *Surendra Nath Das Gupta*, for the Appellants.

Mr. *Khundkar* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—The three appellants before us and one Abdul Latif were tried before the Additional Sessions Judge of Backargunj and a Jury on various charges. The Committing Magistrate framed the following charges,—against Abdul Rahim, Abdul Latif and Saripali Khan, first, with having committed murder by causing the death of Mahomed Sikdar punishable under s. 302, Indian Penal Code, and secondly that they were members of a criminal conspiracy to commit this murder, an offence punishable under s. 120-B of the Indian Penal Code. Aiman Bibi was charged with having been a member of the criminal conspiracy with the other three accused to commit murder by causing the death of her husband Mahomed Sikdar, an offence punishable under s. 120-B, Indian Penal Code. The learned Sessions Judge amended the charges. He struck out the name of Saripali Khan from the charge that had been framed against him jointly with Abdul Rahim and Abdul Latif. The two remaining accused were charged with conspiring together and with Saripali Khan. He added a charge against Saripali Khan charging him in the alternative with having committed murder punishable under s. 302, Indian Penal Code or causing evidence of commission of the murder to disappear punishable under s. 201, Indian Penal Code.

The Jury by an unanimous verdict found Aiman Bibi, Saripali Khan and Abdul Rahim guilty of criminal conspiracy to commit murder under s. 302 read with 120B. They found Abdul Latif not guilty. They also stated that there was no sufficient evidence that any of these accused committed murder of Mahomed Sikdar. The learned Sessions Judge accepting the unanimous verdict of the Jury sentenced the three appellants to transportation for life.

From the above statement of the charges it is apparent that Saripali Khan was convicted of an offence for which no charge had been framed against him. But we hold that s. 535, Cr. P. C. is applicable in the present case. That section provides that no finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed unless in the opinion of the Court of Appeal or revision failure of justice has in fact been occasioned thereby. It is contended on behalf of the appellants that this section is not applicable and only applies to a trial where no charge at all had been framed. In our

opinion this contention is not correct and the section is applicable to a case in which no charge had been framed of the offence of which the appellant has been convicted. We are unable to hold and it has not been contended before us that this appellant Saripali Khan has in fact been prejudiced, or in other words that there has been failure of justice occasioned by the omission of the charge. The learned Sessions Judge in his charge to the Jury stated that all the accused had been charged under section 302 read with s. 120-B, Indian Penal Code. We cannot believe that such a remark would pass unchallenged by the appellant's representative if it had not been understood at the trial that he was being tried on this charge. Further, on the charges as actually framed, the Jury had to determine whether there was in fact a conspiracy in which Saripali Khan took part since in the charges framed both against Abdul Rahim and Abdul Latif and that framed against Aiman Bibi Saripali Khan is alleged to be one of the conspirators. Having regard to these facts we are unable to hold that a failure of justice has in fact been occasioned by the omission to frame a specific charge of conspiracy against the appellant Saripali Khan.

Another point urged on behalf of the appellants relates to certain statements made by two of the appellants Aiman Bibi and Saripali Khan. It is contended firstly, that these statements should not have been admitted in evidence as against the appellant Abdul Rahim, and secondly, that they were not admissible in evidence at all. So far as the first point is concerned it is clear from the charge that the statements were not treated as evidence as against the first appellant. The learned Sessions Judge told the Jury more than once that these statements were not evidence against Abdul Rahim. He has referred to them in parts of his judgment without always respecting this warning, but it appears that then he was dealing with the case as against either Aiman Bibi or Saripali Khan, and as against each of them their individual statements were evidence which the Jury could consider. It is urged on the authority of *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (1), that these statements not being confessions could not be recorded under s. 164, Cr. P. C. A careful examination of this ruling shows that this was not the point that was decided in that case. What was held was that a certain statement of the nature of confession which had not been recorded under s. 146, Cr. P. C. could not be admitted in evidence as having been recorded under s, 364, Cr. P. C. So far as the particular point now argued is concerned we are in agreement with the view expressed by a Divisional Bench of this Court. *Superintendent and Remembrancer of Legal Amairs, Bengal* v. *Lalit Mohan Singha Roy* (2), in which it was held that the word 'statement' in s. 164, Cr. P. C., is not limited to a statement by a witness but includes that made by an accused and not amounting to a confession. Here the statements, though of a somewhat incriminating nature, are self-exculpatory and were duly recorded in accordance with the provisions of s. 164, Cr. P. C. On the view we take it is clear that they were rightly admitted in evidence.

We can find no serious misdirection in the charge to the Jury. Reading the charge as a whole it was distinctly in favour of an acquittal rather than of a conviction. It would have been better if the learned Sessions Judge had stated at greater length how he explained the various relevant sections of the Indian Penal Code to the Jury and did not merely state that these sections had been read and explained. But we cannot hold that he in fact did not properly explain them. It would also have been better if in explaining these sections he had done so by applying them to the facts of the case and clearly told the Jury what was necessary for them to find with reference to these facts in order to come to a verdict of guilty on the various charges framed. But we are unable to hold that there was such misdirection as would result in miscarriage of justice. The evidence as against the appellants is not very strong and depends on the evidence of witnesses whose credibility might perhaps be doubted. But the weak points in the case were fully put to the Jury and there was certainly evidence from which they might draw, as they have drawn, the inference that the appellants were members of a conspiracy to murder Mahomed Sikdar.

For the above reasons we dismiss this appeal.

Z. K. *Appeal dismissed.*

(1) 2 C. W. N. 702.

(2) 62 Ind. Cas. 578; 49 C. 167; 25 C. W. N. 788; 22 Cr. L. J. 562; (1922) A. I. R. (C.) 342.

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Administration suit—*Mortgage during pendency of suit—Mortgagee, position of.*

When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the estate of the deceased in due course of administration. The right of a residuary legatee or a heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied. **C** MONMOTHO NATH MUKERJEE *v.* PURAN CHAND NAHATTA, 29 C. W. N. 539; (1925) A. I. R. (C.) 703 **33**

Adverse Possession—*Mortgage—Redemption—Mortgagee continuing in possession after redemption—Suit to recover possession—Limitation.*

Plaintiff mortgaged a certain holding with the defendants and subsequently sold two-thirds of it to one *M* it being agreed between the plaintiff and *M* that out of the consideration for the sale the mortgage in favour of the defendants should be paid off and *M* should obtain the two-thirds sold to him free from the mortgage and plaintiff should obtain the remaining one-third of the holding unencumbered. Defendants, however, pre-empted the sale in favour of *M* and continued in possession of the entire holding. More than 12 years after the enforcement of the decree for pre-emption plaintiff sued to redeem the entire holding from the defendant:

Held, (1) that as the result of the pre-emption decree the mortgagees had become owners of two-thirds of the holding;

(2) that as regards the remaining one-third they were in possession of it without any title after the date of the enforcement of the pre-emption decree and that their possession was consequently adverse to the plaintiff and had ripened into ownership after the lapse of 12 years, and that the fact that they were still shown as mortgagees in the Revenue Records did not give the plaintiff a right to redeem them. **L** KHUSHALA *v.* BISHAN DAS **476**

——, what amounts to. *See* CONSTRUCTION OF DOCUMENT—COMPROMISE **149**

Agency Rules, rr. 16 (4), 22—Civil Procedure Code, 1908, O. XXXVIII, r. 5—Attachment before judgment—Agency Courts, properties in the jurisdiction of—Power to attach at instance of Court outside Agency Tracts. *See* C. P. C., 1908, O. XXXVIII, r. 5 **430**

Agra Pre-emption Act (XI of 1922), s. 5—Wajib-ul-arz *relating to several villages—Record of custom*—Rubkar *attached to* wajib-ul-arz *stating that no custom prevailed in a particular village, value of—Custom, existence of, proof of.*

A *wajib-ul-arz* relating to a *taluqa* comprising a number of villages stated that there was a custom of pre-emption in the *taluqa* but a *rubkar* was attached to the *wajib-ul-arz* declaring that the entry relating to the custom of pre-emption in the *wajib-ul-arz* was to be deemed to be incorrect so far as it related to a particular *mauza* and it was stated in the *rubkar* that in that particular *mauza* there was no custom of pre-emption and that there would be no such custom in future:

Held, (1) that in order to determine whether the *wajib-ul-arz* recorded a custom of pre-emption in respect of the particular *mauza* within the meaning of s. 5 of the Agra Pre-emption Act, the *wajib-ul-arz* could not be read detached from the *rubkar* which professed to correct it and that when read together the effect of the two documents was that there was no *wajib-ul-arz* recording a custom of pre-emption in respect of the particular *mauza*;

(2) that the two documents indicated that the parties concerned intended to have nothing whatever to do with the right of pre-emption whether by custom or by contract in respect of the particular *mauza* referred to in the *rubkar*. **A** KISHUN AHIR *v.* SARAN AHIR, 23 A. L. J. 519; (1925) A. I. R. (A.) 553; L. R. 6 A. 482 Civ. **433**

—— **ss. 5, 12**—*Agra Pre-emption (Amendment) Act (VIII of 1923)—Pre-emption—Custom, proof of*—Wajib-ul-arz, *entry in—Classes of pre-emptors, whether successively entitled.*

Under s. 5 of the Agra Pre-emption Act a right of pre-emption is to be deemed to exist in *mahals* in respect of which any *wajib-ul-arz*, and not necessarily the latest *wajib-ul-arz*, prepared prior to the commencement of the Act, records a custom of pre-emption.

Section 12 of the Agra Pre-emption Act lays down the classes of persons who are successively entitled to exercise the right of pre-emption. **A** SARJU PRASAD *v.* BHAGWATI PARSAD, 23 A. L. J. 373; L. R. 6 A. 337 Civ.; (1925) A. I. R. (A.) 542 **297**

Agra Pre-emption (Amendment) Act (VIII of 1923). *See* GOVERNMENT OF INDIA ACT (9 & 10 GEO V, c. 101), s. 80 **297**

Agra Tenancy Act (II of 1901), ss. 4, 167—*Co-sharers—Suit by one co-sharer to recover share of produce of tank, nature of—Suit, whether cognizable by Civil Court—Jurisdiction of Civil and Revenue Courts.*

A suit by a co-sharer in one *mahal* of a village against a co-sharer in another *mahal* of the village to recover a certain share of the produce of a tank which is the joint property of the two *mahals* is not a suit for the recovery of rent and is not excluded from the cognizance of a Civil Court. **A** SANWALIA *v.* NATHI LAL, 23 A. L. J. 560; (1925) A. I. R. (A.) 561; L. R. 6 A. 188 Rev. **504**

—— **ss. 18, 20, 59, 79**—*Lease, permanent and transferable—Mortgage of tenancy—Mortgage-decree—Sale—Ejectment proceedings by landlord, effect of—Auction-purchaser, rights of—Jurisdiction of Civil Courts.*

Where a tenant is entitled to make a mortgage of his land and thus to transfer his interest to a third party, the interest so transferred under the express

authority of the *zemindar* should not be allowed to be extinguished unless the person who has acquired that interest has had an opportunity of preventing that extinction.

Section 79 of the Agra Tenancy Act can have no application to the case of an auction-purchaser who never actually or constructively was in possession of the tenancy and who in fact acquired his interest at an auction-purchase subsequent to the ejectment.

Defendant who was the *zemindar* of certain lands granted an agricultural lease of the lands in perpetuity and gave express power to the lessee to transfer his rights. The lessee executed a mortgage of his tenancy, and the mortgagee brought a suit to enforce his mortgage. Almost simultaneously the defendant filed a suit against the lessee for arrears of rent in the Revenue Court and after the mortgagee had obtained a decree for sale enforced the ejectment of the lessee. The tenancy was eventually sold in execution of the mortgage-decree and was purchased by the plaintiff who brought the present suit in the Civil Court for a declaration that the ejectment proceedings carried through in the Revenue Courts by the defendant were null and void and ineffectual as against him:

Held, (1) that the defendant having granted an express right of transfer to his lessee, the mortgage executed by the lessee of his tenancy rights must be deemed to have been executed with the express consent of the defendant;

(2) that, therefore, the ejectment of the lessee did not put an end to the mortgagee rights, which subsisted even after the ejectment proceedings and were validly put up for sale in execution of the mortgage-decree and were purchased by the plaintiff;

(3) that s. 79 of the Agra Tenancy Act had no application to the present case inasmuch as the plaintiff was never in possession of the tenancy and had acquired his interest at an auction-purchase subsequent to the ejectment;

(4) that the suit was maintainable in the Civil Court and must be decreed. A BAHADUR *v.* MOTI CHAND, 23 A. L. J. 409; L. R. 6 A. 133 Rev.; (1925) A. I. R. (A.) 580; 47 A. 589 **224**

——— **s. 22**—*Hindu Law—Widow—Mortgage by widow—Mortgagee put in possession—Ex-proprietary tenancy, whether created—Surrender—Heirs of widow, whether entitled to eject mortgagee.*

A Hindu widow who was absolute owner of certain property mortgaged the property and put the mortgagee into possession of the property. The mortgagee neither received any rent from the mortgagor nor did he pay any rent to her. On the death of the widow her heirs, who were the nearest reversioners of her deceased husband, ejected the mortgagee from the property. He thereupon brought a suit to recover possession of the mortgaged property:

Held, (1) that assuming that an ex-proprietary tenancy in favour of the widow had come into existence from the date of the mortgage it must be taken to have been surrendered by her to the only person who could be treated as the land-holder, namely, the mortgagee;

(2) that if any ex-proprietary tenancy did continue up to the date of the death of the widow it did not devolve on her heirs under s. 22 of the Agra Tenancy Act, and must be taken to have escheated in favour of the plaintiff who was the land-holder;

(3) that, therefore, the plaintiff's suit must be decreed. A RAM PRASAD SINGH *v.* NEPAL SINGH, 23 A. L. J. 368; L. R. 6 A. 163 Rev.; (1925) A. I. R. (A.) 420; 47 A. 600 **290**

——— **s. 79** *Grove, whether holding—Dispossession—Suit to recover possession—Limitation—Trees falling down—Grove-holder, whether loses title.*

A grove is not a holding within the meaning of s. 79 of the Agra Tenancy Act, and, therefore, dispossession of a grove-holder by the *zemindar* from a portion of the grove for six months cannot take away the grove-holder's right.

Ordinarily a grove-holder does not lose his title as a grove-holder in respect of a portion of the land which was once occupied by trees simply because the trees have fallen down. A LODAI RAM *v.* SUKHDEO KOERI, L. R. 6 A. 147 Rev. **540**

——— **s. 161.** *See* C. P. C., 1908, s. 11 **927**

——— **s. 163.** *See* C. P. C., 1908, O. II, r. 2 **530**

——— **ss. 164, 165**—*Suit for profits against legal representative of deceased* lambardar—*Profits, calculaion of, basis of.*

Where a suit for profits is brought not against the *lambardar* himself but is brought after his death against his successor-in-title, the latter is not liable to account for profits which his predecessor had failed to collect or which he permitted to remain uncollected owing to negligence or misconduct. In such a case profits can be awarded only on the basis of actual collections. A RAM SARUP *v.* GAYA PRASAD, L. R. 6 A. 193 Rev. **447**

——— **s. 165**—*Co-sharers—Sale of property with arrears of profits—Pre-emption—Suit to recover arrears, whether maintainable—Jurisdiction of Revenue Court.*

Where two properties are sold under a sale-deed one of which is capable of pre-emption and the other is not, and the property capable of pre-emption is pre-empted the vendee cannot lose his rights in the property which was not capable of pre-emption and that property must be deemed to remain vested in him. It is immaterial whether the pre-emptor paid the whole or only a part of the total consideration for the sale.

Arrears of profits which have accrued due already are capable of being sold but are not capable of being pre-empted.

An assignee of arrears of profits is entitled to sue to recover those profits in the Revenue Court. A R. B. ABHAINANDAN PRASAD *v.* BHAGWAN DATT PATHAK, L. R. 6 A. 190 Rev. **298**

——— **ss. 167, 199**—*Ejectment suit—Question of title—Direction to institute civil suit within a certain period—Failure to institute suit within period limited, effect of—Suit instituted after prescribed period, maintainability of.*

Where in a suit for the ejectment of a tenant in a Revenue Court a question of title is raised, the Court before which the question is raised is given the option under s. 199 of the Agra Tenancy Act of deciding the question itself or of referring it to the Civil Court. If it adopts the former course it becomes a Civil Court for the time being and its decision will be *res judicata* for any Civil Court. If it adopts the second course it must direct the suit to be instituted within a limited time, namely, three months, and if the suit is not instituted within that time, it must decide the question of title against the party who was directed to bring the suit. This decision will also be a final

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decision between the parties. If the suit is instituted in the Civil Court beyond the time limited by the Revenue Court in its order, the Civil Court ought not to proceed with the determination of the suit inasmuch as any decision given by it in the suit would be infructuous and would not be binding upon the Revenue Court, it being the duty of the Revenue Court to decide the question of title against the party who has been directed to institute the suit in the Civil Court and has failed to institute the suit within the time limited by the Revenue Court. **A** GANGA CHAMAR *v.* BINDESARI RAI, 23 A. L. J. 529; L. R. 6 A. 173 Rev.; (1925) A. I. R. (A.) 615 **684**

——— **s. 167, Sch. IV**—*Co-tenants—Declaration of right of co-tenancy, suit for, whether cognizable by Civil or Revenue Court.*

There is in the Fourth Schedule to the Agra Tenancy Act no provision for a suit by which a person alleging himself to be a co-tenant can go to a Revenue Court and ask for a declaration that he has a right of co-tenancy joint or co-equal with that of the persons whom he has named as defendants. The jurisdiction of the Civil Courts, therefore, to entertain such a suit is not barred by the provisions of s. 167 of the Act. **A** AMMAR *v.* GOVIND, 23 A. L. J. 449; L. R. 6 A. 168 Rev.; (1925) A. I. R. (A.) 465; 47 A. 616 **247**

——— **s. 167, Sch, IV**—*Suit for declaration of joint right in occupancy holding, whether cognizable by Civil Court.*

A suit for a declaration that the plaintiff is a joint occupancy tenant along with the defendant is not excluded from the cognizance of a Civil Court by the provisions of s. 167 of the Agra Tenancy Act, inasmuch as such a suit is not provided for in the Fourth Schedule to the Act. **A** BIJAI *v.* NARAIN, L. R. 6 A. 195 Rev. **592**

——— **s. 193 (1)**—*Isolated plot of land, whether* mahal *or share in* mahal—*Sale held by Assistant Collector in execution of decree of Revenue Court, validity of—Irregularity.*

An isolated plot of land within the ambit of a *mahal* cannot be regarded as a *mahal* or a share in a *mahal* within the meaning of cl. (*l*) of s. 193 of the Agra Tenancy Act.

Where in execution of a decree passed by a Revenue Court a *mahal* or a portion of a *mahal* is sold by an Assistant Collector and not by the Collector, the irregularity does not vitiate the sale. **A** NEHAL SINGH *v.* JAGANNATH DASS, L. R. 6 A. 189 Rev. **613**

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See ALSO C. P. C., 1908, ss. 96 TO 112, O. XLI, O. XLIII, O. XLV.

See ALSO THE SECTIONS RELATING TO APPEALS IN THE LAND AND TENANCY ACTS.

See ALSO LETTERS PATENT OF THE HIGH COURTS.

See ALSO REGISTRATION ACT, 1908, s. 72.

——— Arbitration, reference to, without intervention of Court—Award, validity of—Award, whether can be treated as adjustment of dispute—Inherent power of Court, to refuse to allow appeal to be proceeded with. *See* C. P. C., 1908, s. 89 **768**

——— *C. P. C. (Act V of 1908), ss 20 (b), 105—Leave to sue defendant outside jurisdiction, refusal of—Appeal, whether competent.*

An order refusing permission under s. 20 (*b*) of the C. P. C. to sue a defendant outside jurisdiction is not open to appeal. **L** ALLEN BROTHERS *v.* ARURI MAL KHANNA, (1925) A. I. R. (L.) 338 **546**

Appeal (Civil)—contd.

——— *Consent, whether can be withdrawn.*

It is only in special circumstances that a consent which has formed the foundation of the judgment appealed from, can be treated as open to withdrawal in the Appellate Court. **P C** DIWAN CHAND-KIRPA RAM AND CO. *v.* WELD AND CO., (1925) A. I. R. (P. C.) 150; (1925) M. W. N. 459 **54**

——— *Difference of opinion—Procedure.*

Per *Suhrawardy, J.*—The intention of the Legislature under s. 98 of the C. P. C. is to uphold a decision under appeal or review, where the Judges are equally divided in opinion as to its correctness thus giving effect to the concurrent view of two Judges in preference to that of one Judge though the latter may be the Senior Judge composing the Bench.

Per *Walmsley, J.*—In case of a difference of opinion between the Judges of a Division Court hearing an appeal the opinion of the Senior Judge prevails under cl. 36 of the Letters Patent of the Calcutta High Court. **C** BECHARAM CHOUDHURI *v.* PURAN CHANDRA CHATTERJI, 41 C. L. J. 456; 29 C. W. N. 755; (1925) A. I. R. (C.) 845 **637**

——— *Execution of decree—Forum of appeal, determination of.*

The course of appeal in execution proceedings is determined by the value of the suit and not by the value of the subject-matter of any dispute that may arise for settlement in the course of execution proceedings. **L** SHAH MUHAMMAD *v.* MUHAMMAD ROSHAN KHAN, (1925) A. I. R. (L.) 534 **326**

——— Forum—Oudh Civil Courts Act (XIII of 1879), s. 18. *See* OUDH CIVIL COURTS ACT, s. 18 **131**

——— Minor—Appeal filed by next friend after minor attained majority—Mistake, *bona fide*—Procedure—Amendment. *See* C. P. C., 1908, O. I, R. 10 **235**

——— Order under C. P. C., 1908, O. IX, r. 13—Appeal, whether lies. *See* C. P. C., 1908, O. IX, R. 13 **196**

——— Order under C. P. C., 1908, O. XXI, r. 71—Appeal, whether lies. *See* C. P. C., 1908, s. 47 **131**

——— *Order under C. P. C., 1908, O XXII, rr. 3, 4—Death of party—Rules applicable—Procedure—Appeal, whether competent.*

No appeal lies against an order adding a certain person as the legal representative of a petitioner who filed a petition to set aside an *ex parte* decree. **A** MOTILAL *v.* BISHAMBER NATH, 23 A. L. J. 442; L. R. 6 A. 361 Civ.; (1925) A. I. R. (A.) 431 **95**

——— Parties agreeing to be bound by decision of Court after local inspection, effect of—Appeal, whether lies. *See* C. P. C., 1908, s. 96 (3) **611**

——— *Partition suit—Order on application to pass further decree for mesne profits—Appeal, whether lies.*

An order on an application to pass a further decree for mesne profits in respect of properties awarded in a preliminary decree for partition must be treated as a decree and an appeal will lie therefrom. **M** VEERAPPA KOUNDEN *v.* VEERAPPA KOUNDAN, 48 M. L. J. 512; (1925) A. I. R. (M.) 886 **94**

——— *Point of law, raised on earliest possible opportunity, whether can be entertained.*

A plea relating to a point of law raised by an appellant before an Appellate Court at the earliest

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possible opportunity should be entertained. O KALKA DEVI v. GANGA BAKHSH SINGH, 12 O. L. J. 306; (1925) A. I. R. (O.) 435 127

——— Privy Council — Competency to examine concurrent findings of fact. *See* PRIVY COUNCIL, POWERS OF 103

——— *Privy Council—Practice—Order in Council, conformity of, to judgment—Persons deriving title from plaintiff, whether entitled to decree—Procedure.*

It is the duty of their Lordships of the Privy Council to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him.

It is out of question that persons who assert that they have a derivative interest in the stake of a suit can, by getting added as plaintiffs, be associated in a decree in favour of the person who has the only real title. In a case, however, where the question of the interest acquired by such persons was raised before their Lordships, they gave a direction that the judgment was to be without prejudice to the right of such persons to recover in respect of any conveyance or assignment made or of any contract to convey or assign, such share of the property recovered under the judgment as may appertain to them in respect of such conveyance, assignment or contract. P. C. LAJWANTI v. SAFA CHAND, (1925) A. I. R. (P. C.) 168; 23 A. L. J. 643; L. R. 6 A. (P. C.) 125; (1925) M. W. N. 534; 22 L. W. 304 198

——— Refusal of Subordinate Court to make complaint under s. 476 of the Cr. P. C.—Order of Appellate Court making complaint—Appeal, whether competent. *See* CR. P. C., 1898, s. 476 528

——— Registration Act (XVI of 1908), s. 77, appeal under, whether can be treated as an application under s. 73. *See* REGISTRATION ACT, 1908, s. 72 149

——— *Sale proclamation — Order settling particulars—Appeal, whether lies.*

An order refusing to notify a lease in a sale proclamation is an order under O. XXI, r. 66, of the C. P. C., and is not appealable. Pat MOHIT NARAIN JHA v. THAKAN JHA, 3 Pat. L. R 118; (1925) Pat. 189; (1925) A. I. R. (Pat.) 500; 4 Pat. 731 332

See ALSO C. P. C., 1908, s. 11.

——— **(Criminal)**—*Re-trial, order for, when justifiable.*

An order for re-trial is not justifiable if there is no evidence on the record to warrant a conviction for the offence charged. N RAM PRASAD v. EMPEROR, 26 CR. L. J. 1090 178

——— *Several accused—Appellate Court, duty of—Consideration of case against each accused.*

In the case of an appeal from a conviction involving several accused persons the Appellate Court must bring to bear with regard to the case of each of the appellants a judicial mind for the purpose of considering whether he was guilty or not having regard to the charges against him and the special evidence directed to him and his particular defence if any. Though the Appellate Court may give satisfactory reasons for accepting the conclusions of the Trial Court, its omission to consider the case against each individual accused separately would vitiate the judgment.

The judgment of an Appellate Court should be self-sufficient, that is to say, should contain all the

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necessary materials to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused, having regard to the various offences with which each of the accused was charged and to enable the High Court to come to a conclusion as to the correctness of the sentence upon each of the accused. M CHINNA MANIKAM, *In re*, 48 M. L. J. 504; (1925) A. I. R. (M.) 712; 26 CR. L. J. 1089 177

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See BENGAL TENANCY ACT, 1885, s. 50 584

See C. P. C., 1908, O. XLI, R. 4 535

——— *Construction of document of title—Question of law.*

The question of the legal effect of a deed which can be treated as a document of title or embodies a contract or is the foundation of the suit is a question of law and can be considered in second appeal. R ABDUL RAHIM v. MOHAMMAD CASSIM, 4 Bur. L. J. 27; (1925) A. I. R. (R.) 255 314

——— Finding of fact. *See* CONSTRUCTION OF DOCUMENT. 399

——— *Finding of fact—Misconstruction of document.*

The High Court is not justified in interfering with a pure question of fact in second appeal. Where, however, a document has been wrongly read or misconstrued by the lower Appellate Court, the High Court would consider whether the misconstruction has in any way vitiated the finding. M RAMARAO v. APPU 924

——— *Finding of fact—Misreading of documentary evidence—Document of title, construction of—Question of law.*

The construction of a document which is a document of title and forms the basis of the plaintiff's claim is a point of law which can be gone into in second appeal.

Where a finding of fact arrived at by a Court of first appeal is based on a piece of a documentary evidence which has been completely misread by the Court, the finding is not binding in second appeal. Pat GANESH LAL v. BISISAR PANDEY 820

——— Finding that *dahiyak* is not illegal cess—Finding one of fact eannot be challenged in second appeal. *See* BENGAL TENANCY ACT, 1885, s. 67 395

——— *Finding of fact, whether binding.*

A finding of fact based upon admissible evidence cannot be contested in second appeal. L FAZAL DAD v. UMAR BAKHSH, (1925) A. I. R. (L.) 377 1019

——— *Objection to sufficiency of evidence in support of custom, whether can be entertained—Questions of fact—Questions of law.*

In a case in which the existence of the custom is sought to be proved, objections based on the ground of an illegal or improper rejection of evidence or as to the evidence taken as a whole amounting to insufficient proof in law of the custom alleged may properly be gone into in second appeal. But whether a specified instance is properly proved or not is a question of fact; the decision of which lies with the Court of first appeal and which the High Cour will not enquire into but will accept as accurate. In

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second appeal the High Court will not investigate the details of the evidence in support of the various instances, but will merely consider whether taken as a whole they are sufficient in law to support the custom alleged.

The question whether the facts in any given instance prove the existence of the essential attributes of a custom or usage is a question of law which might be discussed in second appeal, while the question whether such a state of facts has been proved by the evidence is merely a question of fact. **B** RATHILAL NATHALAL *v.* MOTILAL SANKAL CHAND, 27 Bom. L. R. 880; (1925) A. I. R. (B) 380 **891**

——— Particular words, construction of—Question of fact. *See* CONSTRUCTION OF DOCUMENT **377**

——— *Point taken in plaint but not raised in issue or tried, whether can be taken.*

A point which, though adumberated in the plaint, was not raised in the issues or tried by the Courts below and on which no evidence was led cannot be allowed to be taken in second appeal. **C** GIRISH CHANDRA CHOUDHURY *v.* GOPAL CHANDRA PODDAR **477**

——— Suit to recover damages for wrongful act done in respect of immoveable property, nature of—Small Cause—Second appeal, whether competent. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ART. 31 **876**

——— *Weight to be attached to evidence—Omission to refer to particular piece of evidence—Finding of fact, interference with.*

The weight to be given to one particular piece of evidence is a question for the Court which has to deal with the facts.

An omission by a lower Appellate Court to refer to a particular piece of evidence in its judgment is not a sufficient ground for setting aside in second appeal a finding of fact arrived at by that Court. **O** SHIVA PRASAD *v.* LAL BAKHSH SINGH **490**

Appellate Court, powers of.

See C. P. C., 1908, O. XLI, R. 33 **99**
See CR. P. C., 1898, ss. 476, 476-B **358**

——— *powers of—Finding of fact—Oral evidence, appreciation of—Interference by Appellate Court.*

As a rule an Appellate Court ought to attach great value to the findings of fact of the Trial Court based on an appreciation of oral evidence. Where, however, the Judge who wrote the judgment in the First Court did not examine the witnesses and had no opportunity of observing their demeanour, he could not be in a better position than the Appellate Court to judge of the reliability of the witnesses' evidence. **R** MA E KHIN *v.* MAUNG SEIN, 2 R. 495, (1925) A. I. R. (R.) 71 **167**

———, *powers of—Question of fact—Trial Court, conclusions of, value of.*

Where the question involved is one of fact the conclusion arrived at by the Trial Judge who has had the advantage of seeing the witnesses examined and cross-examined, should not be interfered with by the Appellate Court. **P C** PALANIAPPA CHETTIAR *v.* KATHERESAN CHETTIAR, (1925) A. I. R. (P. C.) 172; 22 L. W. 309 **351**

Approver—*Corroboration.*

It cannot be laid down as a matter of law that the evidence of witnesses who support the statement of an approver is not corroborative evidence merely because their evidence was known to the Police before the approver was examined by them. It can, however, be urged in such a case that the approver's evidence should not be believed because he might have been tutored by the Police to make a statement fitting in with the evidence of the other witnesses.

Obiter.—Where a co-accused in a dacoity case merely states that after the dacoity he was offered a certain sum of money which he took, the statement is not a confession of his having committed the dacoity and should not be taken into consideration as against the other accused. **C** *In re* IBRAHIM, 26 Cr. L. J. 1146 **458**

——— Pardon, validity of—Inducement offered to approver, effect of. *See* CR. P. C., 1898, s. 337 **283**

Arbitration—Award. *See* C. P. C., 1908, SCH. II, PARAS. 14, 15 **49**

——— Refusal of arbitrators to act. *See* ARBITRATION ACT, 1899, s. 9 **90**

Arbitration Act (IX of 1899), s. 9—*Arbitration—Refusal of both arbitrators to act—Appointment of new arbitrators—Procedure.*

Where both the arbitrators to whom a dispute has been referred refuse to act, each party has a right to appoint an arbitrator in the place of the arbitrator previously appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his previous arbitrator, the provision of sub-s. (*b*) of s. 9 of the Arbitration Act would come into force and the party so appointing would be entitled, after giving notice to the other party, to appoint his own arbitrator as sole arbitrator.

The word "either" is used in cl. (*a*) of s. 9 of the Arbitration Act, because it may happen that one or both of the arbitrators may refuse to act, etc. **B** VALLABHADAS MEGHJI *v.* CAWASJI FRAMJI AND CO., 27 Bom. L. R. 568; (1925) A. I. R. (B.) 469 **90**

——— **s. 12**—*Arbitration—Power of Court to extend time for making award—Dispute arising out of Policy of Insurance—Tribunal different from one contemplated in policy—Award, validity of.*

The Court has power under s. 12 of the Arbitration Act to extend the time for making of an award, even after the expiry of the time originally fixed for making the award.

Where parties agree to submit their disputes under a policy of insurance to arbitration under ordinary reference under the Arbitration Act to a Tribunal different from the one contemplated by the policy, but in itself legal, an award made by such a Tribunal is not in any way bad on that account. **S** HIMALAYA INSURANCE CO. *v.* ASSUDAMAL HARBHAGWANDAS **878**

——— **s. 19**—*Charter-party—Damages, suit for—Order staying suit—Reference to arbitration—Substitution of real plaintiff in place of apparent plaintiff, effect of—Award, validity of.*

A charter-party was made between G as agent for the owners of a vessel and the defendant. The names of the owners of the vessel were not disclosed in the charter-party. A suit was brought against the defendant to recover damages for the detention of the vessel and after the institution of the suit defendant applied under s. 19 of the Arbitration Act for an order for stay of proceedings in the suit, inasmuch as the charter-party contained an arbitration clause, and obtained a stay order. The matter then went to

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arbitration and in the course of the proceedings before the arbitrators it transpired that the owners of the vessel were not the plaintiffs but another firm. Thereupon an application was made on behalf of the original plaintiffs for an order that the real owners of the vessel should be either added as co-plaintiffs or substituted as plaintiffs in the place of the original plaintiffs and that the cause title and register of the suit may be amended accordingly, and an order was made in the terms of the application. An award was made in the arbitration proceedings and it was contended on behalf of the defendant that the award was bad inasmuch as there had been no stay of proceedings in the suit to which the real plaintiffs were parties, and as no arbitrators had been appointed to decide any dispute between the present parties to the suit. It was further contended that assuming that the arbitrators had been validly appointed, the award was bad owing to the pendency of the suit:

Held, that the effect of the substitution order made by the Court was that the real plaintiffs were entitled to take advantage of and to proceed under the stay order made under s. 19 of the Arbitration Act and that consequently the arbitration proceedings were rightly continued and the award could not be attacked on the ground that there had been no valid stay of proceedings or that the arbitrators had not been validly appointed. C HOGRATH SHIPPING CO. LTD. *v.* MITSUI BUSSAN KAISHA LTD., 41 C. L. J 511; (1925) A. I. R. (C.) 922 **1029**

——— **s. 19**—*Step in proceedings, what amounts to —Application for copy of plaint—Application for leave to enter appearance.*

A step in the proceedings within the meaning of s. 19 of the Arbitration Act means something in the nature of an application to the Court, and not mere talk between Solicitors or Solicitor's clerks nor the writing of letters, but the taking of some step, such as the taking out of summons or something of the kind, which is in the technical sense a step in the proceedings. To apply for a copy of a plaint is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. In so doing the defendant does not and is not to be deemed to indicate his acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which has arisen, for until he is made aware of the plaintiff's cause of action he is not in a position to elect whether he will proceed by way of arbitration or will assent to the litigation which has been commenced against him.

Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, would be a step in the proceedings within the meaning of s. 19 of the Arbitration Act. The intention of the party is to be gathered from the nature of the application which is made, and if having regard to the form of the application the Court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party desired that the matters in dispute should be referred to arbitration.

A defendant's application for leave to enter an appearance is not a step in the proceedings within the meaning of s. 19 of the Arbitration Act. It is a reasonable deduction from such conduct that the defendant intends to resist the suit on the merits. It is equally reasonable to infer therefrom that he intends

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thereafter to make a preliminary objection to the matter being made the subject of litigation at all. C BHOWANIDAS RAMGOBIND *v.* PANNACHAND LUCHMIPAT, 52 C. 453; (1925) A. I. R. (C.) 801 **929**

Arbitrator—Misconduct, what amounts to. *See* C. P. C., 1908, SCH. II, PARAS. 14, 15 AND 20 **161**

Arms Act (XI of 1878), ss. 19 (f), 25, 30—*Criminal Procedure Code (Act V of 1898), s. 165—Illegal possession of arms—Search, unlawful—Conviction, whether justified—Search, powers of, restrictions on—Interpretation of Statutes.*

On a search being made of the house of the accused certain arms and ammunition were found therein. The accused was thereupon convicted of an offence under s. 19 (*f*) of the Arms Act. It was found, however, that the search had not been lawful inasmuch as it did not comply with the provisions of ss. 25 and 30 of the Act:

Held, that in spite of the search not being lawful, there being sufficient evidence that the accused was in unlawful possession of the arms and ammunition the conviction was justified.

Per *Walsh, J.*—The words "in the presence of some officer specially appointed" in s. 30 of the Arms Act mean that there must be at least two persons, namely the person making the search and the officer specially appointed within the meaning of the section who is present at the search.

Per *Boys, J.*—Section 30 of the Arms Act does not itself give any power of search to anybody. It is confined to a statement that when a search is being conducted under the Cr. P. C. in the case of any proceedings instituted in respect of an offence punishable under s. 19 (*f*) of the Arms Act, such search is to be conducted in the presence of a particular officer. The section merely places certain restrictions on such powers of search as may otherwise be possessed under the provisions of the Cr. P. C. There is nothing in the Act to limit the powers of an Investigating Officer under s. 165 of the Cr. P. C., except the two qualifications introduced by s. 30 by the words "in the case of any proceedings instituted in respect of an offence punishable under s. 19 (*f*)" and by the requirement of the presence of a particular officer.

The words "in the case of any proceedings instituted" were inserted in s. 30 of the Arms Act with the intention of restricting all powers of an Investigating Officer in making searches for arms where there was no known unlawful purpose.

The same meaning must in the absence of any strong reason to the contrary be given to similar words in two contiguous sections of the same Act. A KUTROO *v.* EMPEROR, 23 A. L. J. 364; L. R. 6 A. 124 Cr.; 26 Cr. L. J. 1112; (1925) A. I. R. (A.) 434; 47 A. 575 **280**

Auditor, duty of. *See* COMPANIES ACT, 1913, ss. 235, 281 **785**

Benami transaction—*Burden of proof.*

When a conveyance has been executed and duly registered it requires strong and clear evidence to justify a Court in holding that the person in whose favour the conveyance was executed was a mere *benamidar* for some third person.

In cases of alleged *benami* transactions the determination of the question as to who is the true-owner of the property must depend not merely on direct

oral evidence but also upon circumstances such as the source of the purchase-money, the possession of the property, the custody of the title-deed, the adequacy of the consideration and the like. N RAMDHAN *v.* PURUSHOTTAM 699

——— *Burden of proof—Presumption—Rebuttal.*

Where one person pays the price for the purchase of certain property but the instrument of sale is obtained in the name of another, the presumption is that the person paying the price is the owner of the property purchased and that the person in whose name the sale-deed is obtained occupies the position of a trustee only. The presumption, however, is rebuttable but it is for the person in whose name the sale-deed stands or for persons claiming through him to establish that the intention of the person who paid the purchase-money was to benefit the person in whose name the sale-deed was obtained and that, therefore, the transaction is in the nature of an advancement. L MAQSUDAN LAL *v.* RAM CHANDAR-RAM RICHPAL, (1925) A. I. R. (L.) 511 289

——— Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Execution of decree—Assignment in writing—Transferee, who is—Third person, whether can claim to be the real transferee—Procedure. *See* C. P. C., 1908, O. XXI, R. 16 409

——— *Purchase by husband in name of wife—Presumption—Marriage settlement, oral, whether can be proved—Duty of Court.*

A purchase in India by a native of India of property in India in the name of his wife unexplained by other proof or admitted facts must be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the Law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India.

It cannot be laid down as a proposition of law that an oral ante-nuptial agreement may not be proved in an Indian case, but it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreemant which would in fact be a marriage settlement unless there was contemporaneous written evidence to corroborate the oral evidence. P C SURA LAKSHMAYYA CHETTY *v.* KODANDARAMA PILLAI, 23 A. L. J. 662; 49 M. L. J. 109; (1925) A. I. R. (P. C.) 181; 42 C. L. J. 8; 27 Bom. L. R. 1076; 29 C. W. N. 1113; 48 M. 605 327

Benamidar and real owner—*Right of suit—Nominal and* benami *transaction, difference between—Intention to transfer—Test—Will, suit based on—Secondary evidence, when admissible.*

A *benamidar* can maintain a suit in his own name at any rate against all persons except the person beneficially entitled.

The essence of a sham transaction is that though a deed of transfer is brought into existence, no title of any kind either legal or beneficial is intended to be passed thereby to any person whatsoever, that is, the deed of transfer is not intended to effect any transfer of property. The difference between sham and *benami* transactions is one of intention. If the deed of transfer is made with the intention of placing the property in the name of the third person, the intention clearly amounts to a transfer of the legal title and such transaction cannot be called a sham transaction;

but comes directly within the meaning of *benami* transactions properly so-called.

An intention to transfer a legal title to the transferee would be sufficient to transform what would otherwise be a sham transaction into a *benami* transaction properly so-called.

If a sale-deed is got up to fight certain third parties the intention to be drawn from the transaction is irresistable that the legal title at any rate was intended to be passed by the transaction from the transferor to the transferee, since otherwise the very object of the transfer would fail.

If a plaintiff comes into Court setting up a Will and claiming certain properties on the ground of the dispositions contained therein, he is bound to take all steps necessary for the production of the Will and it is only if and when he satisfies the Court about his efforts to get the original of the Will produced, that he can be allowed to adduce secondary evidence especially oral evidence with regard to the contents of the document. M RANGAPPA NAYAKAN *v.* RANGASWAMI NAYAKAN, (1925) A. I. R. (M.) 1005 249

Bengal Land Revenue Sales Act (XI of 1859), ss. 2, 3, 6, 7—*Notice under s. 7, contents of—Date to be mentioned—Amount of arrears, whether must be mentioned—Sale, when can take place—Application to set aside sale—Burden of proof.*

Once a sale has taken place under the Bengal Land Revenue Sales Act it is for the person who challenges the validity of the sale to show that there was no jurisdiction in the Collector to put up the property for sale.

In a notice under s. 7 of the Bengal Land Revenue Sales Act it is necessary for the Collector to mention the last date fixed for payment of Government revenue under s. 3 of the Act. It is not necessary for him to state the date on which the Government revenue should have been paid according to the Settlement and *kistbandi* of the *mahal.*

Government revenue is not in arrear until the first of the month following the date on which the Government revenue should be paid according to the original *kistbandi* and the Collector has no power to put up the estate for sale until the expiry of the latest date fixed for payment of Government revenue after the estate is in arrear. For instance, if the revenue is payable in the month of March according to the original *kistbandi* then the estate is not in arrear until the first of April and the Collector has no jurisdiction to put up the estate for sale until the expiry of the next latest date fixed for payment after the first of April.

Section 6 of the Bengal Land Revenue Sales Act does not require the Collector to mention the amount of the arrears for which the property is put up for sale. Pat SURAJ NARAYAN CHAUDHURY *v.* SARASWANI BABURIA, 3 PAT. L. R. 237; 6 P. L. T. 738 485

——— **ss. 10 to 14, 38**—*Land Registration Act (VII B. C. of 1876), s. 70—Separate account, whether can be opened at a time when residuary share is in arrears—Sale for arrears of revenue, when can take place—Extent of share to be sold—Irregularity.*

The three kinds of objections specified in s. 12 of the Bengal Land Revenue Sales Act are the only objections that can be taken to the only statements that an application for the opening of a separate account is to

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contain. If no such objection is made the Collector is bound to open a separate account whether the share from which the separate account is to be opened is in arrears or not at the time.

There is no special procedure appointed by the Bengal Land Revenue Sales Act for dealing with the case where at the time of the opening of a separate account the residuary share is in arrears, possibly because it was not contemplated that there should be arrears, or because the security of the revenue is not affected by the opening of a separate account. There is no authority in the Act for apportioning the arrears in such a case, whether after taking an account or merely according to the ratio between the Government revenue assessed on the separate account and that remaining to be assessed on the residuary share.

In the case of arrears of revenue all that the Collector has to do is to look at the separate accounts as they stand and if he finds that any separate account is not in arrear he is not entitled to sell that share; he can only sell the share from which according to the separate account an arrear of revenue is due.

The Collector is not permitted to sell a share merely because that share is in arrears; he can only sell if the estate is in general arrears. It must be shown, therefore, that the estate as a whole is in arrears and liable to sale; and the date on which this liability to sale arises is the date which will fix the extent of the residuary share of the estate to be put up for sale if it is that share which is in arrears.

The Bengal Land Revenue Sales Act contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest date of payment; and where an estate is put up for sale on a particular date it must be presumed that it did not become liable to sale before that date.

Where a residuary share becomes liable to sale on account of arrears of land revenue after the date of the opening of certain separate accounts out of that share, the extent of the share which can be sold is that which existed on the date when the liability to sale arose and not that which existed at the date on which the arrears began to accrue.

Where the Collector has jurisdiction to sell an estate for arrears of revenue, the remedy for any irregularity in the exercise of the jurisdiction is provided by s. 33 of the Bengal Revenue Sales Act, but an irregularity in the exercise of the jurisdiction cannot take the sale outside the Act. **Pat** MADAN MOHAN LAL *v.* ABDUL RAZAQUE KHAN, 3 Pat. L. R. 66; 4 PAT. 1; 6 P. L. T. 713 **465**

Bengal Municipal Act (III of 1884), s. 202—*Order under section, whether can be based on report of Subordinate Officer—Opportunity to parties of being heard, absence of—Order, legality of—Revision, whether lies.*

An order passed by a District Magistrate under s. 202 of the Bengal Municipal Act is an order passed in a judicial proceeding and the High Court has power to revise the order.

A Magistrate exercising his powers under s. 202 of the Bengal Municipal Act is not engaged in a criminal proceeding and can base his order upon a report made by a Subordinate Officer.

Before passing an order under s. 202 of the Bengal Municipal Act a Magistrate must give the parties concerned an opportunity of being heard, and an order passed under the section without such opportunity

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being given is liable to be set aside in revision. **C** NABADWIP MUNICIPALITY *v.* PURNA CHANDRA MUKERJI, 29 C. W. N. 817; 41 C. L. J. 611; (1925) A. I. R. (C.) 934; 52 C. 670 **862**

Bengal Tenancy Act (VIII of 1885), s. 7 (2)—*Enhancement of rent—Landlord, what must prove—Customary rate, failure to prove, effect of.*

In order to claim benefit of s. 7 (2), Bengal Tenancy Act, the landlord must prove that there is no customary rate of rent and if he asserts that there is such a customary rate but fails to prove it, he is not entitled to ask the Court to determine a fair and equitable rent. **C** SATINDRA MOHAN TAGORE *v.* BAMA SUNDARI DEVI **512**

——— **s. 30.** *See* LANDLORD AND TENANT **377**

——— **ss. 46, 111**—*Record of Rights, preparation of—Ejectment suit, whether maintainable—"Entertain", meaning of.*

A suit under s. 46, Bengal Tenancy Act, is not merely a suit for ejectment, in the sense of ejecting a trespasser, but it involves a determination by the Court of the class of tenant and also the fixing of a fair and equitable rent. Such a suit comes under the express words of s. 111 of the Act and cannot be maintained after a declaration for the preparation of a Record of Rights has been made.

The words "entertain a suit or application" in s. 111, Bengal Tenancy Act, merely mean the consideration of a suit or application, and are equally applicable to a suit or application instituted before the declaration and after. **C** KANAK KANTI ROY CHOUDHURY *v.* SRISHTIDAR MONDAL **670**

——— **s. 50**—*Fixity of rent, presumption of—Kabuliyat providing for excess rent for excess area, effect of—Presumption, rebuttal of—Question of fact—Second appeal.*

The question whether a stipulation in a *kabuliyat* relating to a tenancy is or is not sufficient to rebut the presumption raised under s. 50 of the Bengal Tenancy Act, is for a Court of fact and is not properly a question for a Court of second appeal.

A stipulation in a *kabuliyat* by a tenant to pay rent at the prevailing rate for excess land found in his possession is perfectly consistent with s. 50, Bengal Tenancy Act, and cannot in any sense be said to rebut the presumption as to fixity of rent raised thereunder.

Obiter.—Under cl. (1) of s. 50, Bengal Tenancy Act, if the rent of a holding has not *in fact* been changed since the time of the Permanent Settlement, then it is not liable to be increased. The mere fact that in an instrument executed 40 or 50 years later the rent is *expressed* to be variable will by itself make no difference. **C** SATINDRA MOHUN TAGORE *v.* KAMARADDI MIJI **584**

——— **s. 50**—*Landlord and tenant—Suit for enhancement—Tenure created since Permanent Settlement—Fixity of rent—Presumption, absence of—Contract, whether can be proved.*

Where in answer to a suit for enhancement of rent, the defendants plead that the *jama* is *mourusi mokarrari* and that, therefore, there can be no enhancement, a finding that the *jama* was created after the Permanent Settlement and that consequently no presumption arises under s. 50 of the Bengal Tenancy Act is not enough to dispose of the defence. Notwithstanding such a finding, it is open to the defendants to establish on the evidence that there

was a contract that the rent of the tenure should not be enhanced. **C** GOPI MOHAN MAZUMDA *v.* NAWAB BAHADUR OF MURSHIDABAD, 29 C. W. N. 723; (1925) A. I. R. (C.) 951 **433**

——— **ss. 52, 158, 188**—*Suit for assessment of fair and equitable rent in respect of lands not forming part of original holding, nature of—Suit by co-sharer landlords, maintainability of—Assessment, applicability of, to rent in respect of past years.*

Sections 52 and 188 of the Bengal Tenancy Act are applicable where the plaintiff contends that there has been an addition to the original holding. To a suit for the assessment of rent in respect of lands which did not form part of the original holdings these sections have no application.

The right to sue for assessment of fair and equitable rent is a right given by the general law. Section 52 of the Bengal Tenancy Act applies only to cases where the area of a tenure or holding has increased while s. 158 (*i*) (*d*) of the Act refers to a determination of the existing rent. Where assessment is applied for in respect of lands forming separate holdings under separate agreements in respect of which there is no existing rent, neither of these sections is applicable.

Under the general law a suit by a co-sharer landlord for an assessment of the rent of a tenant's holding is not maintainable where the other co-sharers have not been made parties to the suit either as plaintiffs or as defendants. As in a partition suit, so in a suit for assessment all the interested persons must be made parties to the suit.

A suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been paid by the tenant and where the landlord claims arrears of rent in respect of past years for which rent has already accrued due, a suit for determination of fair and equitable rent does not lie. The assessment made in a suit for the determination of fair and equitable rent can only have reference to future years. **Pat** PARTAB MAHTON *v.* WAZIRUNNISA, (1925) Pat. 125; 6 P. L. T. 367; (1925) A. I. R. (Pat.) 559; 4 Pat. 604 **687**

——— **ss. 52, 188**—*Rent suit by co-sharer landlord—Abatement of rent, question of, whether can be raised.*

In a suit for the recovery of rent by a co-sharer landlord who, under an arrangement between himself, his co-sharers and the tenants, is entitled to collect his share of the rent separately, the tenants are entitled to raise the question of abatement of rent, inasmuch as such a suit is not one for rent under the Bengal Tenancy Act, but in fact a suit for money and the decree that would be obtained would be merely a money-decree in which the right, title and interest only of the judgment-debtor might be brought to sale and consequently neither the provisions of s. 188 nor of s. 52 of the Bengal Tenancy Act are applicable to the suit. **C** SIVA DAS DUTTA *v.* BIRENDRA KRISHNA DUTTA, 41 C. L. J. 330; (1925) A. I. R. (C.) 783 **654**

——— **s. 67**—*Landlord and tenant*—Bhaoli *holding—Arrears of rent—Interest, whether can be claimed*—Dahiyak, *claim for—Finding that* dahiyak *is not illegal cess—Appeal, second—Finding, whether can be challenged.*

An entry in the Record of Rights described the landlord's claim on account of *dahiyak* as an *abwab*. The lower Appellate Court looked at the *zemindari* collection papers for many years and came to conclusion that the charge on account of *dahiyak* was not an illegal cess within the meaning of the Bengal Tenancy Act:

Held, that the finding of the lower Appellate Court was one of fact based on evidence and could not be challenged in second appeal.

Where in the case of a *bhaoli* holdings there is no evidence that the rent is payable quarterly, interest under s. 67 of the Bengal Tenancy Act is not chargeable on arrears of rent. **Pat** GONDA SINGH *v.* JITAM MAHTO, 3 Pat. L. R. 109 **395**

——— **s. 105**—*Tank, lease of—Assessment of rent.*

A tank can be leased for agricultural purposes, *e.g.*, for irrigating adjacent lands or watering the cattle used for cultivation. A tank so leased can be assessed to rent under s. 105, Bengal Tenancy Act. **C** SATINDRA MOHUN TAGORE *v.* RAM SUNDAR DAS **534**

——— **ss. 105, 109**—*Application for settlement of rent—Withdrawal of application with leave to bring fresh suit, effect of—Suit, whether maintainable.*

Held, by the majority (Suhrawardy, J. dissenting), that when an application under s. 105 of the Bengal Tenancy Act for the settlement of rent is withdrawn with liberty to bring a fresh suit, a suit for enhancement of rent is barred by the provisions of s. 109 of the Bengal Tenancy Act. **C** BECHARAM CHOUDHURI *v.* PURAN CHANDRA CHATTERJI, 41 C. L. J. 456; 29 C. W. N. 755; (1925) A. I. R. (C.) 845 **637**

——— **s. 116**—*Landlord and tenant—Lease for term of years*—Raiyat *holding under lessee, position of—Occupancy rights, whether can be acquired—Ejectment—Notice, whether necessary.*

Semble:—A person holding under a lease for a term of years cannot make any contracts of tenancy with *raiyats* except contracts for a term not exceeding the period of his lease. A *raiyat* holding under such a person without any lease must be presumed to be in possession for successive terms of one year under an oral lease. Such a *raiyat* cannot acquire occupancy rights under s. 116 of the Bengal Tenancy Act, nor can he claim the rights of a non-occupancy *raiyat* under any part of the Act. The special Law of Limitation laid down in Sch. III of the Bengal Tenancy Act is not applicable to the case of such a *raiyat* and he is liable to ejectment as a trespasser at the instance of the proprietor on the expiry of the tenancy of his lessor with which his own is co-terminous. **Pat** CHANCHAL MAHTON *v.* BHAGWAN GIR **874**

——— **s. 148-A**—*Decree for arrears of rent obtained against some tenants only—Decree, nature of—Execution of decree—Sale—Auction-purchaser, rights of.*

A decree obtained by a landlord for arrears of rent in respect of a holding which is not transferable without the permission of the landlord, against some only of the tenants of the holding, without impleading the legal representatives of a deceased tenant as parties to the suit, is not a rent-decree within the meaning of s 148-A of the Bengal Tenancy Act and in execution of such a decree only the right, title and interest of the judgment-debtors can be sold. The auction-purchaser at a sale in execution of such a decree does not become a purchaser of the entire holding. **Pat** RAMJAS PANDEY *v.* AWADH MAHTON **830**

——— **s. 153**—*Rent-decree—Execution proceedings—Special Judge, order of—Appeal, if lies.*

No appeal lies under s. 153, Bengal Tenancy Act against an order passed by a Special Judge on an

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application to set aside a sale held in execution of a rent-decree for an amount not exceeding Rs. 50, on the ground of irregularity and fraud. **C** SHASHI KANTA ACHARJYA BAHADUR *v.* MANU SHEIKH **667**

——— **ss. 158, 50, 52, 105, 107, 157, 24**—*Civil Procedure Code (Act V of 1908), s. 9, O. XXII, r. 4—Landlord and tenant—Landlord's right to recover fair and equitable rent—Suit to enforce rights, nature of—Jurisdiction of Civil Courts—Co-sharer landlord, whether can maintain suit.*

Clause (*d*) of s. 158 of the Bengal Tenancy Act entitles a Court to determine the rent payable by the tenant at the time of the application, and there is no reason why this should be restricted to cases where the rate of rent has already been ascertained. If the contract is that the tenant shall pay a fair and equitable rent, then that is the existing rent payable and it is the business of the Court to ascertain it.

An application under s. 158 of the Bengal Tenancy Act must be made by the whole body of landlords.

Section 24 of the Bengal Tenancy Act directs that an occupancy *raiyat* shall pay for his holding at a fair and equitable rate. If a rent is fixed by the demise, that rent is presumed to be "fair and equitable." If no rent has been fixed, then the tenant is under a liability arising out of his contract, to pay such rent as the Court may deem to be fair and equitable.

The jurisdiction for assessing a fair rent where no rent has at any time previously been assessed is not confined to that conferred by ss. 50, 105, 157 and 158 and similar sections of the Bengal Tenancy Act.

A landlord's right to recover fair and equitable rent on the basis of the contract of tenancy can be enforced in the ordinary Civil Courts under the provisions of s. 9 of the C. P. C. Such a suit is maintainable at the instance of a co-sharer landlord with regard to his share of the rent and it is not necessary that the whole body of the landlords should join as plaintiffs.

In general, where the relationship of landlord and tenant exists without any arrangement for the payment of rent properly so-called there is always an implied contract on the part of a tenant to compensate the landlord for use and occupation of the land. In Bengal and Behar the conditions are special and the law in such a case implies a contract to pay not compensation but rent. **Pat** RAMGOBIND SINGH *v.* SHASHI SEKHAR PRASAD SINGH, (1925) Pat. 153; (1925) A. I. R. (Pat.) 517 **959**

——— **s. 174**—*Application to set aside sale—Money deposited on separate* chalans *in favour of decree-holder and auction-purchaser—Money not properly distributed between decree-holder and auction-purchaser, effect of—Sale set aside—Appeal, whether lies—Revision—Interference by High Court.*

Where a sale is set aside under the provisions of s. 174 of the Bengal Tenancy Act no appeal lies at the instance of the auction-purchaser against an order setting aside the sale.

Where, however, an appeal is preferred against such order and is entertained by the Appellate Court and the order is set aside in appeal, the High Court will not interfere in revision unless it is convinced that the order of the Appellate Court is wrong on the merits.

There is no rule requiring that a deposit under s. 174 of the Bengal Tenancy Act must be made by two separate *chalans* in favour of the decree-holder and the auction-purchaser. Where, therefore, the total amount of the deposit made by the judgment-debtor is in accordance with the requirements of the section the mere fact that the deposit is made on two *chalans*, one in favour of the decree-holder and the other in favour of the auction-purchaser and that the amount deposited on the *chalan* in favour of the decree-holder is slightly in excess and the amount deposited on the *chalan* in favour of the auction-purchaser is slightly less than the respective amounts due to the decree-holder and the auction-purchaser, will not affect the maintainability of the application to set aside the sale. **Pat** ASHARFI DHIMAR *v.* MUHAMMAD DINDALAL **989**

——— **s. 182**—*Tenancy of homestead land not forming part of holding, incidents of—Dwelling house, erection of, by tenant, effect of—Ejectment—Notice to quit.*

Where a person has got a tenancy right in homestead land which is not a part of any holding of his as a *raiyat* either in the village in which the land is situated or in any other village, the provisions of s. 182 of the Bengal Tenancy Act are not applicable to the case and the incidents of the tenancy are not governed by the provisions of the Act. The tenancy must be considered either as a tenancy-at-will or a tenancy from year to year and as such is liable to be terminated on a proper notice to quit. The mere fact that the tenant has constructed a dwelling house on the land in dispute and has been in possession thereof for any length of time will not give him a title to remain on the land permanently as a rent-free tenant. **Pat** HARIHAR PRASAD SINGH *v.* GHARBHARAN KOERI, 3 Pat. L. R. 174; (1925) A. I. R. (Pat.) 612 **553**

Berar Municipal Law, ss. 98, 116, 178—*Bye-laws requiring permission for building, whether* ultra vires *—Test.*

Before a rule framed by a rule-making authority is declared *ultra vires* the Court must be satisfied not only that the authority had no power to act under the power under which it purported to act, but also that it had no power at all under any law to so act.

The bye-laws framed under s. 116 (1) of the Berar Municipal Act, requiring a person to obtain permission of the Municipality before commencing to build or re-build or enlarge any structure, and imposing a penalty for failure to obtain such permission, are not *ultra vires*. **N** EMPEROR *v.* SHRIBALLABH, 26 Cr. L. J. 1084 **28**

Bombay Bhagdari and Narvadari Act (V of 1862), s. 1—Narva *land—Sale of portion for building purposes—Remainder, whether constitutes recognized sub-division.*

Where the proprietor of a recognized sub-division of a *narva* in a *bhagdari* village, with the permission of the Collector, separates a small portion of land for building purposes unconnected with the preservation of the homestead and sells that portion, the rest of the share retained by him constitutes a recognized sub-division of a *narva* within the meaning of the Bombay Bhagdari and Narvadari Act and is liable to the process of a Civil Court. **B** BAI SAMJU *v.* LALLUBHAI TALSIBHAI, 27 Bom. L. R. 958 **1034**

Bombay District Municipalities Act (III of 1901), ss. 42, 54, 58—*Rules framed by Local Government under s. 58, r. 3—Misapplication of Municipal funds, meaning of—"Primary" education, meaning of—Primary schools maintained by Municipality—Refusal to allow inspection by Government Inspector—Money spent on schools, whether misapplied.*

Bombay District Municipal Act—contd.

The word "misapplication" in s. 42 of the Bombay District Municipal Act means application to a purpose which the Act neither permits nor requires. The functions of a Municipality are either obligatory or discretionary, and Municipal funds must be expended on those functions and on no others. The obligatory functions are those which the Act requires, the discretionary functions are those which the Act permits.

To establish and maintain primary schools is one of the obligatory functions of a Municipality which has been laid down by s. 54 of the Bombay District Municipal Act. Therefore, money spent on the establishment and maintenance of primary schools is money applied to a purpose which the Act requires and cannot, therefore, be treated as having been misapplied within the meaning of s. 42 of the Act.

"Primary" education means education in its first stages and nothing more. The expression does not in itself connote anything in the way of Government support or Government control.

Rule 3 of the rules framed by the Local Government under the provisions of s. 58 of the Bombay District Municipal Act merely prescribes the ordinary method whereby Government are enabled to satisfy themselves that a Municipality is doing its duty. In other words, the rule is a rule of procedure, and its infringement cannot in any way affect the character of the schools maintained by a Municipality.

Where primary schools are established and maintained by a Municipality, money spent by the Municipality on such schools is spent on a function which has been made obligatory upon the Municipality by s. 54 of the Bombay District Municipal Act, and the mere fact that the Municipality refuses to have its schools inspected in accordance with r. 3 of the rules framed by the Local Government under s. 58 of the Act, will not make the schools any other than primary schools and the money spent on them would not be regarded as having been misapplied within the meaning of s. 42 of the Act. B SECRETARY OF STATE FOR INDIA *v.* MANILAL HARIVALLAVDAS BHAGAT, 27 BOM. L. R. 371; (1925) A. I. R. (B.) 278 **43**

——— **ss. 54, 58**—Rules framed by Local Government under s. 58, r. 3—Misapplication of Municipal funds, meaning of—"Primary education", meaning of—Primary Schools maintained by Municipality—Refusal to allow inspection by Government Inspector—Money spent on schools, whether misapplied. *See* BOMBAY DISTRICT MUNICIPAL ACT, 1901, s. 42 **43**

——— **ss. 155, 154 (2), 107, 131, 3 (8)**—*Notices under ss. 107, 131—Service on agent—Non-compliance with notice—Prosecution of agent—Conviction, legality of*

Under s. 154 (2) of the Bombay District Municipal Act it is open to a Municipality to issue notices under ss. 107 and 131 of the Act to the owner of the premises without specifying his name, and where this is done and the notices are served on a person who is the owner of the premises, it is open to the Municipality to prosecute such owner for an offence under s. 155 of the Act. Where, however, notices are issued to a person by name and are served upon another person, the latter cannot be prosecuted or convicted for an offence under s. 155 merely because he falls within the definition of an owner as laid down in cl. (8) of s. 3 of the Act or because he accepted service of the notices as agent of the person to whom the notices were addressed.

Sections 107 and 131 of the Bombay District Municipal Act provide for issue of notices but non-compliance with such notices is made punishable under s. 155 of the Act and a prosecution in respect of such non-compliance must be under the latter section and not under ss. 107 and 131. S HASSOMAL M. GURBUXANI *v.* EMPEROR, 18 S. L. R. 90; 26 Cr. L. J. 1099; (1925) A. I. R. (S.) 262 **187**

Bombay District Police Act (IV of 1890), ss. 11, 51 (e), 53, Sch. B—*Jurisdiction of Police Officer, scope of—Police Officer aiding another officer, outside area of jurisdiction, whether on duty—Police Officer—Penal Code (Act XLV of 1860), s. 333.*

For the purposes of the Bombay District Police Act of 1890, Police Officers of every grade are appointed to an entire District in which they have to serve and are to be deemed to be on duty in all parts of that District. Although a Police Officer may be outside the area of his jurisdiction, he is bound within the limits of the said District to aid another Police Officer when called on by him to do so or to keep order in streets, etc., as required under ss. 51 (*e*) and 53 of the said Act.

Therefore, any person assaulting a Police Officer while he is engaged in discharging the duty laid on him as a member of the Police force is guilty of an offence under s. 333, Penal Code. S KHAIRO *v.* EMPEROR, 26 Cr. L. J. 1071; 18 S. L. R. 221; (1925) A. I. R. (S.) 280 **15**

Bombay Rent (War Restrictions) Act (II of 1918), ss. 2 (1) (a), 13—*Building let to tenant—Portion let to sub-tenant—Standard rent, ascertainment of—Basic rent, what is—Apportionment, whether to be made.*

Plaintiff leased a large building to one *B* at a certain rent and the latter sub-let a portion of the building to the defendant in September 1915 at a rental of Rs. 75. *B*'s tenancy was subsequently terminated and the defendant became a tenant under the plaintiff. In proceedings under the Bombay Rent (War Restrictions) Act:

Held, that the standard rent of the portion let to the defendant out of the larger building must be ascertained on the basic rent of Rs. 75 on which the premises were first let to the defendant before 1st January 1916, and that the standard rent could not be ascertained by apportionment of the rent which *B* was paying to the plaintiff on 1st January 1916. B DHANRAJGIRJI NARASINGIRJI *v.* W. G. WARD, 27 Bom. L. R. 877; 49 B. 357; (1925) A. I. R. (B.) 400 **886**

——— **s. 2 (1) (b)**—*Transfer of Property Act (IV of 1882), s. 105—Easements Act (V of 1882), s. 52—Lease and license, distinction between—Right to use stalls and cubicles in mews on payment, nature of—"Premises," what are.*

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license and not as a lease.

The ordinary case of a lease of immoveable property is one where a defined piece of land or a defined building or part of a building is transferred to the lessee, and there can be no valid lease of an area the position of which varies from time to time.

The Bombay Rent (War Restrictions) Act of 1918 is an encroachment upon the ordinary property owner's

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right to freedom of contract and must, therefore, be strictly construed.

The definition of "premises" in s. 2 (1) (*b*) of the Bombay Rent (War Restrictions) Act of 1918 excludes the case of a single cubicle reserved not for the occupation of a human being but for the occupation of a chattel, *e. g.*, a motor-car, at any rate, in the absence of some document or reliable oral evidence showing that the agreement between the parties was otherwise, and provided that the owner of the premises exercises a general right of control over the premises.

Plaintiffs were the owners of certain mews which provided stabling accommodation for horses in stalls and loose boxes and also accommodation for carriages which were kept on open spaces, no definite space being allotted to any particular carriage, the carriages being placed as they happened to come in on any particular day. In addition accommodation was provided for motor-cars in single cubicles and also in cubicles accommodating more cars than one and in open spaces. In the open spaces no particular space was allotted to any particular car, nor was any particular space reserved in the larger cubicles for particular cars. The key of the larger cubicles was kept by a supervisor employed by the plaintiffs and the keys of single cubicles were kept by the respective chauffeurs of the cars garaged in the cubicles. Defendant kept a horse in one of the stalls and a carriage on the open space provided for carriages in the building. He also kept three cars, one on the open space, the second in one of the bigger cubicles and the third in a single cubicle. He made certain payments in respect of the use of the stall, open spaces and cubicles. The plaintiffs exercised general control over the premises and carried out the necessary repairs, etc.:

Held, (1) that the right acquired by the defendant on payment to the use of the stall, open spaces and cubicles was in the nature of a license and did not create the relationship of landlord and tenant between the plaintiffs and the defendant;

(2) that the stall, open spaces and cubicles did not fall within the definition of "premises" contained in s. 2 (1), (*b*) of the Bombay Rent (War Restrictions) Act of 1918 and consequently the Act was not applicable to them. **B** THE INDIAN HOTELS COMPANY *v.* PHIROZ SORABJI, 25 Bom. L. R. 84; (1923) A. I. R. (B.) 228 **316**

Buddhist Law, Burmese—*Divorce on ground of desertion—Equal wives—Partition—Wife obtaining divorce, share of.*

Defendant's wife quarrelled with him and left him. A few months later he asked for the plaintiff in marriage, representing falsely that he had divorced his first wife. He married the plaintiff and took her to live with him in his mother's house where he had lived with his first wife. Subsequently he left the plaintiff and went to live with his first wife. Plaintiff thereupon brought a suit for divorce on the ground of desertion and for partition and possession of the property of the marriage:

Held, (1) that the plaintiff and the first wife of the defendant were wives on an equal footing and that the plaintiff was not a "lesser wife";

(2) that the defendant deserted the plaintiff and that the plaintiff was, therefore, entitled to divorce on the ground of desertion and to partition and possession of two-thirds of the immoveable property

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and two-thirds of the jointly acquired property, having regard to the fact that the defendant's first wife was alive. **R** MAUNG PO NYUN *v.* MEA SAW TIN, 4 Bur. L. J. 42; 3 R. 160; (1925) A. I. R. (R.) 242 **402**

——— *Property transferred to children of first marriage on second marriage—Transfer, nature of—Registered deed—Whether necessary.*

On a second marriage it is open to a Burmese Buddhist father to satisfy the claims of his children by the first marriage at once by transferring a portion of his property to them and such transfer is not in the nature of a gift but is by way of partition and no registered deed is necessary to carry the transfer into effect. **R** MA HTAY *v.* U THA HLINE, (1924) A. I. R. (R.) 184; 2 R. 649 **66**

——— *Succession—Father's younger sister, whether to be preferred to mother's sister's son.*

Under the Burmese Buddhist Law a father's younger sister is a preferential heir as against a mother's sister's son and is consequently entitled to Letters of Administration in preference to the latter. **R** U PE GYI *v.* U PYO, 4 Bur. L. J. 88; (1925) A. I. R. (R.) 235; 3 R. 271 **657**

Bundelkhand Land Alienation Act (II of 1903), ss. 9 (3), 16—*Mortgage—Land protected under the Act—Mortgage-decree—Reference to Collector, whether can be made.*

It is advisable that Original Courts, when they find that a mortgage has been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under s. 9 (3) of the Bundelkhand Land Alienation Act before passing a mortgage-decree, and should not wait to take action under the section till the decree has been passed. There is nothing, however, in the wording of the section to support the contention that the provisions of the section can take effect only before a decree is passed and not afterwards. **A** BISHNATH SINGH *v.* BASDEO SINGH, L. R. 6 A. 453; C.v.; 23 A. L. J. 927 **484**

Burden of proof—Ejectment suit. *See* CUSTOM **114**

——— Unregistered document—Execution proved or admitted — Consideration —Burden of proof. *See* EVIDENCE ACT, 1872, s. 102 **301**

Calcutta High Court Original Side Rules—*Sale of property pending dispute, method of.*

On the Original Side of the Calcutta High Court when it appears that a property will have to be sold eventually, such property is frequently sold under conditions which may promptly secure the best possible price entirely without prejudice to all rights and contentions of the parties of any kind whatsoever, the object being to obtain the best value for the property when conditions are most favourable and to allow such contentions as may be raised to be argued at leisure thereafter. **C** HUKUMCHAND KASLIWAL *v.* RADHAKISSEN CHAMARIA, 29 C. W. N. 715; (1925) A. I. R. (C.) 916 **754**

Calcutta Rent Act (III of 1920), s. 11—*Lease, expiry of—Tenant holding over—Refusal of landlord to accept rent—Deposit in Controller's Office—Period during which deposit may be made—Breach of covenant by tenant at time of giving up possession—Tenant, whether disentitled to protection of Act.*

Under a certain lease the rent became due on the 5th of each month succeeding that for which it was payable. The landlord refused to accept the rent,

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The Rent Controller's Office was closed from the 19th up to the 22nd. On the 23rd defendant, who was the tenant, presented a petition and obtained an order from the Rent Controller for the receipt of the amount of rent together with the requisite 10 per cent. The defendant was not able to pay the money to the cashier on that date owing to the large number of people who were waiting to make payments and the money was paid into the Controller's Office on the 24th:

Held, that under the circumstances the deposit had been made in accordance with the provisions of sub-s. (4) of s. 11 of the Calcutta Rent Act.

The fact that a tenant commits a breach of a covenant when he gives up possession of the premises is not sufficient to disentitle him from the protection afforded by the provisions of the Calcutta Rent Act during the whole of the period during which he has been holding over after the date of the expiry of his lease. **G** G. M. HAY *v.* BONOMALI MULLICK, 29 C. W. N. 636; (1925) A. I. R. (C) 791 **589**

Cattle Trespass Act (I of 1871), s. 14. *See* CR. P. C., 1898, s. 197 **517**

C. P. Municipalities Act (II of 1922), s. 12 (1) (a), *scope of—Joint Hindu family—Separate income of member up to requisite amount—Member, whether entitled to vote.*

Under s. 12 (1) (*a*) of the C. P. Municipalities Act, every member of a joint Hindu family is entitled to a vote provided he is in receipt of an income of not less than Rs. 120 per year or such other less sum as may be prescribed under the rules made thereunder irrespective of the fact that he pays the income to the manager for being thrown into the common stock. The manager alone is entitled to a vote if the total income of the entire joint family aggregates to the amount prescribed under the Act or the rules made thereunder, but the income of individual members falls short of that amount. **N** SECRETARY AND PRESIDENT, MUNICIPAL COMMITTEE, NAGPUR *v.* DEVIDAS **480**

C. P. Tenancy Act (I of 1920), ss. 100, 105, Sch. II, Arts. 5, 9—*Lease of* sir *land—Subsequent sale of proprietary rights—Assignment of rights of lessee in favour of purchaser of proprietary rights—Occupancy rights, creation of—Suit to recover possession by occupancy tenant on expiry of period of lease—Limitation—Jurisdiction of Civil Courts.*

Plaintiff, who was the owner of a certain area of *sir* land, gave a lease of the cultivating rights therein to one *N* for twenty years. During the term of that lease the defendant purchased from the plaintiff the proprietary rights in the land without the cultivating rights in the *sir*, and he subsequently obtained an assignment of the remnant of the rights of *N* in the lease. Within two years of the expiry of the period of the lease plaintiff sued to recover possession of the land from the defendant on the ground that she was entitled to possession as an occupancy tenant in the land:

Held, (1) that when the defendant purchased the proprietary rights the plaintiff became an occupancy tenant and *N* became a lessee of the plaintiff:

(2) that by the assignment of *N*'s rights in favour of the defendant the latter became the lessee of the occupancy rights under the plaintiff;

(3) that on the expiry of the period of the lease the plaintiff was entitled to resume possession of the land as occupancy tenant, and that her suit having been brought within two years of the expiry of the period of the lease, it was not barred by time;

(4) that the suit was triable by a Civil Court.

Section 100 of the C. P. Tenancy Act I of 1920, provides only a substitute in the case of a tenant for a suit under s. 9 of the Specific Relief Act, that is to say, it provides an alternative remedy which the tenant may pursue or not at his option. In an application under that section the Revenue Officer, like the Civil Court in a suit under s. 9 of the Specific Relief Act, does not go into the questions of title and all that he is empowered to determine is the right to immediate possession. **N** D. B. BALLABHDAS *v.* PUNA BAI **126**

Charge. *See* CR. P. C., 1898, ss. 227, 237 **1**

Chota Nagpur Landlord and Tenant Procedure Act (I of 1879), s. 10 (b)—*Chota Nagpur Tenancy (Amendment) Act (V of 1903), s. 5—Landlord and tenant—Transfer by* raiyat, *validity of—Transfer, invalid—Title to holding, whether affected—Encumbrance created by tenant—Surrender, validity of.*

A transfer by a *raiyat* falling within the purview of s. 10 (*b*) of the Chota Nagpur Landlord and Tenant Procedure Act of 1879 effected between the 1st day of January 1903 and the 4th day of November 1903, the latter date being the date on which the section was introduced into the Act by s. 5 of the Chota Nagpur Tenancy (Amendment) Act, 1903, comes within the operation of the section and is invalid.

Where a *raiyat* makes a transfer of his holding which is invalid under the provisions of s. 10 (*b*) of the Chota Nagpur Landlord and Tenant Procedure Act of 1879, the title remains in the tenant himself or after his death in his heirs.

A tenant who has created an encumbrance upon the holding is not prevented from making a surrender of the holding. **Pat** PRATAP UDAI NATH SAHI DEO *v.* MAHABIR SAHU, 6 P. L. T. 500 **1032**

Chota Nagpur Tenancy (Amendment) Act (V of 1903), s. 5. *See* CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT, 1879, s. 10 (*b*) **1032**

City of Bombay Police Act (IV of 1902), s. 70—*Accused persons arrested in Native State and handed over to Bombay Police—Investigation not complete—Remand to Police custody—Jurisdiction of Presidency Magistrate.*

Accused, who were residents of Indore State, committed certain offences in Bombay. The Bombay Police applied to a Presidency Magistrate in Bombay to make a requisition for the surrender of the accused by the Indore State, and for that purpose certain information was supplied to the Magistrate by the Police. The requisition was made and the accused were arrested by the Indore Police and were handed over to an Inspector of the Bombay Police by whom they were brought down to Bombay and were immediately taken before the Magistrate who had made the requisition. On an application by the Police under s. 70 of the City of Bombay Police Act, the Magistrate remanded the accused to Police custody under that section:

Held, that the accused were brought to Bombay in Police custody and that the investigation not being complete, the Magistrate had jurisdiction to make the order of remand under s. 70 of the City of Bombay Police Act. **B** P. B. PONDE *v.* EMPEROR, 27 Bom. L. R. 612; 49 B. 623; (1925) A. I. R. (B.) 387; 26 Cr. L. J. 1181 **605**

Civil Procedure Code (Act V of 1908), s. 9.
See BENGAL TENANCY ACT, 1885, s. 158 **959**

——— **ss. 9, 92.** *See* RELIGIOUS ENDOWMENTS ACT, 1863, s. 14 **1035**

——— **s. 10**—*Stay of suit—"Matter in issue", meaning of—Issue common to both suits, whether sufficient.*

Under s. 10 of the C. P. C. it is necessary that the matter must be directly and substantially in issue in both the suits. The expression "matter in issue" in the section has reference to the entire subject in controversy between the parties. It is not enough that the main question involved in both the suits should be the same.

The real intention of the Legislature in framing s. 10 of the C. P. C. was merely to prevent a later suit relating to the same subject-matter being tried before an earlier suit relating to the same subject-matter is tried and disposed of. **M** NARIKKOTE KUNNAMANGALATH *v.* PATHUA KALLOOR KOMAN NAIR, 48 M. L. J. 251; (1925) A. I. R. (M.) 574 **421**

——— **s. 11**—*Agra Tenancy Act (II of 1901), s. 161—Suit for determination of rent in Revenue Court—Finding that defendants held under a third person and not under plaintiff—Suit against third person for recovery of possession*—Res judicata.

Plaintiff brought a suit in the Revenue Court for the determination of the amount of rent to be paid by certain persons on the allegation that they were ex-proprietary tenants under the plaintiff. The defence was that they did not hold under the plaintiff but under one *S.* who was a perpetual lessee of the land from the plaintiff. *S.* was impleaded as a party to the suit and the Court arrived at the finding that the defendants held under *S.* and not under the plaintiff. In a subsequent suit in the Civil Court by the plaintiff to recover possession of the land from *S.* on the allegation that *S.* was a *benamidar* for the plaintiff and that the real lessee was the plaintiff himself:

Held, that the question whether *S.* was the *benamidar* of the plaintiff had not been decided by the Revenue Court in the previous suit and that the decision of the Revenue Court did not operate as *res judicata* between the parties. **A** SHANKAR KUNBI . MOQIM ALI KHAN **927**

——— **s. 11, O. XXI, r. 66**—*Execution of decree—Sale proclamation—Order settling particulars*—Res judicata.

In cases where the principle of *res judicata* is applicable it is the final order which operates as a bar, and not the reasons given for the final order.

An order of an Execution Court determining any of the particulars to be stated in the sale proclamation under O. XXI, r. 66 of the C. P. C. is not a final order and the parties are at liberty to re-open the question in a subsequent proceeding. Such an order does not operate as *res judicata* in a subsequent proceeding. **Pat.** MOHIT NARAIN JHA *v.* THAKAN JHA, 3 Pat. L. R. 118; (1925) Pat. 189; (1925) A. I. R. (Pat.) 500; 4 Pat. 731 **332**

——— **s. 11**—*Official Assignee, whether legal representative of insolvent—Small cause suit—Order in execution on Original Side—Subsequent suit on title*—Res judicata.

The Official Assignee does for certain purposes represent the insolvent, but he has other capacities such as the representative of the body of creditors; and in each case in order to determine what particular character he holds regard must be had to the circumstances. If in a case he is litigating under the same title under which the insolvent had previously litigated, he may be held to be the legal representative of the insolvent and the decision in the previous case would operate as *res judicata* against him.

But where in a suit the Official Assignee claims certain properties as belonging to the insolvent and, therefore, available for the benefit of all the creditors, he cannot be deemed to claim under or be litigating under the same title as the insolvent.

Therefore, an order in execution proceedings that certain properties are liable to be attached in execution of a decree against the judgment-debtor is not *res judicata* in a later suit in which the Official Assignee claims the properties on behalf of the creditors of the judgment-debtor since adjudged an insolvent.

An order in execution proceedings on the Original Side in a small cause suit cannot operate as *res judicata* in a later suit on title on the regular side. **M** OFFICIAL ASSIGNEE, MADRAS *v.* AIYU DIKSHITHAR, 48 M. L. J. 530; (1925) A. I. R. (M.) 688 **85**

——— **s. 11**—*Point left undecided, whether can be raised in a subsequent suit*—Res judicata.

Where a point is expressly left undecided by the Court in a suit it is open to the parties to agitate it in a subsequent suit. **A** SHIAM LAL *v.* RADHA BALLABH, L. R. 6 A. 547 Civ.; 23 A. L. J. 950 **822**

——— **s. 11**—Res judicata *between co-defendants—Conditions necessary for application of rule.*

In order that a decision might operate as *res judicata* between co-defendants there must have been a conflict of interests between the co-defendants and it must have been necessary for the decision of the suit for the Court to decide the question on which they are at issue. If the issue was one the decision of which was sufficient for the decision of the suit, and the issue was raised and the suit was actually in fact decided upon it, then, if that issue was one which was raised not only between the plaintiff and the defendants but between the co-defendants as well the rule of *res judicata* applies between the co-defendants.

Plaintiff purchased certain property from the defendant. Defendant's son brought a suit to set aside the sale on the ground that the sale was without consideration and that there was no legal necessity for it. Both the plaintiff and the defendant were made parties to the suit, and the suit was decreed *ex parte* on the finding that there was no consideration and consequently no legal necessity for the sale. Plaintiff then filed the present suit to recover from the defendant the alleged consideration for the sale-deed:

Held, that the finding in the previous suit that there was no consideration for the sale operated as *res judicata* between the parties. **A** MAHIP NARAYAN PANDEY *v.* MANNU SINGH, 23 A. L. J. 453; L. R. 6 A. 385 Civ.; (1925) A. I. R. (A.) 516 **130**

——— **s. 11**—Res judicata—*Finding on several issues—Appellate Court, judgment of—Subject-matter of suits not identical.*

A finding which is the real ground of the decision in a case operates as *res judicata* even though there may have been other issues in the case on which the case might equally well have been decided.

Where a certain issue is treated as material in the judgment of an Appellate Court and is decided, the decision on the issue operates as *res judicata.*

A suit for ejectment was dismissed on the finding that the plaintiff had no title to the land in respect of which he alleged an encroachment and that, as a

Civil Procedure Code—1908—contd.

matter of fact, there had been no encroachment on the plaintiff's rights:

Held, that the finding with regard to the want of title of the plaintiff operated as *res judicata* in a subsequent suit between the parties.

For the application of the rule of *res judicata* it is not necessary that the subject-matter of the two suits should be identical. The question is whether the issue determined was the same. **O** RAM DAS *v.* BHAGWAN KUMAR, 12 O. L. J. 248; 2 O. W. N. 292; (1925) A. I. R. (O.) 390 **985**

——— **s. 11**—Res judicata—*Previous Court not competent to try subsequent suit, effect of.*

In a previous suit for arrears of rent by one of the parties it was decided by an Assistant Collector of the Second Class that the land in dispute was the defendants' *khudkasht*. The same question arose between the same parties in a subsequent suit triable by an Assistant Collector of the First Class:

Held, that the decision of the Assistant Collector of the Second Class in the previous suit would operate as a decision of a Civil Court in a subsequent suit in a Court of Assistant Collector of the Second Class, but that it would not operate as *res judicata* in the Court of an Assistant Collector of the First Class. **A** SUNDERLAL *v.* BHUP SINGH, (1924) A. I. R. (A.) 466; L. R. 5 A. 105 Rev. **164**

——— **s. 11**—Res judicata—*Suit instituted by shebait on behalf of deity—Suit held not to be maintainable—Decision on other issues, whether binding—Decision arrived at incidentally, whether operates as* res judicata.

A suit by some of the *shebaits* against other *shebaits* for proper management of the *debutter* properties, where the defendants deny the *debutter* character of the properties, is a suit on behalf of the deity, and must be treated as such in order to determine whether the decision in such a suit operates as *res judicata* in a subsequent suit.

Where a suit is properly framed and the Court decides several issues the decision on each issue is binding upon the parties. Where, however, it is held that the suit as framed is not maintainable, the suit should be dismissed on that ground alone and the Court cannot try the other issues so long as the suit is not properly framed. A finding on any of the other issues in such a suit does not operate as *res judicata* in a subsequent suit.

A decision on a question which is merely incidentally decided in a previous suit does not operate as *res judicata* in a subsequent suit. **C** GOPAL JEW THAKUR *v.* RADHA BINODE MONDAL, 41 C. L. J. 396 **616**

——— **s. 11**—Res judicata—*Suit to recover share of income and for declaration of title—Subsequent suit for partition.*

An *Inam* was granted to a certain person and his male descendants. After the death of one of the holders of the *Inam* who died leaving only female issue, the *Inam* was entered in the name of another male descendant of the original grantee. The daughters of the last holder of the *Inam* thereupon brought a suit against the present holder for a declaration that as the heirs of the last holder, they had got a certain share in the grant and that they were entitled to a certain share of the profits thereof. They were given a decree for the share of the profits claimed and a declaration was made in their favour that they were the owners of a certain share of the *Inam* villages in dispute. After the death of the judgment-debtor the *Inam* was entered in the name of his son. The plaintiffs then brought a suit for partition and separate possession of their share in the *Inam* estate:

Held, (1) that so far as the plaintiffs' claim to partition was concerned the matter was not *res judicata* between the parties inasmuch as the previous suit related only to a claim for profits and a declaration and a claim for partition if made in the previous suit might have been negatived even on the interpretation of the grant which was adopted in that suit;

(2) that the succession of the defendant to the *Inam* on the death of his father did not involve a re-grant of the *Inam* to him by the Government, it being merely a continuance of the grant to him in accordance with its original declared terms and that he held the estate burdened with the obligation of recognizing the rights of the plaintiffs to the share of income declared by the decree in the previous suit. **P C** SUBHAN ALI *v.* IMAMI BEGUM, 23 A. L. J. 667; (1925) A. I. R. (P. C.) 184; (1925) M. W. N. 535; 21 N. L. R. 117 (P. C.) **347**

——— **s. 11, O. XXII, rr. 3, 4, 8, 10, 12, O. XXI, r. 16**—*Execution of decree—Amalgamation of decree-holder Bank with another Bank—Application by latter for substitution, dismissal of—Application to execute decree under O. XXI, r. 16, maintainability of*—Res judicata.

A decree was obtained by the Tata Industrial Bank, Ltd., but in the course of execution proceedings an application was filed by the Central Bank of India requesting that its name may be substituted in place of the Tata Industrial Bank on the ground that the latter Bank had merged in the Central Bank and all its rights and liabilities were represented by the Central Bank. This application purported to be under O. XXII of the C. P. C., and was dismissed on the ground that rr. 3 and 4 of that Order were not applicable to execution proceedings and that the case was not one of assignment during the pendency of execution proceedings so as to be covered by r. 10 of the Order. Subsequently the Central Bank of India applied for execution of the decree under O. XXI, r. 16 of the Code:

Held, (1) that the dismissal of the previous application which was made under O. XXII of the Code did not bar the maintenance of the subsequent application under r. 16 of O. XXI of the Code;

(2) that on the amalgamation of the Tata Industrial Bank with the Central Bank of India there was a valid transfer of the decree from the former to the latter Bank and that the latter Bank was entitled to execute the decree. **O** KALIMUDDIN *v.* TATA INDUSTRIAL BANK LTD., 2 O. W. N. 352; (1925) A. I. R. (O.) 417; 12 O. L. J. 538 **1016**

——— **s. 20 (c)**—*Breach of contract—Compensation, suit for—Place of suing—Cause of action, whether arises at place, where contract was made.*

A part of the cause of action in respect of a suit for compensation for breach of contract arises at the place where the contract was made and the suit can, therefore, under s. 20 (c) of the C. P. C., be instituted at such place. The mere fact that the defendant alleges that the suit really arises out of a tort committed at another place, does not affect the jurisdiction of the Court at the place where the contract was made to entertain the suit. **A** SRI NIWAS *v.* E. I. RY., Co., L. R. 6 A. 395 Civ **575**

——— **s. 20 (c)**—*Principal and agent—Suit for accounts—Place of suing.*

Civil Procedure Code—1908—contd.

In the absence of any express contract regulating the rights of the parties or trade usage, a suit against an agent by his principal for rendition of accounts for payment of money due thereon can only be instituted at the place where the agent resides or carries on business or where the contract of agency was made or where it was to be performed or where the refusal to account took place.

Plaintiff sent goods from Sargodha to the defendant at Karachi to be sold by the latter as commission agent. Defendant accepted the plaintiff's drafts, paid money at his request and having sold the goods credited the amount realised to plaintiff's account. Defendant also purchased goods at Karachi at plaintiff's request and sent them abroad under plaintiff's directions to various constituents. Goods were also despatched by defendant to Sargodha, the goods being consigned to defendant himself and the Railway Receipt being handed over to a Bank which transmitted it to its own branch at Sargodha for being handed over to the plaintiff by the latter on payment of the price of the goods. Defendant was put in funds in various ways, for instance, by actual remittance of money, *hundis* sent by the plaintiff drawn in favour of the plaintiff and by defendant drawing upon plaintiff and selling the *hundis* to a Bank at Karachi. Plaintiff instituted a suit for accounts against the defendant and for recovery of money due thereon at Sargodha:

Held, that the cause of action arose at Karachi and that the Sargodha Court had no jurisdiction to entertain the suit. **L** RAM DAS-UTTAM CHAND *v.* DHANPAT-DIWAN CHAND, (1925) A. I. R. (L.) 387; 6 L. 153 **950**

——— **s. 22**—*Transfer of suit—Application not made at earliest possible opportunity, whether must be rejected.*

The language of s. 22 of the C. P. C., is mandatory and an application made under that section must be rejected unless it is made at the earliest possible opportunity as detailed in the section. **L** SHIV DATT *v.* MOTIRAM, (1925) A. I. R. (L.) 322 **531**

——— **s. 34**—*Interest*—Pendente lite—*Discretion of Court.*

Interest *pendente lite* is in the discretion of the Trial Court and an Appellate Court will not interfere with the exercise of that discretion merely on the basis of conjecture. **P C** DIWAN CHAND-KIRPA RAM AND COMPANY *v.* WELD AND COMPANY, (1925) A. I. R. (P. C.) 150; (1925) M. W. N. 459 (P. C.) **54**

See also interest *pendente lite.*

——— **s. 47, O. XXI, rr. 71, 84**—*Appeal, whether lies.*

An order under r. 71 of O. XXI of the C. P. C., directing a defaulting auction-purchaser to make good the loss occurring on the re-sale of the property, is a decree within the meaning of s. 47 of the C. P. C., and is appealable. **O** ANGNU *v.* MUHAMMAD SAJJAD ALI KHAN, 12 O. L. J. 261; 2 O. W. N. 212; (1925) A. I. R. (O.) 397; 28 O. C. 327 **131**

——— **s. 47**—*Execution of decree—Sale of property in excess of that ordered to be sold, legality of—Application to set aside sale, nature of—Appeal, whether lies.*

An application by a judgment-debtor that an auction-sale should be set aside on the ground that the sale had taken place in contravention of the decree and that the property sold was in excess of that ordered to be sold falls within the purview of s. 47 of the C. P. C, and an order setting aside the sale on such an application is open to appeal.

Civil Procedure Code—1908—contd.

A sale of property in excess of that directed to be sold under the decree is absolutely illegal. **A** GANGA DEVI *v.* RAM PRASAD, 23 A. L. J. 558; (1925) A. I. R. (A.) 551; L. R. 6 A. 464 Civ. **393**

——— **s. 47, O. XLI, r. 5**—*Letters Patent (Ran.), cl. 13—Stay of execution—Security—Order declaring sufficiency of security, whether "judgment"—Appeal, whether lies.*

Execution of a decree was stayed by the Appellate Court pending the decision of the appeal. The order directed that the security already furnished by the judgment-debtor may be accepted with liberty to the decree-holder to apply for fresh or further security if it was decided that the security already furnished was invalid or insufficient. The Trial Court, on the application of the decree-holder, declared that the security already furnished by the judgment-debtor was sufficient:

Held, that the order declaring the sufficiency of the security did not fall within the purview of s. 47 of the C. P. C., nor was it a "judgment" within the meaning of cl. 13 of the Letters Patent of the Rangoon High Court and that consequently no appeal lay against that order. **R** MOOLJEE DHARSEE & CO. *v.* M. E. MOOLA, 4 Bur. L. J. 61; (1925) A. I. R. (R.) 225; 3 R. 255 **740**

——— **s. 47**—*Limitation Act (IX of 1908), s. 18, Sch. I, Art. 174—Execution of decree—Adjustment out of Court—Certification, application for—Limitation—Extension of time, whether can be obtained.*

Section 47 of the C. P. C. cannot be invoked to secure an investigation under O. XXI, r. 2 (2) and an extension of time provided in Art. 174 of Sch. I, to the Limitation Act, in the absence of fraud, on account of the mere omission on the part of the decree-holder to certify the fact of adjustment of the decree notwithstanding his promise to do so. **N** MAROTI *v.* NARAYAN (1925) A I. R. (N.) 374 **48**

——— **s. 47, O. XXI, rr. 97, 98**—*Mortgage-decree—Sale—Obstruction to possession—Order on application of decree-holder—Appeal, whether lies—Construction of decree—Property mortgaged, determination of.*

Proceedings connected with the delivery of possession referred to in r. 94 of O. XXI of the C. P. C. and the subsequent rules are proceedings relating to the execution of the decree.

Where the decree-holder is himself the auction-purchaser and is resisted by the judgment-debtor, an order made under r. 98 of O. XXI of the C. P. C., on his application is appealable as a decree under s. 47 of the Code. **Pat** ASKARAN BAID *v.* RAGHUNATH PRASAD, 6 P. L. T. 351; (1925) Pat 212; (1925) A. I. R. (Pat) 478; 4 Pat. 726 **104**

——— **s. 47, O. XXI, r. 58**—*Persons sued in representative capacity, whether party to suit—Execution of decree—Attachment—Objection by judgment-debtor, dismissal of—Title suit, whether maintainable.*

A person against whom a decree is obtained in a representative capacity is a party to the suit within the meaning of s. 47 of the C. P. C. Where in execution of the decree obtained against such a person, he prefers an objection to the attachment of certain property and the objection is dismissed, he is not competent to maintain a regular suit to establish his title to the property. **O** SANTU CHAMAR *v.* ARJUN MISRA **542**

Civil Procedure Code—1908—contd.

——— **s. 48 (1) (b)**—*Execution of decree—"Subsequent order", whether must be by Court which passed decree—Order directing payment by instalments passed by Execution Court, whether extends limitation.*

The words "any subsequent order" in s. 48 (1) (*b*) of the C. P. C., mean any order made by a competent Court and not necessarily by the Court which passed the decree. An order made by an Execution Court that the amount recoverable under a decree should be recovered by instalments falls within the purview of a subsequent order contemplated by s. 48 (1) (*b*) and operates to extend limitation. **B** D. S. APTE *v.* TIRMAL HANMUNT SAVNUR, 27 Bom. L. R. 961; 49 B. 695; (1925) A. I. R. (B.) 503 **949**

——— **s. 53**—*Hindu Law—Decree passed against father, whether can be enforced against ancestral property in the hands of son.*

Under s 53 of the C. P. C. property in the hands of a son or other descendant, which is liable under the Hindu Law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed must, for the purpose of execution, be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Where a decree for costs is passed against a Hindu father who honestly resists a claim to certain property brought against him by a person who might have failed to establish his right, the decree might be enforced after the death of the judgment-debtor against ancestral property in the hands of his son by virtue of the provisions of s. 53 of the C. P. C. **A** RUDRA PRATAP SINGH *v.* SHARDA MAHESH PRASAD SINGH, 23 A. L. J. 467; L. R. 6 A. 321 Civ.; (1925) A. I. R. (A.) 471 **200**

——— **s. 60 (c)**—*Agriculturist becoming* Akali, *whether ceases to be agriculturist.*

The mere fact that an agriculturist has turned an *Akali* does not necessarily show that he has ceased to be an agriculturist. **L** SURIAN SINGH *v.* MULA SINGH, (1925) A. I. R. (L.) 331 **543**

——— **s. 65**—*Execution of decree—Sale of property under two decrees—Prior sale set aside—Subsequent sale, confirmation of, effect of.*

Under s. 65 of the C. P. C. property sold in execution of a decree must be deemed to have been vested in the purchaser from the time when it was sold and not from the time when the sale becomes absolute. But until the sale becomes absolute the property cannot be said to be vested in the purchaser, who has only an inchoate right which becomes permanent only when the sale is made absolute.

Certain property belonging to a judgment-debtor was attached in execution of a decree passed by Court *T* and was subsequently attached in execution of a decree passed by Court *P*. It was sold in execution of the decree of Court *T* and a few days afterwards it was sold in execution of the decree of Court *P*. The sale by Court *T* was set aside under a compromise arrived at between the parties to that sale and was, therefore, never confirmed. The sale by Court *P* was duly confirmed:

Held, (1) that when the Court *T* sold the property the purchaser merely had a right to get the sale confirmed and that until he obtained a sale certificate the property would not vest in him and that similarly when the Court *P* sold the same property the purchaser at that sale obtained only an inchoate right which would fail to materialize if the previous sale in the Court *T* was confirmed;

(2) that when the *T* sale was set aside the right of the purchaser from the Court *P* which had been in the meanwhile in suspense revived and that the sale having been confirmed his title dated back to the date of the sale. **B** VISHNU SHANKAR JOSHI *v.* YUSSUF NUR MUHAMMAD, 27 Bom. L. R. 963; (1925) A. I. R (B.) 483 **962**

——— **s. 89, O. XXIII, r. 3, Sch. II**—Appeal—Arbitration, reference to, without intervention of Court, pending appeal—Award, validity of—Award, whether can be treated as adjustment of suit. *See* C. P. C., 1908, O. XXIII, r. 3 **768**

——— **s. 91, O. I, r. 8**—*Suit for declaration of public right—Advocate-General's consent, whether necessary—Public right—Immemorial user—Lost grant—Presumption—Property obtained on undertaking that it would be used by public—Absolute title, whether can be set up—Estoppel.*

Section 91 of the C. P. C. does not take away a right to sue which may exist independently of its provisions. The section does not control or restrict the provisions of O. I, r. 8 of the C. P. C.

Where a person takes a lease of certain property on the distinct understanding that the property would be used for the benefit of the public and the undertaking forms a part of the consideration for the lease he or his successors cannot be subsequently allowed to turn round and to say that they have an absolute interest in the property leased and that the public has no right to use it for the purpose mentioned in the lease.

Where it is found that the people of a village have been using a *ghat* from time immemorial a presumption may be made that they have a right to use the *ghat* based on a lost grant. **C** PEARY LAL MULICK *v.* SURENDRA NATH **505**

——— **s. 92**—*Partition—Property set aside for feeding the poor—Trust, whether created—Property alienated by trustee—Suit to recover possession of property from transferee, whether maintainable—Procedure.*

On a partition taking place between the members of a joint family certain property was set apart for *vanabhojanam dharmam* and it was provided in the partition deed that they should remain with one *M* for the purpose of carrying out the object of the charity. *M* mortgaged the property set apart for charity and the mortgagee brought a suit on his mortgage and purchased the property himself in execution of the decree. Plaintiffs who were parties to the partition deed brought a suit to recover possession of the endowed property on the ground that the mortgage by *M* and the subsequent sale were not binding on the charity:

Held, (1) that the properties having been set apart for *vanabhojanam dharamam*, *i. e.*, for the feeding of the poor, they constituted a public charity;

(2) that *M* was the trustee of the endowed properties;

(3) that if *M* had mismanaged the trust he was liable to be removed by the Court in a suit properly framed for that purpose under s. 92 of the C. P. C. but that until he was so removed the plaintiffs had no *locus standi* to sue to recover possession of the property. **M** MUTHUSWAMI NAIDU *v.* RAYULU NAIDU, 21 L. W. 525; (1925) A. I. R. (M.) 689 **375**

——— **ss. 92, 9**—Religious Endowments Act, 1863, s. 14—Specific Relief Act, 1877, s. 42—Religious endowment—Suit for declaration that *mutwalli* is liable to dismissal and has been dismissed for

neglect of duty, nature of—Procedure. *See* RELIGIOUS ENDOWMENTS ACT, 1863, s 14 **1035**

——— **s. 96, O. XXIII, r. 3**—*Decree passed on award of Debt Conciliation Board, nature of—Forfeiture clause—Court, power of, to grant relief—Consent-decree, whether can be varied.*

A decree passed on an award by the Debt Conciliation Board is not a consent-decree, but a decree based on an award, and an Executing Court cannot go behind it in order to grant equitable relief to the judgment-debtor against a forfeiture clause in the decree.

A consent-decree cannot be varied except by consent of the parties. **N** GANGARAM *v.* GANPAT RAO, (1925) A. I. R. (N.) 361 **135**

——— **s. 96 (3)**—*Parties agreeing to be bound by decision of Court after local inspection, effect of—Appeal, whether lies.*

Plaintiff brought a suit that a certain spout opened by the defendant towards his court-yard should be closed. The defence was that the spout was an old one and not a recent one and that it threw water on the defendant's own land. During the progress of the suit the parties made statements before the Court that they did not want to produce any evidence whatsoever and that whatever the Court after making a local inspection decided, that would be acceptable to both the parties. The Court made a local inspection of the place and as a result of such inspection decreed the suit:

Held, that the matter in dispute having been left entirely to the decision of the Court the parties could not resile from their agreement and were bound by the decision whether it was, as a matter of fact, right or wrong, and that the decision must be treated to have been one based on a compromise between the parties and was not open to appeal. **A** SITA RAM *v.* PEARE, 23 A. L. J. 525; (1925) A. I. R. (A.) 558; L. R. 6 A. 503 Civ. **611**

——— **s. 98**—Appeal—Difference of opinion—Procedure. *See* APPEAL **637**

——— **s. 99.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 35 **661**

——— **s. 99, O. XXXII, r. 3 (4)**—*Minor defendant—Guardian* ad litem *appointed by Court—Notice to minor, absence of, effect of—Irregularity—Decree, whether binding on minor.*

Defendant, who was a mortgagee, brought a suit to enforce the mortgage against the plaintiffs, sons of the mortgagor, who were minors at the date of the institution of the suit. He named the plaintiffs' mother as their guardian *ad litem*. A notice was served on the mother personally but she paid no attention to it and the defendant then applied for the appointment of the Court *Nazir* as guardian *ad litem* of the minors, and the Court proceeded to appoint the *Nazir* guardian *ad litem*, but no fresh notice was served either upon the minors or upon their mother. The *Nazir* tried to communicate with the mother but she gave him no help in the matter and the suit was eventually decreed. The mortgaged property was sold in execution of the decree and was purchased by the defendant. On one of the plaintiffs attaining majority they instituted a suit to set aside the sale on the ground that they had not been properly represented in the mortgage suit:

Held, (1) that the failure to issue the notice required by sub-r. (4) of r. 3 of O. XXXII of the C. P. C., was a mere irregularity which was covered by s. 99 of the C. P. C., and that no prejudice having been caused to the plaintiffs, it did not affect the validity of the decree or the sale which took place thereunder;

(2) that inasmuch as effective defence to the mortgage suit could have been put up by the Court *Nazir* who was appointed guardian *ad litem* of the plaintiffs in the mortgage suit the decree and the sale which took place thereunder were binding upon the minors. **A** SULTAN *v.* HARDHIYAN, L. R. 6 A. 323 Civ.; (1925) A. I. R. (A.) 548 **294**

——— **ss. 100, 101.** *See* OUDH RENT ACT, 1886, s. 119 **65**

——— **s. 102.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ART. 31 **876**

——— **s. 102**—*Suit to recover document affecting land, whether land suit—Appeal, second, whether lies.*

A document though it may be evidence of an interest in land is not itself an interest in land and a suit for recovery of a document referring to or affecting land cannot be regarded as a land suit.

Where the value of such a suit is below Rs. 500 a second appeal is not competent under the provisions of s. 102 of the C. P. C. **L** ADU RAM *v.* ASA RAM, (1925) A. I. R. (L.) 335; 6 L. 33 **574**

——— **s. 104, O. VII, r. 10**—*Order directing return of plaint for presentation to proper Court—Appeal, second, whether lies.*

Under O. XLIII, r. 1 (*a*) of the C. P C., an appeal lies from an order directing a plaint to be returned for presentation to the proper Court. From the order of the Appellate Court, however, no second appeal is competent in such a case. **B** NILKANTH VASUDEO SAMANT *v.* BALWANT PANDURANG SAMANT, 27 Bom. L. R. 635; (1925) A. I. R. (B.) 431 **753**

——— **s. 104, Sch. II, para. 21 (2)**—*Arbitration without intervention of Court—Order filing award—Decree—Appeal, whether lies.*

An appeal is allowed under s. 104 (1) (*f*) of the C. P. C. from an order filing or refusing to file an award but no second appeal is allowed from an order passed on such an application. On the other hand, under para. 21 (2) of Sch. II to the C. P. C., when an award has been filed and a decree is made in accordance with it no appeal lies from such decree except in so far as it is in variance with the award. The right of appeal given by s. 104 (1) (*f*), however, is not taken away by the fact that a decree has subsequently been passed in accordance with the award.

Where instead of passing an order directing the award to be filed and then proceeding to pass a decree upon it in accordance with the law the Court disposes of the whole case by one order, an appeal against the order is in substance an appeal against an order directing the award to be filed and is competent under s. 104 (1) (*f*) of the C. P. C. **A** JAGAT PANDE *v.* SARWAN PONDE. 23 A. L. J. 440; L. R. 6 A. 350 Civ.; (1925) A. I. R. (A.) 404 **76**

——— **s. 104 (1) (f), Sch. II, paras. 20, 21**—*Arbitration without intervention of Court—Application to file award—Objections overruled—Decree in accordance with award—Appeal, whether lies.*

An appeal is competent under s. 104 (1) (*f*) of the C. P. C. from an order filing an award, though there is no appeal from a decree passed in accordance with the award. This right of appeal conferred by the Legislature cannot be defeated by the mere fact that no express order filing the award is made.

In a proceeding to file an award made by arbitrators without the intervention of the Court, the Court

dismissed the objections preferred by the defendant and passed a decree in accordance with the award;

Held, that the decision of the Court dismissing the objections amounted to an order filing the award and was subject to appeal under the provisions of s. 104 (1) (*f*) of the C. P. C. L SHANKAR DAS-NAND LAL *v.* AMIR CHAND-LAKSHMI DAS, (1925) A. I. R. (L.) 321 **533**

——— **s. 104 (2), O. XXI, rr. 89, 92, O. XLIII, r. 1 (j)**—*Execution of decree—Sale set aside on deposit—Appeal, second, whether lies.*

Where an execution sale is set aside under O. XXI, r. 92 of the C. P. C., on an application made under r. 89 of the order, the order setting aside the sale is not open to second appeal. O IFTIKAR HAIDER *v.* IKRAM FATIMA, 2 O. W. N. 376; 12 O. L. J. 336; (1925) A. I. R. (O.) 622 **559**

——— **s. 105, O. IX, r. 13**—Ex parte *decree, order setting aside—Appeal—Order, whether can be questioned.*

The erroneous order referred to in s. 105 of the C. P. C., must be an order affecting the decision of the case on its merits.

An erroneous order accepting an application to set aside an *ex parte* decree cannot be challenged in an appeal from the final decree passed in the suit, except in so far as it has affected the decision of the case on the merits. L SUNDAR SINGH *v.* NIGHAIYA, 6 L. 94; (1925) A. I. R. (L.) 466 **920**

——— **ss. 105, 107, O. XLI, r. 20**—*Appeal—Appellate Court's power to implead party who was not party to suit—Procedure—Order directing a person to be impleaded as party—Appeal, whether lies.*

Under O. XLI, r. 20, of the C. P. C., an Appellate Court has power to implead in an appeal a person who was a party to the suit but who has not been made a party to the appeal. Under that rule an Appellate Court has no power to implead a person as party to the appeal who was no party to the original suit at all.

Where an Appellate Court is of opinion that a certain person was a necessary party and ought to have been impleaded in the suit, the proper procedure for the Court is to remand the case to the Court of first instance with a direction that that Court should implead the person whose presence on the record is necessary and then proceed to dispose of the case.

An order made by an Appellate Court directing that a certain person should be impleaded as a party to the suit is not open to appeal but can be challenged in an appeal filed from the order finally passed by the lower Appellate Court on the merits of the appeal.

In answer to a suit for accounts the defendants pleaded that the transactions in dispute were entered into by them with one *C* and not with the plaintiff and that they had settled the accounts with *C*. They contended that *C* should be impleaded as a party to the suit. The Trial Court after taking evidence came to conclusion that *C* had nothing to do with the transactions in dispute and that the defendants had divided the sale-proceeds of those transactions between themselves and *C* in order to defraud the plaintiff. It refused to implead *C* as a party to the suit and eventually made a decree in favour of the plaintiff. On appeal by the defendants the District Judge directed that *C* should be impleaded as a party to the suit:

Held, that if the defendants had acted collusively with *C*, they could not complain if a decree was passed against them on a finding that *C* had no concern with the dispute at all and that, on the other hand, if the lower Appellate Court had come to the finding that the defendants in the honest belief that the only person with whom they had to deal was *C*, had settled accounts with him and had paid over the amount due to him then the plaintiff would have had no case against the defendants and that, therefore, the appeal ought to have been disposed of by the lower Appellate Court on the merits and it should not have directed that *C* should be impleaded as a party to the suit which would involve a new trial of the suit altogether. A SHIAM LAL-JOTI PRASAD *v.* DHANPAT RAI, L. R. 6 A. 386 Civ.; 23 A. L. J. 757 **493**

——— **s. 109**—*Cross-claims for damages—Award, suit to set aside—Valuation of suit below ten thousand rupees—Appeal to Privy Council—Cross-claim for damages, whether property involved in suit—Leave, whether can be granted.*

Petitioner entered into a contract for sale of goods with the respondents and the contract contained a clause that all disputes arising out of the sale should be settled by arbitration. A dispute arose and was referred to arbitration and an *ex parte* award was made but was set aside by the Court. Against the order setting aside the award respondents preferred an appeal. In the meantime petitioner filed a suit claiming the damages which he had claimed in the arbitration but the suit was stayed on the application of the respondents. Petitioner appealed against the order of stay. Respondents' appeal against the order setting aside the award and petitioner's appeal against the stay order were both eventually dismissed. The parties again betook themselves to arbitration and as the arbitrators were unable to agree *ex parte* awards were made one in favour of the petitioner for Rs. 81,000 and the other in favour of the respondents for Rs. 3,900. The High Court on the application of the respondents set aside the award in favour of the petitioner. The petitioner then filed a suit to set aside the award in favour of the respondents which was decreed but was dismissed on appeal. Against this order of dismissal petitioner applied for leave to appeal to the Privy Council which was refused. Petitioner then made an application to the Privy Council for special leave to appeal:

Held, (1) that the case did not fall under sub-s. (*c*) of s. 109 of the C. P. C., inasmuch as the High Court had refused to certify it under that sub-section;

(2) that the case did not fall under sub-s. (*a*) of s. 109 of the C. P. C., inasmuch as the subject-matter of the suit was only Rs. 3,900;

(3) that the case did not fall within the purview of sub-s. (*b*) of s. 109 of the C. P. C., inasmuch as the petitioner's right to recover damages against the respondent was not consequential on the result of the present suit and was too remote to be entitled to the description of being property indirectly involved in the issue of the suit within the meaning of sub-s. (*b*) of s. 109 and that consequently petitioner was not entitled to come up in appeal to the Privy Council. P C UDOYCHAND PANNALAL *v.* P. E. GUZDAR & Co., 27 Bom. L. R. 867; (1925) A. I. R. (P. C.) 159; 49 M. L. J. 20; 41 C. L. J. 623; 52 C. 650; 22 L. W. 255 (P. C.) **445**

——— **s. 109, O. XLI, r. 23**—*Remand, order of, whether final—Appeal to Privy Council, whether lies.*

Civil Procedure Code—1908—contd.

An order of remand passed by an Appellate Court under O. XLI, r. 23 of the C. P. C., is not a "final order" within the meaning of s. 109 of the Code, and no appeal, therefore, lies against such an order to the Privy Council. N FAKRUDDIN v. FARID KHAN, (1925) A. I. R. (N.) 349 **69**

——— **ss. 109, 110, O. XLIV, r. 1**—*Application for leave to appeal as pauper, rejection of—Order, whether final—Application for leave to appeal to His Majesty in Council—Substantial question of law.*

An application for leave to appeal as a pauper was dismissed on the ground that the application did not satisfy the requirements of the proviso to r. 1 of O. XLIV of the C. P. C. The applicant failed to pay Court-fees on the appeal and the decree of the lower Court was consequently confirmed. The applicant then applied for leave to appeal to His Majesty in Council against the order rejecting his application for leave to appeal as a pauper:

Held, (1) that the order rejecting the application for leave to appeal as a pauper was not a final order inasmuch as it still left to the applicant the option to file an appeal on payment of Court-fees;

(2) that no substantial question of law arose on the application and that the decree of the lower Court having been affirmed leave to appeal to His Majesty in Council could not be granted O SUNDAR BAHU v. MAHANDEI, 2 O. W. N. 393; (1925) A. I. R. (O.) 548 **575**

——— **s. 110**—*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Transfer of decree—Application for substitution made to Court to which decree transferred, whether according to law—Appeal to His Majesty in Council—Substantial question of law.*

The question whether an application for substitution made in the course of execution proceedings to a Court to which execution was transferred is an application according to law within the meaning of cl. (5) of Art. 182 of Sch. I to the Limitation Act, is a substantial question of law within the meaning of s. 110 of the C. P. C. O JANG BAHADUR v. BANK OF UPPER INDIA LD., LUCKNOW **552**

——— **s. 110**—*Succession Act (X of 1865), s. 54—Will—Signature of legatee not made as attesting witness—Appeal to His Majesty in Council—Substantial question of law.*

In the case of a Will to which the provisions of s. 54 of the Succession Act were applicable the Trial Court arrived at the finding that the signatures which certain legatees had made on the Will were not intended to attest the execution of the Will. On appeal, the Appellate Court agreed with this finding and affirmed the decree. On an application for leave to appeal to His Majesty in Council:

Held, that the matter did not involve any substantial question of law within the meaning of s. 110 of the C. P. C., and that consequently leave could not be granted. O SHIAM SUNDAR SINGH v. JAGANNATH SINGH, 2 O. W. N. 394; (1925) A. I. R. (O.) 541 **579**

——— **s. 115**—Ex parte *decree, order setting aside—Revision—Grounds for setting aside* ex parte *decree—Power of Court.*

An order setting aside an *ex parte* decree is open to revision by the High Court under s. 115 of the C. P. C N VISHWANATH v. VAIJNATH, (1925) A. I. R. (N.) 356 **46**

——— **s. 115, O. XXXIII, r. 5**—*Application for leave to sue as pauper, rejection of—Revision, whether lies.*

Civil Procedure Code—1908—contd.

An order rejecting an application to sue as a pauper amounts to a decision of a case within the meaning of s. 115 of the C. P. C., and is subject to revision by the High Court.

Where, however, a Court has jurisdiction to determine a question and determines that question, it cannot be said to have acted illegally or with material irregularity merely because it has come to an erroneous decision. N RAMACHANDRA v. GAJRABAI, (1925) A. I. R. (N.) 343 **157**

——— **s. 115**—*Revision—Review, application for rejection of—Revision, whether lies.*

An order rejecting an application for review made on the ground of discovery of new and important evidence does not fall within the scope of s. 115 of the C. P. C., and is not open to revision. O SHEO CHARAN DAS v. JAGWANT KAUR, 2 O. W. N. 419; 12 O. L. J. 443 (1925) A. I. R. (O.) 594 **582**

——— **s. 115**—*Revision—Want of expression in stating finding—Defect of jurisdiction.*

Where the defect in the lower Court's judgment is only of expression and of want of experience it cannot be said that there is a defect of jurisdiction within the meaning of s. 115 of the C. P. C. O JAGAN MOHAN DAS v. AHMAD RAZA **577**

——— **s. 144, O. XXII, r. 4**—Appeal—Death of respondent — Substitution, absence of — Appeal decree, effect of—Restitution—Objection to appellate decree on the ground of abatement, whether can be taken in restitution proceedings. *See* C. P. C., 1908, O. XXII, r. 4 **865**

——— **s. 145**—*Surety bond, construction of—Operative part and recitals, conflict between—Rule, applicable.*

Where both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.

The respondent became surety for the production of the judgment-debtor before the Court on a particular date or at any time when he was called on to do so. The bond executed by him contained a recital that the bond was required for the appearance of the judgment-debtor at the execution proceedings on the date mentioned or for further orders. Respondent produced the judgment-debtor before the Court on the date mentioned in the bond and no order was made for his further appearance:

Held, that the respondent had fulfilled the condition of the bond by producing the judgment-debtor on the date mentioned in the bond and that the mention of execution proceedings or for further orders in the recitals of the bond did not lay any further obligation upon the surety than that which was described in the operative part. R T. HUSSAIN v. CHIN CHONG, (1925) A. I. R. (R.) 209; 4 Bur. L. J. 31; 3 R. 53 **910**

——— **s. 148, O. XXI, r. 90**—*Execution of decree—Sale, application to set aside—Compromise—Time fixed for payment, whether can be extended.*

When in the course of proceedings taken by a judgment-debtor to set aside an execution sale, a compromise is arrived at between the decree-holder, the judgment-debtor and the auction-purchaser that on payment of the judgment-debt within a prescribed period the sale shall stand cancelled, while upon failure to make the payment within the period fixed the sale shall stand confirmed, time must be taken to have been made of the essence of the contract and

the Court has no power to extend the time fixed for payment except by consent of all the parties concerned. **Pat** HANSRAJ SANGECHI *v.* JOGESWAR PRASAD, 6 P. L. T. 511; (1925) A. I. R. (Pat.) 691 **1020**

——— **s. 151.** *See* PARTITION SUIT **94**

——— **s. 151**—*Criminal Procedure Code (Act V of 1898), s. 476—Forgery—Finding by Trial Court—Appeal pending in High Court—Proceeding under s. 476, Cr. P. C., whether can be started—Stay of proceedings—Inherent power of Court.*

Petitioners who were defendants in a civil suit for the recovery of money pleaded payment and produced a receipt which was held by the Trial Court to be a forgery The suit was decreed and the Court issued a notice to the petitioners to show cause why they should not be prosecuted for producing a forged document in evidence. Petitioners lodged an appeal to the High Court against the decree and the appeal was admitted. They then made an application under s. 151 of the C. P. C., to the High Court to stay the proceedings pending in the Trial Court under s. 476 of the Cr. P. C.:

Held, (1) that inasmuch as the question whether the receipt was a forged one or not had to be finally decided by the High Court, it was not proper that proceedings under s. 476 of the Cr. P. C. should be taken against the petitioners before the decision of the appeal;

(2) that as the proceedings under s. 476 of the Cr. P. C. were pending in a Civil Court the High Court had jurisdiction in the exercise of its inherent power under s. 151 of the C. P. C. to stay the proceedings. **L** HARNAM SINGH *v.* ATRI, (1925) A. I. R. (L.) 323; 26 Cr. L. J. 1166 **526**

——— **s. 151**—*Decree for delivery of possession—Execution issued—Appeal against decree—Review, power of—Trial Court, jurisdiction of—Possession, delivery of, effect of.*

After a writ for delivery of possession of property under a decree had been issued by the Court, the judgment-debtor applied for stay of the writ, stating that he had preferred an appeal against the decree. The Court made an order re-calling the writ. Possession was, however, delivered to the decree-holder before the second order could be conveyed to the peon delivering possession:

Held, (1) that the Court had jurisdiction to review its previous order and re-call the writ;

(2) that the writ having been re-called before delivery of possession, possession delivered under it was of no effect. **C** RASH BEHARI MONDAL *v.* HEMANTA KUMAR GHOSE, 41 C. L. J. 349; (1925) A. I. R. (C.) 1023 **921**

——— **s. 151**—*Inherent powers of Courts, when can be invoked.*

When certain questions have been removed from the jurisdiction of the Court, they cannot be brought within its jurisdiction on the ground that the Court has inherent power to do what justice requires for the parties before it. **N** NIZAMUDDIN *v.* JUMMA **693**

——— **ss. 151, 152**—*Practice—Variation between judgment and decree—Amendment of decree—Appellate Court, powers of—Omission to file memo. of objections, effect of.*

Where there has been an appeal against a decree any order to amend the decree so as to make it agree with the judgment should be passed by the Appellate Court.

Where a decree of the Court of first instance which is not in accordance with the judgment is confirmed in appeal, the Appellate Court has power even after disposal of the appeal to amend the decree so as to bring it in accordance with the judgment.

The only executable decree is that of the Appellate Court which incorporates the decree of the lower Court when it confirms it. Although the mistake might have been corrected by means of a memo. of objections at the time when the Appellate Court had cognizance of the case, the omission to do so will not have the effect of taking away the plaintiff's inherent right to have a decree in accordance with the judgment passed in his favour. **M** CHANGANATH KUTTAPPA NAIR *v.* POOPPIL, (1925) M W. N. 209; (1925) A. I. R. (M.) 735; 49 M. L. J. 385 **828**

——— **s. 152**—*Amendment of decree—Appeal, dismissal of, for default, effect of—Decree for money, satisfaction of—Court, power of, to amend decree.*

Where an appeal is dismissed in default, there is no decree of the Appellate Court in which the decree of the Trial Court merges. In such a case the Trial Court is not deprived of jurisdiction to amend the decree.

A Court is not bound to amend a decree under s. 152 of the C. P. C., and where a Court acts under the erroneous impression that it cannot refuse an application for amendment which has been made to it, it fails to apply its mind to the case correctly and acts with material irregularity in the exercise of its jurisdiction, inasmuch as it fails to exercise any discretion at all.

Per *Daniels, J.*—When a decree for money has been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment of the decree under s. 152 of the C. P. C. **A** PITAMLAL *v.* BALWANT SINGH, 23 A. L. J. 518; L. R. 6 A. 423 Civ.; (1925) A. I. R. (A.) 556 **396**

——— **O. I, r. 3, s. 99**—*Mortgage suit—Adverse claim of person not privy to mortgage, whether can be determined—Misjoinder—Irregularity—Appeal—Decree, whether can be set aside.*

A suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagee are sought to be investigated, is open to objection on account of misjoinder and inconvenience. The question, however, is not one of jurisdiction and at most the misjoinder is an irregularity or inconvenience, and where there has been no prejudice by reason of the misjoinder the irregularity, if any, is not such as would justify an Appellate Court in setting aside the decree. **C** BHUBAN MOHAN GHOSE *v.* CO-OPERATIVE HINDUSTAN BANK, 29 C W. N. 784; (1925) A. I. R. (C.) 973 **866**

——— **O. I, r. 8**—*Club, nature of—Debts incurred by members of club—Liability of members.*

A club is not a corporate body and has no existence in the eye of the law and is, therefore, incapable of contracting or entering into any legal relations with other persons and bodies.

The only persons who can be held liable for the debts owing by a club, which is not registered as a body politic, are such officials of the club who had actually contracted them and possibly such directing bodies or such members of the club as may be shown to have authorized or approved of the contracts, and members of the club who are not personally liable for such contract cannot be made liable by the application of O. I, r. 8, of the C. P. C. **S** SCOTT OLDFIELD *v.* CO-OPERATIVE STORES, 18 S. L. R. 93; (1925) A. I. R. (S.) 244 **784**

Civil Procedure Code—1908—contd.

——— **O. I, r. 10, O. XLI**—*Appeal in name of minor after attaining majority—Mistake* bona fide—*Procedure—Amendment—Guardian* ad litem, *appointment of, effect of.*

If a suit or appeal is presented by a next friend in the name of a minor under a *bona fide* mistake that he is still a minor when the suit or appeal is filed, the suit or appeal is not liable to be dismissed but the plaint or appeal should be allowed to be amended in order to show the plaintiff or appellant as major by striking out the name of the next friend.

The appointment of a guardian *ad litem* once made enures for the whole *lis* in all its ramifications and continues to subsist, whether in the Court of first instance or in the Court of Appeal, unless the guardian takes the necessary steps to have himself discharged from the position which has been put upon him by the Court.

The law gives a large latitude to a litigant who has recently attained majority in the matter of admitting within time an appeal in which he was described as a minor even after he had attained majority. An inadvertent ommission to sign a power-of-attorney given to an agent is an irregularity which is cured by subsequent signing. **N** DATTU *v.* BHANSINGH **235**

——— **O. II, r. 2**—*Agra Tenancy Act (II of 1901), s. 163, Sch. IV—Suit for profits filed on day on which profits for last year have become payable—Claim with regard to profits of last year not included—Subsequent suit for recovery of profits, whether barred.*

The cause of action for a suit to recover a share of the profits accrues on the day on which the profits become payable or divisible. Where, therefore, a suit is brought to recover the plaintiff's share of the profits in respect of certain years on a date on which the profits for the last year have also become payable, but a claim with regard to those profits is not included in the suit, a subsequent suit for the recovery of such profits would be barred under the provisions of O. II, r. 2, of the C. P. C. **A** GIRDHARI LAL *v.* KHARE PRASAD, L. R. 6 A. 371 Civ. **530**

——— **O. II, r. 2**—*Suit for possession—Subsequent suit to recover purchase-money, whether barred.*

A suit for refund of purchase-money from a vendor on the ground that he had no title to the property conveyed is not barred by a previous suit against him for possession of the property conveyed. **N** RAMDHAN *v.* PURUSHOTTAM **699**

——— **O. III, r. 4 (3)**—*General Clauses Act (X of 1897), s. 8 (2)—Government of India Act, 1919 (9 and 10, Geo. V, Ch. 101), ss. 45, 47—Advocate, whether bound to file* vakalatnama—*Reference to Indian High Courts Act, meaning of.*

An Advocate of the Patna High Court is exempted under O. III, r. 4 (3) of the C. P. C. from presenting any document empowering him to act on behalf of his client.

By virtue of the provisions of ss. 45 and 47 of the Government of India Act of 1919 any reference in an Act of the Indian Legislature to the Indian High Courts Act of 1861 must now be taken as a reference to the Government of India Act. **Pat** GOBINDKUER *v.* JAI NARAIN CHOUDHRY, 6 P. L. T. 380; (1925) Pat. 233; (1925) A. I. R. (Pat) 614 **91**

——— **O. V, rr. 12, 17**—Service of summons, mode of—Substituted service, when to be effected. *See* C. P. C., 1908, O. IX, r. 13 **508**

Civil Procedure Code—1908—contd

——— **O. V, r. 17**—*Service of summons—Duty of plaintiff—Personal service, mode of—Substituted service, when can be permitted.*

A plaintiff must use reasonable diligence to ascertain the whereabouts of the defendant in order to effect personal service of summonses upon him, and where, according to the plaintiff himself, the defendant resides at more places than one the plaintiff cannot be held to have used reasonable diligence to discover the defendant's whereabouts if he has not made enquiries for the defendant at every one of such places. The fact that the plaintiff has called more than once at one of such places and has failed to find the defendant will not entitle him to take advantage of the provisions for substituted service.

Where a defendant refuses to accept service it is not sufficient compliance with the provisions of O. V, r. 17, of the C. P. C., to affix a copy of the summons on the outer door of the premises in which the defendant happens to be at the time, unless the premises are such that the defendant ordinarily resides or carries on business or personally works for gain in the premises. **C** BHOWANIDAS RAMGOBIND *v.* PANNACHAND LUCHMIPAT, 52 C. 453; (1925) A. I. R. (C.) 801 **929**

——— **O. VI, r. 16**—*Evidence Act (I of 1872), s. 92, proviso (3)—Pleadings, striking out of—Duty of Court—Suit to recover amount of cheque—Oral agreement that cheque would not be presented in a certain event, whether admissible.*

The jurisdiction to strike out pleadings which is given to the Court by O. VI, r. 16 of the C. P. C., is one which ought to be exercised with great care and caution. A written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations which the defendant has put upon the record are such as cannot afford a defence to the action with the result that if they are allowed to stay upon the record the trial of the suit must be unnecessarily delayed.

The Court should not, as a rule, decide a point as to the relevancy of matters on an application to strike out a pleading.

Oral evidence is admissible to prove a contemporaneous verbal arrangement, upon the faith of which an instrument was handed over that it would not be effective or operative until a certain condition has been fulfilled.

In answer to a suit to recover the amount of certain cheques, it was pleaded by the defendant that when the cheques were handed over to the plaintiff it was orally agreed between the parties that in the event of a certain dispute being settled in a certain manner the cheques would not be presented for payment. On an application by the plaintiff to strike out this plea, the Court held that evidence of the oral agreement which the defendant alleged would not be admissible under s. 92 of the Evidence Act and that consequently the plea must be struck out:

Held, that as the pleadings stood the allegation of the defendant was susceptible of the meaning that when the defendant handed over the cheques to the plaintiff, it was agreed between them that the cheques should not be presented for payment until a dispute which had arisen between the parties should be settled in the manner which was stated in the written statement and that in this view of the case evidence of the oral agreement might be admissible under proviso (3) to s. 92 of the Evidence Act and that, therefore, the

order striking out the plea could not be upheld. C ANDERSON KIRKWOOD TENANT v. WALTER MITCHELL 29 C. W. N. 670; (1925) A. I. R. (C.) 860 **435**

——— **O. VI, r. 17**—*Amendment of pleadings, power of, extent of.*

The language of r. 17 of O. VI of the C. P. C. gives wide powers of amendment and these powers should always be liberally exercised. M BOMMADEVARA SATYANARAYANA VARA PRASADA RAO BAHADUR GARU v. SANKARAHANAPALLI VENKATA TIRUMALA MANAVALLASWAMI, 48 M. L. J. 489; (1925) A. I. R. (M.) 794; 22 L. W. 318 **65**

——— **O. VI, r. 17**—Contract for sale of goods—Breach—Re-sale two months after—Suit for damages on the basis of re-sale—Suit dismissed—Amendment application of plaint on basis of difference between contract and market rates. *See* CONTRACT ACT, 1872, s. 107 **571**

——— **O. VII, r. 10**—*Finding that Court has no jurisdiction to try suit—Return of plaint—Procedure—Court, whether can try suit on merits.*

Where a Court decides that it has no jurisdiction to entertain a suit, the proper course for it is to return the plaint for presentation to the proper Court, and not to proceed to decide the suit on the merits on the other issues. O SHUKRU v. FARZAND ALI **991**

——— **O. VIII, rr. 1, 9, 10, O. IX, rr. 6, 13, O. XLIII, r. 1 (b)**—*Defendant not specifically required to file written statement—Absence of defendant on first hearing—Procedure—Judgment pronounced against defendant—Application to set aside decree, whether maintainable.*

Rule 10 of O. VIII of the C. P. C. applies only to a specific requirement by the Court to the filing of a written statement and not to a general direction in the summons that a written statement may be filed.

Where a defendant who has not been specifically required either under r. 1 or under r. 9 of O. VIII, of the C. P. C., to file a written statement is not present on the first day of hearing, the Court ought to proceed under O. IX, r. 6, of the Code and not under O. VIII, r. 10. Where in such a case the Court proceeds under r. 10 of O. VIII and passes judgment against the defendant, the defendant is entitled to maintain an application under r. 13 of O. IX to set aside the decree passed against him. O DHIRAJ KUMAR v. SARJU NARAIN SINGH, 2 O. W. N. 391; 12 O. L. J. 532; (1925) A. I. R. (O.) 567 **540**

——— **O. VIII, r. 9**—*Award after suit, set up by defendant—Amendment of written statement, whether allowable—Court-fee, whether payable.*

Where after the filing of the plaint and the written statement, the parties referred the matter to arbitration without the intervention of the Court, and an award was properly made, the defendant set up the award as an adjustment of the suit under O. XXIII, r. 3 of the C. P. C., and further claimed a specific sum as due to him under the award, it is open to the Court to direct the defendant to amend his written statement and to plead the award as an adjustment so as to enable the Court to raise and try an issue on the point and the Court can call upon the defendant to pay Court-fees on the specific sum claimed by him S BOLMAL CHELLARAM v. JHAMANDAS KISHARAM, 18 S. L. R. 111; (1925) A. I. R. (S.) 266 **61**

——— **O. IX, rr. 8, 9, O. XI, rr. 12, 21, O. XLIII, r. 1 (f)**—*Order directing discovery of documents, failure to comply with—Dismissal of suit—Restoration—Appeal—Remedy, proper.*

During the pendency of a suit the plaintiff was directed by an order of Court passed under r. 12 of O. XI of the C. P. C. to make discovery on oath regarding documents which were or were not in his possession relating to the matters in question. The plaintiff failed to comply with this direction and failed to put in appearance on the date fixed with the result that the suit was dismissed for want of prosecution under r. 21 of O. XI. This order was subsequently set aside by the Court purporting to act under O. IX, r. 9 of the Code and holding that the dismissal order was really one passed under r. 8 of O. IX:

Held, that the order of dismissal was one passed under r. 21 of O. XI of the C. P. C., and that the provisions of r. 9 of O. IX of the Code were inapplicable to the case, inasmuch as the order of dismissal was appealable under O. XLIII, r. 1 (*f*) of the Code and the plaintiff's remedy was either by way of appeal or by way of review, and that consequently the order restoring the suit must be set aside. R MAUNG KHANT GYI v. MA THET ANIN, (1925) A. I. R. (R.) 218; 3 R. 63 **751**

——— **O. IX, r. 13, O. XLIII, r. 1 (d)**—*Application to set aside* ex parte *decree—Order, conditional—Condition not complied with—Application, dismissal of—Appeal, whether lies.*

On an application to set aside an *ex parte* decree the Court passed an order that the decree will be set aside if the petitioner will pay to the plaintiff all costs incurred by him and deposit the decretal amount into Court within a certain period. A note was made on the order that the petition will be called for final disposal on a certain date. On the date on which the application was taken up for final disposal, petitioner applied for permission to give immoveable property as security for the decretal amount. The Court dismissed the application to set aside the *ex parte* decree on the ground that the money had not been deposited in Court. Against this order the petitioner preferred an appeal but the appeal was dismissed on the ground, that the order of the Trial Court that the *ex parte* decree would be set aside, provided the petitioner paid the costs of the plaintiff and deposited the decretal amount into Court within a certain period, not having been appealed against, had become final and that an appeal against the order finally dismissing the application to set aside the *ex parte* decree was not sustainable:

Held, (1) that the first order of the Court was merely conditional and that, therefore, it was not open to the petitioner to prefer an appeal against that order;

(2) that the final order dismissing the application to set aside the *ex parte* decree was open to appeal under O. XLIII, r. 1 (*d*) of the C. P C. and that the District Judge should, therefore, have decided the appeal on the merits. M RAJAGOPALACHARY v. NARASIMHA THATHA CHARIAR **196**

——— **O. IX, r. 13**—Ex parte *decree, application to set aside—Sufficient cause—Non-service of summons—Service of summons, mode of—Substituted service when to be effected.*

Under r. 13 of O. IX of the C. P. C. a defendant is entitled to have an *ex parte* decree made against him set aside and the suit restored on such terms as the Court may deem to be fit, if he satisfies the Court either that the summons was not duly served upon him or that he was prevented by any sufficient cause

from appearing when the suit was called on for hearing. The two branches of the rule are disjunctive and the defendant, whatever his position may be in respect of one branch, is entitled to the benefit of the rule if he has satisfied the Court that he has made good his contention under the other branch.

It is of the utmost importance in every case for which provision for personal service is made in the C. P. C., that all available steps should be taken to effect personal service, before resort is had to the provisions of O. V, r. 17 of the Code. It is not enough to attend at the ordinary place of residence or of business of the defendant or the place where the defendant personally works for gain and to conclude that substituted service may be effected merely because at the time when the serving peon attends at such place the defendant does not happen to be there. It makes no difference whether the peon attends at such place once or several times. It is necessary that the serving peon, having discovered or believing that the defendant cannot be served at the time when he is attending, should institute proper enquiries and endeavour to ascertain where the defendant's whereabouts are. The serving peon before he can take advantage of the provisions of O. V, r. 17, must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant he must take reasonable steps to discover where the defendant may happen to be.

The serving peon went to the place of the residence of the defendants three times and each time on enquiring from the *durwan* was informed that the defendants were not in. The peon made no enquiries as to the whereabouts of the defendants. On the third occasion he proceeded to effect substituted service by affixing a copy of the summons to the entrance gate of the defendants' house:

Held, that under the circumstances the summons had not been duly served. **C** BALDEODAS LOHIA *v.* SUBKARANDAS GOENKA, (1925) A. I. R. (C.) 627; 52 C. 179 **508**

——— **O. IX, r. 13**—Ex parte *decree, grounds for setting aside—Power of Court.*

An *ex parte* decree can only be set aside if the defendant satisfies the Court that he was not duly served or that he was prevented by some sufficient cause from appearing, and a Court has no power to set aside an *ex parte* decree apart from the provisions of O. IX, r. 13 of the Code.

A defendant who has refused to accept the summons cannot contend that he has not been duly served. **N** VISHWANTH *v.* VAIJNATH, (1925) A. I. R. (N.) 356 **46**

——— **O. IX, r. 13**—Ex parte *decree passed against minor—Negligence of guardian—Minor, whether can apply to set aside decree.*

The Courts in India will allow a minor to intervene for the purpose of setting aside an *ex parte* decree passed against him provided he can show negligence on the part of his guardian in the conduct of the suit. **Pat** DULHIN BINODINI DEBI *v.* PARMESHWAR DAYAL SINGH, (1925) Pat. 180; (1925) A. I. R. (Pat.) 512; (1925) Pat. 180 **987**

——— **O. XIII, rr. 1, 2**—*Documents, production of—Witness, documents of.*

It is open to a witness to produce at the hearing documents which are not referred to in the summons requiring him to give evidence. Such documents are admissible in evidence.

There is no obligation on a party summoning a witness to procure the filing of documents which belong to the witness and which are not in the possession or power of the party summoning the witness. **C** BAIKUNTHA NATH CHAKRAVARTI *v.* UMANATH CHAKRAVARTI **498**

——— **O. XVII, r 3**—*Date fixed for taking oath—Oath not taken—Procedure—Court, whether can proceed to decide suit on materials on record.*

The parties to a suit agreed to have the suit decided in accordance with an oath to be taken by one of them. The Court fixed a date for the oath to be taken. On the date fixed, the oath was not taken and the Court purporting to act under the provisions of r. 3 of O. XVII of the C. P. C. proceeded to decide the case on the materials on the record giving the parties no opportunity of producing any further evidence:

Held, that r. 3 of O. XVII of the C. P. C., had no application to the case and that the proper course for the Court was to direct the suit to proceed and to be decided on the merits after allowing the parties an opportunity to produce all the evidence that they wished to produce. **A** TULSHI RAM *v.* DAYA RAM, 23 A. L. J. 513; L. R. 6 A. 396 Civ.; (1925) A. I. R. (A.) 604 **448**

——— **O. XX, r. 4**—*Judgment of Court of Small Causes, contents of—Reasons, whether must be given.*

A Court of Small Causes need not in its judgment give reasons for its decision and need not give even a concise statement of the case. It is enough if the point for determination is stated and a decision is given thereon. **O** SHIVA SEWAK *v.* JANGLI, (1925) A. I. R. (O.) 648 **376**

——— **O. XXI, r. 16**—*Execution of decree—Assignment in writing—Transferee, who is—Third person, whether can claim to be the real transferee*—Benami *transaction—Procedure.*

The "transferee" referred to in O. XXI, r. 16 of the C. P. C., is the transferee named as such in the assignment in writing.

Where there has been a transfer of a decree to a particular person under an instrument in writing another person is not entitled to come to the Court and say that the transferee mentioned in the instrument is a mere *benamidar* for himself and that he is the real owner of the benefit secured by the transfer.

The rule of law that where a person's name appears on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless it comes within the words of O. XXI, r. 16 of the C. P. C., and there has been an assignment in his favour either in writing or by operation of law, is no ground for holding that a person otherwise a stranger to the Court can come forward and allege that the decree does not belong to the transferee and that the latter is a *benamidar* for himself.

The scheme of the Code is that the transferee of a decree by assignment in writing or by operation of law merely files his application for execution of the decree setting out either in it or in an affidavit which he files in support thereof that he is the transferee either by operation of law or by any particular instrument in writing, and thereupon the Court orders execution or rejects the application. **M** PALANIAPPA CHETTIAR *v.* SUBRAMANIA CHETTIAR, 48 M. L. J. 419; 21 L. W. 545; (1925) A. I. R. (M.) 701; 48 M. 553 **409**

——— **O. XXI, r. 22**—*Execution of decree—Notice to judgment-debtors—Uninterested judgment-debtor,*

Civil Procedure Code—1908—contd.

The object of the notice under O. XXI, r. 22, C. P. C., is to enable the judgment-debtor to show cause why the decree should not be executed, and also to give him an opportunity of satisfying the decree.

Where one of several judgment-debtors has no interest whatever in the property affected by the decree, the failure to serve the notice under O. XXI, r. 22, C. P. C., on him does not vitiate the execution proceedings.

Per *Suhrawardy, J.*—Under Art. 182 of Sch. I to the Limitation Act, an execution application against some of several judgment-debtors is to be treated as one against all of them. Therefore, it is not necessary that notice under O. XXI, r. 22, C. P. C., should be served upon all the judgment-debtors. **C** TARA PRASANNA SINHA *v.* JNANENDRA NARAYANA BAGCHI **1039**

——— **O. XXI, r. 54**—*Attachment of immoveable property—Procedure—Land paying revenue to Government, what is—Notice not affixed in office of Collector, effect of.*

When the law lays down a definite procedure for the doing of an act which is purely symbolical that procedure must be strictly followed and any omission therein must be regarded as material.

Under r. 54 of O. XXI, of the C. P. C., it is necessary when immoveable property is attached that an order should be made prohibiting the judgment-debtor from transferring or charging the property in any way and other persons from taking any benefit from such transfer or charge. This order should be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and a copy of the order may be affixed on a conspicuous part of the property and then on a conspicuous part of the Court-house and also, where the property is land paying revenue to the Government, in the office of the Collector of the District in which the land is situate. Failure to comply with any of the provisions of the rule would render the attachment illegal and of no effect.

Where property sought to be attached in execution of a decree is a house standing on a site which is assessed to land revenue, the property is land paying revenue to the Government within the meaning of r. 54 of O. XXI of the C. P. C., and in such a case it is necessary to have the notice contemplated by the rule fixed in the office of the Collector of the District in which the property is situate.

Per *Fforde, J.*—The meaning of the word "land" unless otherwise controlled by the context includes everything which is above or beneath the surface.

In O. XXI, r. 54 of the C. P. C., the term "land" is not declared to be used in any special or restricted sense and accordingly it must be presumed that it bears its ordinary meaning. It, therefore, comprises not only the site on which a house stands but also the building which has been erected upon that site. **L** AHMAD YAR KHAN *v.* S. K. BOSE, (1925) A. I. R. (L.) 583 **321**

——— **O. XXI, r. 66 (2)**—*Execution of decree—Decree passed against legal representative—Notice to settle terms of sale proclamation—Sale—Objection by judgment-debtor that property is not liable to attachment and sale in execution of decree, whether can be entertained.*

In execution of a money-decree passed against the legal representative of a deceased debtor certain property was attached and notice was issued to the judgment-debtor under O. XXI, r. 66 (2) of the C. P. C., for settling the terms of the sale proclamation.

Civil Procedure Code—1908—contd.

The judgment-debtor did not appear and the sale took place but was not confirmed as the purchaser failed to pay the balance of the price within the proper time. A fresh proclamation was subsequently ordered to issue and the judgment-debtor made an application alleging that the property attached belonged to her and was not liable to attachment and sale in execution of the decree passed against her in her representative character:

Held, that the judgment-debtor having failed to take the objection at the time when the sale proclamation was settled it was not open to her to raise it later in the execution proceedings. **N** RUKHMABAI *v.* RAMACHANDRA, 21 N. L. R. 23; (1925) A. I. R. (N.) 320 **831**

——— **O. XXI, rr. 69, 72, 90**—*Execution of decree—Sale—Inadequacy of price, whether ground for setting aside sale—Procedure.*

The fact that the price fetched at a Court-sale has since been found to be inadequate is not by itself a ground for setting aside the sale. The inadequacy of the price must be occasioned by some irregularity before the Court will interfere with the sale.

Where a Court is dissatisfied with the highest bid at an auction-sale, it might refuse to knock the property down for that amount and might under O. XXI, r. 69, C. P. C., adjourn the sale so as to enable a higher bid to be offered. But once the sale is concluded the Court is not justified in refusing to confirm it for the mere reason that the price appears to be inadequate and that certain mortgagees who have obtained decrees with respect to the same property but who did not take any steps to secure a proper price at the auction cannot get their decrees satisfied. **M** KORPALU HENGSU *v.* GOWRI HENGSU, 21 L. W. 521; (1925) A. I. R. (M.) 729 **228**

——— **O. XXI, rr. 71, 84**—*Sale—Default by auction-purchaser—Re-sale held after long interval—Auction-purchaser, liability of.*

The re-sale resulting in loss for which a defaulting auction-purchaser is responsible must be a re-sale held in accordance with the law, that is to say, it must be a re-sale held forthwith in accordance with the provisions of r. 84 of O. XXI of the C. P. C. It may be that if the delay which occurs is so slight that it cannot possibly prejudice the defaulter he would still be liable for the loss on the re-sale, but if the re-sale takes place after a considerable delay, the provisions of the rule are not complied with and the defaulting purchaser cannot be called upon to make good the deficiency resulting from the re-sale. **O** ANGNU *v.* MOHAMMAD SAJJAD ALI KHAN, 12 O. L. J. 261; 2. O. W N. 212; (1925) A. I. R. (O.) 397; 28 O. C. 327 **131**

——— **O. XXI, rr. 89, 90**—*Execution of decree—Sale, application to set aside on ground of fraud—Application to set aside on deposit, dismissal of—Application under r. 90, whether maintainable—Fraud, proof of.*

Where a judgment-debtor applies to set aside an auction-sale both under the provisions of r. 89 and under the provisions of r. 90 of O. XXI of the C. P. C., the Court ought to call upon him to make his election either to withdraw his application under r. 90 or to elect to proceed with it, and in case the judgment-debtor insists upon proceeding with his application under r. 90 his application under r. 89 should be dismissed. Where, however, the application under r. 89 is heard and disposed of during the pendency of an application under r. 90, it does not necessarily

follow that the latter application is not maintainable. A SARVI BEGAM v. RAM CHANDRA SARUP, L. R. 6 A. 388 Civ.; 23 A. L. J. 760 500

——— O. XXI, rr. 89, 90, 91, ss. 65, 151—*Contract Act (IX of 1872), s. 86—Specific Relief Act (I of 1877), s. 18, ill.* (a)—*Auction-sale—Property burnt down after sale but before confirmation—Sale, whether can be confirmed—Auction-purchaser, rights of—Inherent powers of Court, when can be invoked.*

An auction sale is valid until it is set aside and in the absence of any circumstance vitiating it at its inception, the Executing Court has no right to refuse to confirm the sale apart from the contingencies contemplated in rr. 89, 90 and 91 of O. XXI of the C. P. C., even if by accident or by act of God the property has since the date of the sale been destroyed by fire.

An Executing Court has inherent power to refuse to confirm an auction-sale if it is shown that it was misled by mis-statement or non-disclosure of relevant facts or the like.

But it has no such power when there are no equities justifying a refusal to confirm the sale. The mere fact that by an accident or by an act of God the property sold has been destroyed after the date of the sale, does not empower the Court to refuse to confirm the sale.

Under s. 65 of the C. P. C., where immoveable property is sold in execution of a decree it is deemed to have vested in the purchaser from the date of the sale.

Under s. 86 of the Contract Act, the buyer has to bear any loss arising from the destruction or injury of the property after the contract of sale has been completed.

Where the judgment-debtor has a saleable interest, however small, in the property sold the purchaser buys at his own risk, and there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief, if the property does not correspond to the said description, and in the absence of fraud the auction-purchaser has no remedy unless the judgment-debtor has no saleable interest at all in the property.

An auction-purchaser is entitled to claim profits and accretions from the date of the sale of the property sold to him and he is responsible for the deterioration or loss which the property suffers during the interval between the date of sale and that fixed for confirmation thereof.

When certain questions have been removed from the jurisdiction of the Court, they cannot be brought within its jurisdiction on the ground that the Court has inherent power to do what justice requires for the parties before it. N NIZAMUDDIN v. JUMMA 693

——— O. XXI, r. 90—*Execution of decree—Sale, whether can be set aside by compromise between judgment-debtor and decree-holder.*

The rights of an auction-purchaser cannot be affected by any agreement between the judgment-debtor and the decree-holder. An auction-sale cannot, therefore, be set aside as the result of a compromise between the decree-holder and the judgment-debtor. O BADAL SINGH v GUR PRASAD SINGH 534

——— O. XXI, r. 90—*Execution of decree—Sale—Application to notify encumbrance, rejection of—Encumbrance proclaimed by Sale Officer—Property sold at inadequate price—Irregularity—Substantial injury—Injunction staying sale, effect of—Sale held after injunction, whether nullity.*

An injunction issued by a Court of competent jurisdiction directing that a sale about to be held in execution of a decree should be stayed during the pendency of the suit in which the injunction is issued has the effect of stopping the sale altogether during the pendency of the suit, and if the sale takes place in spite of the injunction it is a mere nullity and cannot be allowed to stand.

A decree-holder made an application that a certain encumbrance should be shown in the sale proclamation relating to certain property which was about to be sold in execution. The application was rejected but the decree-holder prevailed upon the Sale Officer to proclaim the encumbrance at the time of the sale. As a consequence of this proclamation the property was sold at a grossly inadequate price:

Held, that there was material irregularity in the conduct of the sale which had resulted in substantial injury to the judgment-debtor and that the sale must consequently be set aside. O SITAPAT RAM v. MAHABIR PRASAD, 2 O. W. N. 315; 12 O. L. J. 331; (1925) A. I. R. (O.) 424 532

——— O. XXI, r. 91—*Execution of decree—Sale, whether can be set aside by compromise.*

The only ground upon which a decree-holder can apply to have a sale set aside is that the judgment-debtor has no saleable interest in the property. There is no provision in the C. P. C. for allowing an adjustment between the parties after a sale has been held. The sale is a solemn act and the Court is not competent to set it aside merely at the request of the parties. Pat SHAM NARAYAN SINGH v. BASDEO PRASAD SINGH, (1925) A. I. R. (Pat.) 702 537

——— O. XXI, rr. 91, 92—*Sale in execution—No saleable interest of judgment-debtor—Suit for recovery of purchase-money, whether maintainable—Auction-purchaser, remedy of.*

It is, under the present Code, no longer open to an auction-purchaser to maintain a regular suit for a declaration that the judgment-debtor had no saleable interest in the property which amounts to a declaration that the order confirming the sale was bad and for setting aside the same and for a refund of the purchase-money.

The only remedy of the auction-purchaser is by way of an application under O. XXI, r. 91 of the Code. Pat NAGENDRA NATH GHOSH v. SAMBHU NATH PANDEY 3 Pat. 947; (1925) A. I. R. (Pat.) 106 219

——— O. XXI, r. 93—*Execution of decree—Sale—Agreement to set aside sale and refund purchase-money—Suit to recover purchase-money, maintainability of—Construction of document—Compromise—Intention of parties.*

After a sale in execution of a decree an agreement was entered into between the auction-purchaser, the decree-holder and the judgment-debtor whereby it was agreed that possession of two-thirds of the property sold should be returned to the judgment-debtor and that the auction-purchaser should withdraw from the Court two-thirds of the purchase-money deposited by him. In the meantime, however, another decree-holder had attached and withdrawn a portion of the money which had been deposited by the auction-purchaser in Court. The auction-purchaser brought a suit to recover two-thirds of the purchase-money on the basis of the agreement:

Held, (1) that the plaintiff's suit being based upon a contract arrived at between the parties after the execution sale had been confirmed was not barred by virtue of the provisions of r. 93 of O. XXI of the C. P.C.;

(2) that the intention of the compromise arrived at between the parties was that two-thirds of the purchase-money paid by the auction-purchaser should be refunded to him and that the judgment-debtor was, therefore, liable to refund that amount to the auction-purchaser and to make up the deficiency caused by the attachment and removal of a portion of the purchase-money by another decree-holder of the judgment-debtor.

In construing a compromise the intention of the parties should be enquired into and not what may appear on the face of the compromise which may have been prepared by some Pleader's clerk of small knowledge and little education. O GUR PRASAD *v.* LALMAN, 2 O. W. N. 248; (1925) A. I. R. (O.) 404; 28 O. C. 136 **379**

——— **O. XXII, r. 2, O. XLI, r. 4**—*Defendants-appellants—Abatement of appeal—Easement—Declaratory suit—Parties.*

In the case of defendants-appellants when the appeal proceeds on a ground common to all of them, the abatement of the appeal as against one of the appellants has not the effect of causing the appeal to abate as against all of them. The principle of O. XLI, r. 4, C. P. C., is applicable to such a case. C UPENDRA NATH GHOSE *v.* BHUSHAN SAHANA **970**

——— **O. XXII, r. 3** *-Death of plaintiff—Substitution, absence of—Abatement—Defendant not demanding abatement, effect of.*

An abatement takes place *ipso facto* if an application for impleading the legal representatives of a deceased party is not made within the period prescribed by law. The question of abatement does not depend upon the opposite party demanding or not demanding an abatement. L RAM GOPAL *v.* HAR KISHEN **478**

——— **O. XXII, rr. 3, 12**—*Civil Procedure Code (Act XIV of 1882), ss. 211, 212—Decree passed under Code of 1882—Mesne profits, ascertainment of—Proceedings, nature of—Death of decree-holder—Substitution, whether necessary.*

Under the C. P. C. of 1882 a proceeding for the ascertainment of mesne profits was a proceeding in execution; therefore in a decree passed under that Code such proceedings must be held in execution and not in the suit. Where in the course of such proceedings one of the decree-holders dies the case is covered by r. 12 of O. XXII of C. P. C. and no substitution under r. 3 of the Order is necessary. P C KEDARNATH GOENKA *v.* ANANT PRASAD SINGH, (1925) M. W. N. 313; 48 M. L. J. 482; (1925) A. I. R. (P. C) 117; 41 C. L. J. 339; 2 O. W. N. 355; 6 P. L. T. 366; 27 Bom. L. R. 848; 22 L. W. 7; 4 Pat. 507 (P. C.) **482**

——— **O. XXII, r. 3, O. XXXIII, r. 1**—*Pauper plaintiff, death of—Legal representative, whether entitled to continue suit* in forma pauperis.

The legal representative of a deceased pauper plaintiff or appellant cannot continue the suit or appeal *in forma pauperis* if he is not a pauper himself. M *In re* A. S. RADHA KRISHNA AIYER, 21 L. W. 550; (1925) A. I. R. (M.) 819 **91**

——— **O. XXII, r. 4**—*Appeal—Death of respondent—Failure to bring legal representatives on record within time prescribed—Ignorance of death—Abatement.*

It is obligatory upon an appellant to see that the necessary parties to the appeal are on the record. Ignorance of the fact of the death of a respondent is no excuse for an appellant's failure to bring the legal representatives of the deceased respondent upon the record within the time prescribed by law. Pat RAMGOBIND SINGH *v.* SHASHI SEKHAR PRASAD SINGH, (1925) Pat. 153; (1925) A. I. R. (Pat.) 517 **959**

——— **O. XXII, r. 4** — *Mortgage-decree—Appeal—Death of one respondent—Legal representatives not brought on record—Abatement, extent of.*

During the pendency of an appeal against a mortgage-decree one of the respondents, who were all members of a joint Hindu family, died and his sons were not brought upon the record within the prescribed period:

Held, that the respondents being all jointly interested in the mortgage-decree obtained by them and the sons of the deceased respondent being necessary parties to the appeal, the whole appeal abated as the result of their not having been brought upon the record within limitation. Pat DAROGA SINGH *v.* RAGHUNANDAN SINGH, 6 P. L. T. 451; (1925) A. I. R. (Pat.) 590 **669**

——— **O. XXII, r. 4, s. 144**—*Appeal—Death of respondent—Substitution, absence of—Appeal decreed, effect of—Restitution—Objection to appellate decree, whether can be taken.*

A decree obtained against a dead person is a nullity, and objection to the nature of the decree may be taken in execution proceedings.

A joint decree for possession of a house was passed in favour of two plaintiffs and they obtained possession of the house in execution. An appeal was preferred by the judgment-debtor and the decree was reversed in appeal. The defendant applied under s. 144, C. P. C., for restoration of possession of the house. It was objected on behalf of one of the plaintiffs that the other plaintiff had died before the decree of the Trial Court had been reversed by the Appellate Court and that the decree of the Appellate Court was, therefore, a nullity:

Held, (1) that the decree of the Appellate Court having been obtained against a dead person was a nullity so far as the deceased plaintiff was concerned;

(2) that the decree of the Trial Court being a joint decree in favour of both the plaintiffs, and that the appeal having abated against one of them could not have been decreed against the other;

(3) that, consequently, the decree of the Trial Court in favour of the plaintiffs still stood and that the Executing Court could not restore to the defendant possession of the house which had been given to the plaintiffs in execution of their decree. L ANWAR-UL-HAQ *v.* NAZAR ABBAS, 6 L. 313; (1925) A. I. R. (L.) 494 **865**

——— **O. XXII, r. 4, O. XLI, r. 22**—*Respondent, death of—Legal representative, substitution of, in memo. of objections, effect of, on appeal.*

Any order that is made bringing the legal representatives of a deceased respondent on record in the memorandum of objections will enure for the whole of the proceedings including the appeal. M KANTHIMATHI AMMAL *v.* PERUMAL KONA, 48 M. L. J. 492; (1925) A. I. R. (M.) 777 **215**

——— **O. XXIII, r. 1**—*Mistaken view of law—Withdrawal of suit.*

The fact that a plaintiff's claim has failed on account of a mistaken view of the law, is not sufficient ground

for permitting withdrawal of suit in second appeal, under O. XXIII, r. 1, C. P. C. C SATINDRA MOHUN TAGORE v. BAMA SUNDARA DEVI 512

——— O. XXIII, r. 1—*"Other sufficient grounds," meaning of—Withdrawal of suit, leave for—Alternative cause of action.*

"Other sufficient grounds" in sub-cl. (*b*) of r. 1 of O. XXIII of the C. P. C. must be *ejusdem generis* with the formal defect in sub-cl. (*a*). A Court has no power under O. XXIII, r. 1 to grant permission to a plaintiff to withdraw from the suit with liberty to institute a fresh suit, in a case where the evidence adduced by the defendant is such as to cause the plaintiff's suit to fail and the plaintiff thereafter asks leave to withdraw the suit with a view to institute a fresh suit on an alternative cause of action, especially after a prayer for amendment of the plaint to introduce the alternative cause of action had been refused.

Where a Court in such a case grants leave to the plaintiff to withdraw the suit with liberty to bring a fresh suit it acts with gross irregularity in the exercise of its jurisdiction so as to call for interference under s. 115, C. P. C. M JAVVADI CHINNA VENKATARAMAYYA v. BANDI VEERASAMI, 21 L. W. 282; (1925) A. I. R. (M.) 617 665

——— O. XXIII, r. 1—*Withdrawal of suit with liberty to bring fresh suit—Order passed by Appellate Court—Appeal, whether lies.*

No appeal lies from an order passed by a Court of First Appeal under O. XXIII, r. 1 of the C. P. C., permitting the plaintiff to withdraw his suit with liberty to bring a fresh suit. O BISHNUNATH v. RAM PARSHAD 1029

——— O. XXIII, r. 3—*Arbitration—Reference during pendency of suit—Award, whether can be pleaded as adjustment—Procedure—Award set up by defendant—Amendment of written statement—Court-fees, whether payable.*

Where an arbitrator to whose arbitration the parties to a pending suit have referred their disputes without intervention of the Court, properly comes to a decision, the parties must be held to have adjusted their differences and the adjustment can be recorded under O. XXIII, r. 3 of the C. P. C.

Where such an adjustment is set up by the defendant and he claims a specific sum as due to him under the award, it is open to the Court to direct the defendant to amend his written statement and to plead the award as an adjustment so as to enable the Court to raise and try an issue on the point and the Court can call upon the defendant to pay Court-fees on the specific sum claimed by him. S BOLMAL CHELLARAM v. JHAMANDAS KISHARAM, 18 S. L. R. 111; (1925) A. I. R. (S.) 266 61

——— O. XXIII, r. 3—*Counsel, traditions and privileges of—Counsel, authority of, to compromise suit—Compromise out of Court, whether binding on client—Recording of compromise—Duty of Court.*

The sanctity of contracts would be greatly imperilled if a Court were to permit a person acting under no mistake of fact and no misapprehension as to his capacity to contract and who to all intents and appearances had entered into a contract, subsequently to resile therefrom by unfolding a mental reservation of the existence of which no mention had been made at the time when the contract was entered into. To hold such a person to the agreement which he had made is merely to apply the common law principle

that a person's intention is to be ascertained from his acts, and the Court is not concerned to enquire what the uncommunicated mental processes may have been which at the material time were exercising his mind.

The rights, privileges and obligations of an Advocate of the Calcutta High Court are, and since its foundation have been, the same as those of Counsel entitled to practise in what is now the High Court of Justice in England.

The authority of an Advocate remains the same whether he appears as Counsel in the High Court or in Courts subordinate thereto. When Counsel appear in Courts other than the High Court they carry with them the traditions and privileges of their profession and the sanctions of their high calling.

An Advocate of the High Court in the course of conducting a case is clothed with authority to compromise a suit in which he has been retained as Counsel. A compromise entered into by Counsel would be valid and binding upon the parties even although it had been effected contrary to the express intentions of the client, unless the prohibition has previously been communicated to the other side. Such a compromise should in a proper case be recorded in the manner prescribed in r. 3 of O. XXIII of the C. P. C.

In considering whether such a settlement has been arrived at as would justify the Court in passing a decree under O. XXIII, r. 3 of the C. P. C., the question as to which the Court has to be satisfied is not whether the order was a final order or a perfected order but whether it was an agreed order. But a litigant is not entitled *ex debito justitiæ* to an order under the rule or to a decree in a suit brought to enforce a compromise effected by Counsel merely because the Court is satisfied that Counsel in bringing about the settlement possessed authority as Counsel in that behalf.

Whether or not the Court is satisfied that a suit has been adjusted by an authority, agreement or compromise which the Court is bound to enforce must depend upon the circumstances of each case.

The apparent authority of Counsel who is retained to conduct a suit to bind his client by his admissions and acts is restricted to acts and admissions in Court, and such acts and admissions out of Court do not bind the client unless in fact they are authorized by the client or by his agent duly authorized in that behalf. The nature of the duty which an Advocate accepts by undertaking to appear for a client indicates that he is clothed with authority to bind his client only when he is in fact engaged in the actual management of the suit.

A compromise effected by Counsel out of Court and not assented to by the client is only binding upon the client if it was expressly authorized or is subsequently ratified by the client or by his agent authorized in that behalf. C ASKARAN CHOUTMAL v. E. I. RY. Co., 29 C. W. N. 566; (1925) A. I. R. (C.) 696; 52 C. 386 413

——— O. XXIII, r. 3, s. 89, Sch. II—*Appeal—Arbitration, reference to, without intervention of Court, pending appeal—Award, validity of—Award, whether can be treated as adjustment of dispute—Inherent power of Court to refuse to allow appeal to be proceeded with—"Any other law" in s. 89, meaning of—Interpretation of Statutes—Marginal notes, whether can be referred to—Duty of Judges.*

Held, by the majority (*Mukerji, J.*, dissenting), that where an arbitration is entered into in a pending suit without the intervention of the Court, the Court may

on the application of any party stay the hearing of the suit, and on an award being subsequently made act on the award if it finds that it is otherwise valid, treating it as an adjustment of the suit. There is no reason why when an award is brought to the notice of the Court in a pending suit, it should not try the issue whether the award is not binding on the parties under the general principles of the law of contract by a proceeding under O. XXIII, r. 3 of the C. P. C.

Per *Walsh, J.*—Forbearance to sue and forbearance to take definite steps to enforce legal rights are adequate consideration to support an agreement, particularly an agreement where there are mutual considerations and both the parties intend and agree to make an end of their dispute.

The High Court has an inherent discretion to decline to allow an appellant to prosecute an appeal the moment it is satisfied that the appellant by his solemn act and deed testified to by his signature, for what he considered adequate consideration, has expressly abandoned his right and undertaken to withdraw his appeal.

Per *Kanhaiya Lal, J.*—The procedure provided by Sch. II to the C. P. C., is by no means the only manner in which an award can be enforced. The language of s. 89 of the C. P. C. does not exclude the applicability of O. XXIII, r. 3, or any other portion of the C. P. C., to an arbitration. The failure to adopt the procedure provided by Sch. II of the Code deprives a party of his right to claim advantages which that Schedule gives. It does not deprive him of his right to enforce the contract embodied in the award otherwise, unless the subject-matter of the reference has meanwhile been disposed of by suit. Where during the pendency of an appeal the parties refer their dispute to arbitration and an award is made by the arbitrator and is carried into effect, the award must be treated as good so far as it operates as a complete accord and satisfaction of the decree under appeal. It makes no difference whether such a settlement is a direct settlement between the parties themselves, or made by a third person to whom the parties have referred their dispute as arbitrator.

Per *Mukerji, J.*—The words "any other law for the time being in force" in s. 89 of the C. P. C., do not refer to the Schedules appended to the main Code of Civil Procedure.

A compromise is the direct result of an agreement between the parties. Rule 3 of O. XXIII of the C. P. C., must, therefore, be taken as directed only to cases where the parties have agreed that the Court should decide a matter between them in a particular way. An arbitration cannot come within the purview of r. 3 of O. XXIII.

An award which has been arrived at by a reference of the subject-matter of an appeal to arbitration pending the appeal cannot be recognized as an "adjustment by lawful agreement" by the parties to the appeal or as a "compromise" within the meaning of r. 3 of O. XXIII of the C. P. C. If both parties accept the award, there would be no difficulty in the acceptance of it by the Court. But then the award would be accepted not as an award but as a document embodying what has been accepted by the parties as a proper basis for the settlement of their dispute. **A** GAJENDRA SINGH *v.* DURGA KUMARI, 23 A. L. J. 561; (1925) A. I. R. (A.) 503; 47 A. 637 **768**

——— **O. XXIII, r. 3, O. XXXIV, r. 5**—*Execution of decree—Money-decree creating charge on land—Decree, whether can be executed—Final decree, whether necessary—Compromise decree—Terms not relating to suit, whether can be enforced.*

Where in a suit for money, a decree is passed creating a charge on certain properties, the provisions of O. XXXIV of the C. P. C., do not apply to the case and the decree is capable of execution without the necessity of having a final decree passed in the matter.

Where the terms of a compromise decree which do not relate to the suit appear either directly or indirectly as considerations on which the settlement of the claim is based, such terms may be considered as part of the decree and executable with it; and the whole compromise decree is enforceable in execution proceedings without a separate suit. **M** RAMASAWI NAYADU *v.* K. N. S. SUBBARAYA THEVAR, (1925) M. W. N. 525; 49 M. L. J. 490; (1925) A. I. R. (M.) 1101 **648**

——— **O. XXIX, r. 1**—*Suit by Corporation—Plaint signed and verified by authorized agent, validity of.*

Rule 1 of O. XXIX of the C. P. C., does not contain a mandatory rule, and if a person who has signed and verified a plaint on behalf of a Corporation is the duly authorized agent of the Corporation and is acquainted with the facts of the case, there is no irregularity in the signature or the verification. **L** ALLEN BROTHERS *v.* ARURI MAL KHANNA, (1925) A. I. R. (L.) 338 **546**

——— **O. XXX, r. 3**—*Suit against partners of firm—Service of summonses.*

Order XXX, r. 3 of the C. P. C. has no application to a suit which is not brought against the partners in the name of their firm but against them individually. **C** AJIT KUMAR SHAHA *v.* MRITUNJOY KUNDU **489**

——— **O. XXXII, r. 3 (4), s. 99**—Minor defendant—Guardian *ad litem* appointed by Court—Notice to minor, absence of, effect of—Irregularity—Decree, whether binding on minor. *See* C. P. C., 1908, s. 99 **294**

——— **O. XXXII, r. 7**—*Compromise entered into on behalf of minor—Leave of Court, absence of, effect of—Guardian refusing to be bound by compromise before leave granted—Compromise, whether binding on minor—Decree passed on compromise—Leave of Court, whether can be presumed.*

A compromise entered into on behalf of a minor without the leave of the Court is a nullity.

The mere fact that a decree has been passed in terms of a compromise does not necessarily justify an inference that the Court granted leave on behalf of a minor party or that it was satisfied that the compromise was for the benefit of the minor.

Where the guardian of a minor enters into a compromise without the leave of the Court but changes his mind before the leave of the Court is granted, the compromise cannot be forced on the minor. **A** GULAB DEI *v.* VAISH MOTOR COMPANY, 23 A. L. J. 523; L. R. 6 A. 390 Civ.; (1925) A. I. R. (A.) 570 **429**

——— **O. XXXII, r. 7**—*Compromise of suit—Minor and major parties—Leave not obtained—Adult parties, whether affected.*

Order XXXII, r. 7 (2), contemplates the case of a minor on one side ranged against adults on the other as regards the matter of compromise of a suit. It can have no reference to the effect of any compromise between adults although a minor may be a party to the suit, which must be governed by the general law and not by O. XXXII, r. 7 (2), C. P. C. **C** TARU BALA DASI *v.* SURENDRA NATH MITRA, 41 C. L. J. 213; 29 C. W. N. 597; (1925) A. I. R. (C.) 866 **369**

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——— **O. XXXII, r. 7**—*Minor—Compromise entered into by guardian, whether binding on minor—Sanction of Court—Concealment of material facts.*

A minor will be bound by a compromise decree which is entered into on his behalf by his guardian, and which has received the sanction of the Court. But, if it is found that the facts were not properly placed before the Court by the guardian at the time when the Court sanctioned the compromise on behalf of the minor, with the result that while the minor received no benefit, but on the contrary lost heavily, his guardian did receive some benefit for himself, the compromise decree is vitiated and does not bind the minor. For, it is the duty of a minor's guardian to place the Court in possession of all essential facts, and any concealment of material facts will amount to fraud on the Court, because the Court must be put in a position to form an opinion whether a compromise ought or ought not to be sanctioned. **O** LAL BISHUNPAT SINGH *v.* LAL KEDAR NATH SINGH, 12 O. L. J. 366; (1925) A. I. R. (O.) 512 **804**

——— **O. XXXIII, r. 1, O. XXII, r. 3**—*Pauper plaintiff, death of—Legal representative, whether entitled to sue* in forma pauperis.

The legal repesentative of a deceased pauper plaintiff or appellant cannot continue the suit or appeal *in forma pauperis* if he is not a pauper himself. **M** *In re* A. S. RADHAKRISHNA AIYAR, 21 L. W. 550; (1925) A. I. R. (M.) 819 **91**

——— **O. XXXIII, rr. 1, 5**—*Application for leave to sue as pauper—Plaintiff possessed of property, whether can be granted leave.*

Plaintiffs who were minors applied for leave to sue *in forma pauperis* to set aside an alienation by their father of joint family property. It was found that there was a share of property which had not been transferred at the time when the suit was filed:

Held, that unless it could be proved that it was impossible for the plaintiffs to obtain funds on the security of the property which belonged to them, it could not be said that they were paupers and they could not, therefore, be granted leave to sue *in forma pauperis*. **A** RAM PRASAD SINGH *v.* JAGTAMBA PRASAD SINGH, 23 A. L. J. 512; L. R. 6 A. 352 Civ.; (1925) A. I. R. (A.) 547 **420**

——— **O. XXXIV, r. 1**—*Jurisdiction of Court over land outside jurisdiction.*

Order XXXIV, r. 1, of C. P. C., enacts a rule of procedure and cannot be invoked to extend jurisdiction. **B** PRANLAL TRIBHUWANDAS v. GOCULDAS DAMODAR, 27 Bom. L. R. 570; (1925) A. I. R. (B.) 333 **92**

——— **O. XXXIV, rr. 1, 5**—*Mortgage suit—Prior mortgagee, whether necessary party—Sale in execution of mortgage-decree—Auction-purchaser, position of.*

At a sale in execution of a mortgage-decree, the purchaser acquires the rights of both mortgagor and mortgagee. As purchaser of the equity of redemption he is entitled, if he wishes, to redeem a later mortgage or as purchaser of the rights of the mortgagee, he can claim priority over the later mortgage by electing to stand in the shoes of the prior mortgagee.

A prior mortgagee or a purchaser of his rights under the mortgage is not a necessary party to a suit on the subsequent mortgage, as he is under no obligation to redeem to keep his rights alive. **N** YADO RAO *v.* AMRIT RAO **803**

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——— **O. XXXIV, rr. 2 and 3**—*Foreclosure decree, preliminary and final—Costs of suit, whether included—Mortgagee, whether entitled to recover costs from mortgagor.*

The words "such payment" in cl. (*d*) of r. 2 of O. XXXIV of the C. P. C. must be interpreted to mean payment of the amount due as declared by the preceding clauses, and within the amount so declared due are included the costs of the suit. Where, therefore, a preliminary decree for foreclosure is passed under this rule the foreclosure is to take place in lieu of the principal and the interest on the mortgage as well as the costs of the suit, and under cl. (2) of r. 3 of the Order the final foreclosure must be declared to take place in lieu of the entire mortgage-money plus the costs of the suit. After a final foreclosure decree has been passed in terms of r. 3 of O. XXXIV, the mortgagee is not entitled to recover the costs of the suit separately from the mortgagor. **O** LAL RAM PARKASH *v.* JANKI PRASAD, 12 O. L. J. 91; 2 O. W. N. 203; (1925) A. I. R. (O.) 351 **203**

——— **O. XXXIV, rr. 2, 4**—*Mortgage suit—Decree, form of—Interest* pendente lite *and future interest, direction to pay—Construction of judgment—Future interest, meaning of.*

Under rr. 2 and 4 of O. XXXIV of the C. P. C., where in a suit for sale the plaintiff succeeds the Court must pass a decree either ordering an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs, if any, awarded to him upto the expiry of the days of grace, or must pass a decree declaring the amount so due and the decree must further direct that in default of payment within the period of grace the mortgaged property be sold and the proceeds, after defraying expenses of the sale, applied in payment of what is declared due to the plaintiff together with subsequent costs. Under these rules the Court has power to direct not only payment of the principal and interest on the mortgage upto the expiry of the days of grace but also payment of subsequent interest, that is to say, interest up to the date when the property is sold and the claim realized.

In a mortgage suit the plaintiff is entitled to interest at the bond rate from the date of the suit till the date fixed for payment unless the Court for any special reason thinks fit to reduce the interest during this period. On default the decree-holder is entitled to the Court rate of interest from the date fixed for payment till the date of actual realization.

In a mortgage suit the plaintiff claimed that an account be prepared of the principal amount and interest due under the mortgage-bond and that a mortgage decree be passed for a certain sum besides costs and future interest till the day of realization at the rate of interest entered in the bond. The suit was decreed and the judgment concluded as follows:—"Hence it is ordered that the suit be decreed with costs. Defendants to pay up the decretal amount within six months. In default the mortgaged property will be sold subject to the encumbrance mentioned above. As the interest has swelled to an abnormal amount I do not allow future interest on the bond rate. Interest at 6 per cent. per annum from this date till the date of payment:

Held, (1) that the expression "future interest" in the judgment meant interest from the date of the decree and that the words "date of payment" meant

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the date of actual realization so that the effect of the judgment was that interest at the rate of 6 per cent. per annum had been awarded from the date of the decree till the date of actual realization;

(2) that an order for the payment of interest between the date of the suit and date of the decree was implied in the opening words of the concluding portion of the judgment which meant that the suit as laid in the plaint was decreed with costs subject to the reduction of the rate of interest as specified in the judgment. **Pat** RADHAKISHUN CHAMARIA *v.* ZALIM SINGH, 2 Pat. L. R. 315; (1925) A. I. R. (Pat.) 455; 6 P. L. T. 459 **323**

——— **O. XXXIV, r. 3**—*Limitation Act (IX of 1908), Sch. I, Art. 181—"The day fixed," meaning of—Application for final decree—Period for payment, extension of—Papers ordered to be filed—Fresh application—Limitation.*

The words "the day fixed" in sub-r. (2) of r. 3 of O. XXXIV of the C. P. C. refer to the day fixed under the preceding sub-rule and do not include the day to which payment may be postponed under the proviso to the rule.

Where an application for a final decree is made within time and it is ordered to be filed as time for payment has been extended, the order cannot be construed as amounting to a dismissal of the application.

Any subsequent application for the making of the decree final on default of payment within the time extended is meant only for the purpose of continuing the proceedings on the original application and is not governed by Art. 181 of Sch. I of the Limitation Act and there is no limitation provided in respect of it. **N** CHIMNAJI *v.* SONAJI, (1925) A. I. R. (N.) 291; 21 N. L. R. 47 **901**

——— **O. XXXIV, rr. 5, 6**—*Mortgage, simple—Suit for sale—Compromise, decree based on—Personal liability of mortgagor, whether affected—Costs, liability for.*

During the course of a mortgage suit brought on the basis of a simple mortgage which provided for the personal liability of the mortgagor a compromise was arrived at by which the mortgagee agreed to accept payment of the decretal amount by instalments, the whole to be recoverable in default of payment of any instalment. The mortgagee obtained a preliminary decree on the basis of the compromise and default being made in payment the preliminary decree was followed by a final decree for sale under r. 5, O. XXXIV of the C. P. C. The sale-proceeds of the mortgaged property did not satisfy the decretal amount and the mortgagee made an application for a personal decree against the mortgagor under r. 6 of O. XXXIV:

Held, (1) that the compromise having been entered into in connection with a suit for sale merely modified the terms on which a decree for sale would otherwise have been passed and that the mere fact that the mortgagor's personal liability was not mentioned in the compromise did not put an end to such liability;

(2) that a preliminary and a final decree having been passed in accordance with the compromise and neither party having appealed against them or contested the correctness of the procedure adopted by the Court it was not open to the mortgagor to contend that the preliminary decree could not have been passed on the basis of a compromise which provided for payment by instalments;

(3) that there was, however, no antecedent liability for costs under the terms of the mortgage-deed and that the mortgagor's personal liability not having been declared by the decree in respect of the costs, the mortgagee was not entitled to recover the amount of the costs from the mortgagor personally. **O** SRI RAM *v.* SURAJ BALI **507**

——— **O. XXXIV, rr. 5, 10**—*Mortgage suit—Decree for sale—Final decree—Costs incurred in execution, whether can be added to mortgage-money—Mortgagee, personal liability of.*

There is no provision in r. 5 of O. XXXIV of the C. P. C. that costs incurred subsequent to the passing of a final decree for sale on a mortgage should also be added to the mortgage-money. The scheme of the rules is that the mortgaged property is liable for the costs properly incurred even subsequent to the preliminary decree, but it does not follow that all kinds of costs which are incurred after the final decree are to be added to the mortgage-money. Rule 10 of the Order contemplates that when the time for final adjustment arrives the Court has to add to the mortgage-money such costs as have been properly incurred since the decree and till the time of actual payment, but the costs mentioned in the rule are costs which are properly incurred in the suit in carrying out the directions contained in the decree and do not include costs incurred in subsequent objections to execution proceedings or in appeals from orders passed in execution. These costs are incurred in proceedings separately numbered and treated as quite distinct and independent from the suit itself. Costs awarded in subsequent proceedings or in appeal from such proceedings must be separately taxed and realized by separate execution against the mortgagor personally. **A** HET RAM *v.* RAJAH DAT PRASAD SINGH, L. R. 6 A. 530 Civ. **829**

——— **O. XXXIV, r. 6**—*Mortgage suit—Decree for sale—Liberty to apply for personal decree, effect of.*

Where in a decree for sale of a mortgaged property liberty is given to the plaintiff to apply for a personal decree for the amount of the balance due to him after the sale of that property, this does not imply that on application a personal decree must be granted. The question of limitation remains open and has to be decided at the proper time. **O** BIBI BATUL *v.* KEDAR NATH, 12 O. L. J. 372; (1925) A. I. R. (O.) 462 **810**

——— **O. XXXIV, r. 14**—*Maintenance decree declaring charge upon certain properties—Execution of decree—Properties charged, whether can be sold.*

It is not necessary that in every case where it is sought to enforce a charge upon immoveable property the person for whose benefit the charge was created must resort to the procedure for enforcement of claims under a mortgage laid down in O. XXXIV of the C. P. C.

Plaintiff obtained a decree declaring that she was entitled to a certain maintenance allowance from the defendant and that certain properties belonging to the defendant were charged with the payment of the allowance. In execution of this decree the plaintiff made an application for the recovery of a certain sum on account of arrears of maintenance and sought to sell the properties charged under the decree in order to enforce payment of the amount due to her:

Held, (1) that although the decree obtained by the plaintiff was declaratory in form it was capable of

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execution the object of the decree being that maintenance should be recoverable by the plaintiff without her having to bring a fresh suit for the purpose; (2) that the decree obtained by the plaintiff being a money-decree the interest of the judgment-debtor in the properties charged with the payment of the maintenance allowance could be sold in execution of the decree, and that the provisions of r. 14 of O. XXXIV of the C. P. C., were not applicable to the case. **Pat** HARI SANKAR RAI *v.* TAPAI KUER, 4 Pat. 693; 6 P. L. T. 802 **923**

——— **O. XXXVII, r. 1**—*Limitation Act (IX of 1908), Sch. I, Art. 5—Suit on negotiable instrument—Summary procedure—Admission of plaint—Limitation.*

Article 5 of Sch. I to the Limitation Act of 1908 is not applicable to suits under O. XXXVII of the C P. C. **C** ROBINDRA NATH DUTT *v.* ABDUL AHAD & Co., 29 C. W. N. 589; 41 C. L. J. 368; (1925) A. I. R. (C.) 781 **400**

——— **O. XXXVIII, r. 5**—*Attachment before judgment—Agency Courts, properties in the jurisdiction of—Agency Rules, rr. 16 (4), 22—Power to attach at instance of Court outside Agency Tracts.*

A Court acting under the C. P. C., has no jurisdiction in a suit pending before it to attach before judgment properties situate in the Agency Tracts over which it has no jurisdiction.

Under the Agency Rules for the administration of the Agency Tracts, there is no power in the Agency Court to attach properties before judgment at the instance of a British Court situate outside the Agency Tracts. **M** ZUBEDA BEGAM SAHEBA *v.* KOMMANNA KANNIAH, 48 M. L. J. 680, (1925) A. I. R. (M.) 1100 **430**

——— **O. XXXIX, r. 1**—*Temporary injunction, when can be granted.*

Before a Court is asked to issue a temporary injunction the application must show that the requirements of O. XXXIX, r. 1, C. P. C., must be fulfilled, *viz.*, that there is a risk of the property being damaged or the creditors being defrauded. **O** AHMAD MUJTABA KHAN *v.* PIRTHIPAL SINGH **581**

——— **O. XL, r. 1**—*Receiver, appointment of—Discretion of Court, how to be exercised—Appointment, when to be made.*

The jurisdiction to appoint a Receiver must not be exercised lightly but should be exercised most cautiously. The relief by way of appointment of a Receiver is not one *ex debito justitiæ* but one which is purely within the judicial discretion of the Court. The power should not generally be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a Receiver that it could do no harm to appoint a Receiver. The appointment of a Receiver is in many cases a matter for the most serious consideration, for the Court taking possession at the instance of a plaintiff may be doing wrong, in some cases, irreparable, to the defendant. For if the plaintiff were to fail in establishing his right the Court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation.

Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver. **L** GURDWARA PARBANDHAK COMMITTEE *v.* DHARAM DAS, 1 L. C. 514; (1925) A. I. R. (L.) 349; 6 L. 74 **562**

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——— **O. XLI, r. 4**—*Suit brought by two plaintiffs, dismissal of—Appeal by one—Suit decreed by Appellate Court in favour of appealing plaintiff—Non-appealing plaintiff, whether entitled to decree—Discretion of Court—Appeal, second, whether lies.*

A suit to recover certain property was brought by two plaintiffs, but was dismissed by the Trial Court. Only one of the plaintiffs appealed describing his appeal as being one under O. XLI, r. 4 of the C. P. C. The Appellate Court decreed the suit so far as the appellant was concerned but did not pass a decree in favour of the plaintiff who had not appealed:

Held, that the matter was within the discretion of the Appellate Court and that that Court having exercised its discretion in refusing to pass a decree in favour of the non-appealing plaintiff, no second appeal lay against that decree at the instance of the latter, inasmuch as the lower Appellate Court was not bound to pass a decree in his favour simply because his title had been made out. **A** JAI NARAIN SINGH *v.* MANDHAI SINGH, L. R. 6 A. 495 Civ. **535**

——— **O. XLI, rr. 10, 22 (4)**—*Letters Patent (Mad.), cl. 15—Limitation Act (IX of 1908), s. 5—Appeal—Security for costs, failure to furnish—Dismissal of appeal—Cross-objections, whether can be heard—Appeal from Original Side—Cross-objections, nature of—Limitation—Delay—Extension of time—Sufficient cause.*

Where an appeal is dismissed on account of the failure of the appellant to furnish security for costs as directed by the Court, a memorandum of cross-objections, filed by the respondents pending the appeal can still be dealt with as a substantive appeal and disposed of after notice to the parties.

Order XLI of the C. P. C., has no application to appeals from the Original Side of the High Court. Such appeals are provided for by cl. 15 of the Letters Patent of the Madras High Court. A memorandum of cross-objections by a respondent in such an appeal must, therefore, be treated as a substantive appeal and must be filed within 20 days from the date of the judgment.

Where, however, a respondent is misled by the rules and practice of the Court, and files a memorandum of cross-objections beyond the time for filing the appeal, the delay in the presentation may be excused under s. 5 of the Limitation Act. **M** BHIMASENAROW *v.* VENUGOPALA MUDALI, 48 M. L. J. 384; (1925) M. W. N. 190; 21 L. W. 672; (1925) A. I. R. (M.) 725; 48 M. 631 **443**

——— **O. XLI, r. 22**—*Appeal filed by one defendant—Cross-objections by co-defendant, whether can be entertained.*

Where a decree is passed against two defendants, the interest of one of whom is adverse to the other, and one of them files an appeal against the decree the mere fact that in his appeal he urges grounds which support the claim of the other defendant does not disentitle the latter from filing cross-objections to the appeal putting forward grounds in support of his own claim. Such cross-objections are properly filed under r. 22 of O. XLI of the C. P. C., and must be entertained. **C** BHUBAN MOHAN GHOSE *v.* CO-OPERATIVE HINDUSTAN BANK, 29 C. W. N. 784; (1925) A. I. R. (C.) 973 **866**

——— **O. XLI, rr. 23, 25, s. 151**—*Suit decided on merits—Appeal—Remand order, legality of—Procedure.*

A case should not be remanded for re-trial when the Trial Court has really disposed of it on the merits. If

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in such a case the Appellate Court considers that it ought to have a finding on some issue or issues which the Trial Court has not decided, it can always remit issues under O. XLI, r. 25, of the C. P. C., but it is not legitimate for an Appellate Court to send back a case from its file merely because it differs radically from the conclusions of the Court below on the facts or because it considers that the discussion of the evidence in the Trial Court's judgment is inadequate.

A preliminary decree was passed in a redemption suit and thereafter the Trial Court went into the accounts and holding that the mortgagee had not kept complete or clear accounts accepted the accounts filed by the plaintiff which were prepared on the basis of the *Patwari's* papers. On appeal the Appellate Court thinking that the Court of first instance had not gone properly into the accounts and had decided the case in a summary and unsatisfactory manner remanded the case with the direction that the accounts should be gone into again and that the objections advanced by the mortgagee should be decided after framing issues as regards them:

Held, that it was the duty of the Appellate Court to go into the question of accounts itself and to find out what amount was actually due to the plaintiff on the evidence that was before it, and that it had no power to remand the case after the first Court had already expressed its opinion clearly on the reliability of the account books produced by the mortgagee. **A** LAKHAN SINGH *v.* BABU RAM, 23 A. L. J. 880 **1021**

——— **O. XLI, r. 27**—*Appeal—Additional evidence, when can be taken—Fresh evidence, discovery of, effect of.*

An Appellate Court has no jurisdiction to admit fresh evidence merely on the ground that the evidence had been discovered by one of the parties to the litigation under circumstances which would warrant an application for review of judgment under O. XLVII, r. 1 of the C. P. C. **A** BALDEO RAM *v.* KUN KUN RAM, L. R. 6 A. 393 Civ. **586**

——— **O. XLI, r. 33**—*Appeal—Decree, whether can be modified in favour of a person not party to appeal.*

Under O. XLI, r. 33 of the C. P. C. a decree cannot be modified in appeal in favour of any person unless he is a party to the appeal. **N** YADO RAO *v.* AMRIT RAO **803**

——— **O. XLI, r. 33**—*Decree against two sets of defendants—Appeal by one set—Decree, whether can be set aside as against defendants who have not appealed.*

It is possible that within the ambit of an estate there may be *raiyatwari* holdings, and in such cases the *zemindar* collects the amounts due to the Government only as an agent for the Government.

An *inamdar's* right to both *varams* is not inconsistent with the lands being a part of the *zemindari*.

In a suit by an *inamdar* against a *zemindar* for a declaration that his lands were not part of the estate of the *zemindari* and against the tenants in possession of the land for a declaration that they had no occupancy rights, the Trial Court held that the *inams* were excluded from the assets of the *zemindari* and that the tenants had no occupancy rights. On appeal by the *zemindar* alone, on a finding that the lands were included in the assets of the *zemindari* the Appellate Court reversed the finding as to occupancy rights also and dismissed the plaintiff's suit

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both as against the *zemindar* and as against the tenants:

Held, that the tenants-defendants not having appealed from the decree of the Trial Court, it was not competent to the Appellate Court to dismiss the plaintiff's suit as against them, inasmuch as the finding of the Appellate Court that the lands were included in the assets of the *zemindari* was not inconsistent with the decree which the plaintiff had obtained in the Trial Court against the tenants-defendants. **M** MALYALA SURAYYA *v.* VENKATA KUMARA MAHIPATHI SUNYA ROW, 48 M. L. J. 577; (1925) A. I. R. (M.) 771; 22 L. W. 376; (1925) M. W. N. 730 **99**

——— **O. XLI, r. 33**—*Decree against some defendants—Appeal—Decree, whether can be passed against defendants who were absolved by the Trial Court.*

Where a plaintiff obtains a decree against some of the defendants in the suit and no decree is passed against the other defendants, but on an appeal by the judgment-debtor defendants the Appellate Court comes to the conclusion that the decree should have been against the defendants who have been absolved from liability by the Trial Court, and not against the defendants-appellants, it can apply the provisions of O. XLI, r. 33 of the C. P. C., to give appropriate relief to the plaintiff. **A** KANJI MALL *v.* DURGA PRASAD, 2 A. L. J. 501; L. R. 6 A. 346 Civ.; (1925) A. I. R. (A.) 555; 47 A. 597 **43**

——— **O. XLIII, r. 1 (d), O. IX, r. 13**—Application to set aside *ex parte* decree—Order, conditional—Condition not complied with—Consequent dismissal of application—Appeal from which order lies. *See* C. P. C., 1908, O. IX, R. 13 **196**

——— **O. XLIII, r. 1 (w), O. XLVII, rr. 4, 7**—*Review of judgment on ground of discovery of new evidence—Appeal, grounds for—Objection that new evidence does not refer to property in dispute, whether can be taken—New case, whether can be set up in review.*

The right of appeal conferred by O. XLIII, r. 1 (*w*) against an order allowing a review is not an unlimited right but is subject to the conditions laid down in r. 7 of O. XLVII of the Code.

A review of judgment was granted on the ground of discovery of new and important evidence which the party applying for review could not by the exercise of due diligence have discovered earlier. The new and important evidence consisted of a certified copy of a sale-deed. In an appeal against the order allowing the review it was contended that it was not clear on the face of the sale-deed that it related to the property in dispute:

Held, that the objection did not come within the scope of r. 7 of O. XLVII of the C. P. C., and that consequently the order allowing the review could not be upset.

A party ought not to be allowed in review to raise a case which was never raised at the trial and on which no evidence was adduced. **A** MADHORI SARAN *v.* PARBATI, 23 A. L. J. 534; L. R. 6 A. 454 Civ; (1925) A. I. R. (A.) 552 **653**

——— **O. XLIV, r. 1**—*Application for leave to appeal as pauper, when can be entertained—Appellate Court, duty of—Record, whether can be looked at.*

The proviso to r. 1 of O. XLIV of the C. P. C., is a necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers, and is apt to be overlooked. A right of appeal as a pauper is very distinctly limited. It is

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not sufficient for the applicant to show that he is a pauper. The Court must be satisfied from a perusal of the judgment and decree that there is something wrong with the decree. If the judgment and the decree are on the face of them unexceptionable, the application cannot be entertained and it is not open to the Appellate Court to consider whether the judgment is justified by the record. **R** MAUNG THA DIN *v.* DAW PAW, 4 Bur. L. J. 55; (1925) A. I. R. (R.) 249 **988**

——— **O. XLV, r. 13, O. XLI, r. 6**—*Appeal to Privy Council—Stay of execution—Security—Procedure—Jurisdiction of High Court.*

Order XLI of the C. P. C., applies only to appeals from original decrees, but by virtue of the provisions of O. XLII it is also made applicable to second appeals. It has no application to appeals to the King in Council. In the course of such an appeal the powers with regard to the stay of execution or the taking of security from the respondent are specifically laid down in r. 13 of O. XLV of the C. P. C. Under that rule the High Court may allow the decree appealed from to be executed taking such security from the respondent as it thinks fit for the due performance of any order which His Majesty in Council may make on the appeal. The provisions of this rule are alone meant to govern any question regarding the execution of a decree under appeal to His Majesty in Council and the provisions of r. 6 of O. XLI of the C. P. C., have no application to such a case. **R** MAUNG PO SHEIN *v.* MAUNG PO KIN, 4 Bur. L. J. 50; 3 R. 158; (1925) A. I. R. (R.) 254 **992**

——— **O. XLVII, r. 1 (1)**—*Review—Wrong exposition of law, whether ground for review.*

A judgment cannot be reviewed under O. XLVII, r. 1 (1) of the C. P. C., on account of some mistake or error apparent on the face of the record; where the alleged mistake or error is a wrong exposition of the law **N** JAGANNATH *v.* SHRINIVAS, (1925) A. I. R. (N.) 362 **112**

——— **O. XLVII, rr. 4, 7, O. XLIII, r. 1 (W)**—Review of judgment on ground of discovery of new evidence—Appeal, grounds for—Objection that new evidence does not refer to property in dispute whether can be taken—New case whether can be set up in review. *See* C. P. C., 1908, O. XLIII, r. 1 (w) **653**

——— **Sch. II, para. 4**—*Reference to arbitration by Court—Award by majority of arbitrators, validity of.*

The matter in dispute in a pending suit was referred to the arbitration of two arbitrators and an umpire and the terms of the reference provided for a decision according to the opinion of the majority in the event of there being any dissent. The arbitrators took evidence and after a discussion among themselves arrived at certain conclusions, one of the arbitrators and the umpire being of one opinion and the other arbitrator being of a contrary opinion. The dissenting arbitrator left the place after expressing his dissent from the opinion of the majority. Next day the award was reduced to writing and was dated and signed by the majority and they added a note that the other arbitrator did not agree with the view expressed in the award:

Held, that the award had been arrived at by the arbitrators and the umpire and that the opinion of the majority having been reduced into writing, the award was in accord with the terms of the reference and was perfectly valid. **O** DHARMUN SINGH *v.* SURAT SINGH **547**

——— **Sch. II, paras. 5, 8**—*Arbitration, reference to, in pending suit—Failure of arbitrators to act—Procedure—Reference, whether can be superseded.*

Where a dispute in a pending suit is referred to arbitration and the arbitrators fail to act, the Court is not bound to take action under para. 5 of Sch. II to the C. P. C., if neither party has served a notice upon the other for the removal of an arbitrator and the substitution of another. Even where the Court takes action under para. 5 it is within its discretion to refuse to appoint a fresh arbitrator and to supersede the reference. In a case where nothing has been done under a reference for several years it is desirable that the reference should be superseded and the case dealt with by the Court itself. **L** THAKAR DASS *v.* RAM DASS, (1925) A. I. R. (L.) 374 **975**

——— **Sch. II, paras. 14, 15**—*Arbitration—Error on face of award, what amounts to—Award, proceeding on false assumption of law, validity of—Award, form of—Sale—Consideration, portion of, left in hands of vendee for payment to prior encumbrancer—Vendee, whether trustee.*

An error on the face of an award means that the Court can find in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which is erroneous.

Where a portion of the consideration for a sale of immoveable property is left in the hands of the vendee for payment to previous encumbrancers, the vendee is not a trustee or a *quasi*-trustee in respect of the sum which is so left in his hands, and an award which proceeds on the basis that the vendee is a trustee in respect of such sum is vitiated by reason of the fact that there is an error of law apparent on the face of the award.

When a suit or a dispute is referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions of law and fact.

The award of an arbitrator is intended to be final both in fact and in law, and the Courts will not interfere except on certain well-recognized principles and in certain well-defined circumstances. The award must, therefore, be couched in a form which would lead to finality and must not be put in a form which incites the parties to embark upon further litigation. **C** SREELAL MANGTULAL *v.* J. F. MADAN, (1925) A. I. R. (C.) 599; 52 C. 100 **49**

——— **Sch. II, paras. 14, 15, 20**—*Reference to arbitration without intervention of Court—Court, power of, to amend award—Evidence recorded in absence of one party—Misconduct.*

In the case of a reference to arbitration without the intervention of the Court, the Court has no power to make a correction in the award. The only order which the Court can make in such a case is to order the award to be filed and to pronounce judgment on the award or to refuse to order that the award be filed.

An arbitrator must record evidence in the presence of both parties, allowing each to examine and cross-examine the witnesses produced by the other. Where an arbitrator records the evidence of one party in the absence of the other party, he is guilty o

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judicial misconduct and his proceedings are vitiated. L MOHAMMAD AFZAL v. ABDUL HAMID, (1925) A. I. R. (L.) 570 **161**

——— **Sch. II, paras. 15, 16**—*Arbitration—Arbitrator importing personal knowledge into consideration of case—Evidence taken in absence of party—Misconduct—Award, legality of.*

The question whether an arbitrator can import his own personal knowledge into the consideration of a case before him depends upon the terms of the submission to arbitration. If the submission simply asks him to decide a case, that would not give him a right to import his own personal knowledge into the consideration of the case. But where the submission gives him an option either to take evidence or to decide the case upon his own personal knowledge, he is entitled to import into the consideration of the case his own personal knowledge.

It is illegal for an arbitrator to take evidence in the absence of a party. M R. PALAVESAM CHETTIAR v. NARAYANA AYER, 49 M. L. J. 115; (1925) M. W. N. 503; (1925) A. I. R. (M.) 1086 **660**

——— **Sch. II, paras. 15, 16**—*Arbitration in pending suit—Award—Objections—Opportunity to produce evidence, failure to give, effect of—Decree passed on award, validity of—Appeal, whether lies.*

Where during the pendency of a suit the matter in dispute is referred to arbitration and an award is made and objections are filed to the award, the Court must give an opportunity to the objector to produce evidence in support of his objections. Where a decree is passed upon the award without giving such opportunity to the objector the decree is liable to be set aside on appeal. R E. E. DAWOODJI v. H. C. SHERMAN, 4 Bur. L. J. 39; (1925) A. I. R. (R.) 238 **339**

——— **Sch. II, para. 21 (2), s. 104**—Arbitration without intervention of Court—Order filing award—Decree—Appeal, whether lies. *See* C. P. C., 1908, s. 104 **76**

Club, nature of—Debts incurred by members of club—Liability of members. *See* C. P. C., 1908, O. I, r. 8 **784**

Companies Act (VII of 1913), s. 2 (14)—Prospectus, definition of. *See* COMPANIES ACT, ss. 92, 93 **5**

——— **ss. 92, 93, 2 (14)**—*Advertisement offering shares of Company for sale, whether "prospectus"—Failure to file copy before Registrar—Offence.*

An advertisement offering to the public shares in a Company for sale comes within the definition of "prospectus" as contained in cl. (14) of s. 2 of the Companies Act.

Under the provisions of s. 92 of the Companies Act an advertisement of this nature must be placed before the Registrar by filing a copy of it before it is issued, and in order to be so filed it must contain the essential particulars which are mentioned in s. 93 of the Act. If the advertisement does not comply with the requirements of s. 93 it cannot be accepted by the Registrar and consequently it cannot be published.

Failure to file a copy of such an advertisement with the Registrar before it is issued is punishable under s. 92 (5) of the Companies Act. C PRAMATHANATH SANYAL v. KALI KUMAR DUTT, 29 C. W. N. 523; (1925) A. I. R. (C.) 714; 52 C. 440; 26 Cr. L. J. 1061 **5**

——— **s. 162**—*Private Company having two Directors—Winding up—One Director representing creditor Company—Debtor Company, whether can be represented by other Director—Appeal filed by other Director, whether competent.*

Companies Act—contd.

A private Company consisted of two share-holders who were also the Directors of the Company. One of the Directors was the governing Director of another Company which was the creditor of the former Company and which filed a petition for the winding up of the former Company. The other Director of the Company filed an appeal against that order:

Held, (1) that the Company could be represented only by its Directors and that there being only two of them and one of them being the governing Director of the petitioning Company was incompetent to represent the debtor Company which was consequently to be represented by the other Director alone;

(2) that it was, therefore, competent to the other Director to file an appeal against the order for winding up. R BOWDENS LTD. v. BRITISH PLUMBING AND SANITARY ENGINEERING CO., 4 Bur. L. J. 36; (1925) A. I. R. (R.) 241 **331**

——— **ss. 162, 170, 174**—*Winding up, petition for, by creditor—Advantage of creditors and share-holders—Adjournment.*

An application for compulsory winding up of a Company by one of the creditors of the Company was opposed by the Company and by other creditors of the Company to whom large sums were due from the Company on the ground that the Company had entered into a contract for the sale of its property to another Company and that if an order were made for the winding up of the Company it would cause loss to the creditors and the share-holders. It was found that it would be more to the advantage of the share-holders and of the creditors if an opportunity were given to the Company to complete the sale of their properties:

Held, that under the circumstances the petition for winding up ought to be adjourned and the Company should be given an opportunity to carry out the agreement of sale. R IRAWADDY FLOTILLA CO., v. MERGUI TIN DREDGING CO., 2 Bur. L. J. 296; (1924) A. I. R. (R.) 108 **138**

——— **s. 171**—*Company in liquidation—Suit by secured creditor, whether should be stayed.*

Where a Company is being wound up a secured creditor has *prima facie* a clear right to apply for and obtain leave to enforce his security.

Where a suit is brought by a plaintiff against a Company which is being wound up alleging that he is entitled to a charge on the assets of the Company, and the defendants deny that the plaintiff is entitled to a charge, the issue involved in the suit ought in the ordinary course to be decided in a suit, and such a suit ought to be allowed to proceed in spite of the winding up proceedings. C HUKAMCHAND KASLIWAL v. RADHAKISEN CHAMARIA, 29 C. W. N. 715; (1925) A. I. R. (C.) 916 **754**

——— **s. 209**—*Voluntary winding up—Joint liquidator, appointment of, application for—Recommendation of creditors—Discretion of Court—Extension of time—Appointment, whether can be retrospective.*

When an application is made under sub-s. (2) of s. 209 of the Companies Act, the Court is not required to register by a formal order the recommendation of the creditors of the Company as to the person to be appointed as joint liquidator. The Court may or may not act under sub-s. (3) of s. 209 on the resolution of the creditors. The matter is entirely discretionary with the Court. Till, however, an order is made appointing a person to act as joint liquidator such person cannot take upon himself the duties of a joint liquidator and the assumption of

the duties of joint liquidator on the part of such a person does not give him any rights whatsoever.

In a proper case the Court has power to extend the time for making an application for the appointment of a person as joint liquidator but the Court has no power to make an appointment with retrospective effect. C *In re* BHAGAT BROTHERS LTD., 41 C. L. J. 521; (1925) A. I. R. (C.) 809 **905**

——— **s. 235**—*Managing Director of Company, position of—Money withdrawn by Managing Director from till of Company and invested in mortgage in his own name—Breach of trust—Examination, order for, when to be made.*

The Managing Director of a Company was authorized to invest sums of money not immediately required by the Company, the Company's Solicitor being responsible for the investment. The Managing Director withdrew a certain sum from the till of the Company and advanced that sum together with money of his own to one *K* and obtained a mortgage of *K*'s property in the joint names of himself and his wife. In the balance-sheet of the Company the sum withdrawn by Managing Director was shown as having been invested in a mortgage taken from *K*:

Held, (1) that the Managing Director occupied the position of a trustee for the Company and that he was bound to exercise his powers for the benefit of the Company and for that alone;

(2) that the Managing Director could not in law withdraw from the till of the Company a sum of money and mix it with moneys belonging to himself and represent to the mortgagor that the entirety of the moneys advanced on the mortgage were moneys belonging to the Managing Director and his wife on a joint account;

(3) that the Managing Director was guilty of breach of trust and misfeasance.

An order under s. 235 of the Companies Act should only be made on a clear case being made out. C *In re* A. E. ALEXANDER & Co., 41 C. L. J. 413; (1925) A. I. R. (C.) 852 **672**

——— **ss. 235, 281**—*Limitation Act (IX of 1908), Sch. I, Arts. 36, 115, 116, 120—Misfeasance by Directors—Claim by Liquidator—Dividends paid out of capital—Reasonable conduct—Burden of proof—Duty and position of Directors—Auditor, duty of—Misfeasance proceedings—Limitation, commencement of—Registration under Art. 116, whether includes registration with Registrar of Companies.*

The Directors of a Banking Company are fiduciary custodians of the money entrusted to the Company by the depositors and of the ordinary capital subscribed by the share-holders, and the more satisfactory on the face of it, and the more glowing in character the success of the Company appears to be, the more the Directors are called upon as ordinary responsible business men to satisfy themselves that the apparent profits are really being made.

It may be that in the case of a good debtor it is legitimate to treat as profits earned for the purpose of declaring a dividend, a sum of interest which has accrued due although it has not been paid, but a Bank can only justify doing that, and the Directors can only justify a payment out of profits, which means realised profits, if they have satisfied themselves that the debtor, whose particular liability for interest has fallen due but has not been paid, is a man whose liability is as good as cash, and if in a succeeding year he again does not pay, it is their duty to write that off as a loss in the following year's

Profit and Loss Account until the sum is realised. That is to say, that which is a legitimate risk for a business man to take in a sound business concern can only be justified where the Directors have taken reasonable care to satisfy themselves that the debtor is a solvent person, and that though he is temporarily in arrears the liability is a good one, and where it is shown afterwards that the debt was a bad one, a Director cannot escape from liability by merely saying that he did not know anything about the debtor.

Where an examination of the accounts of a Bank discloses the fact that dividends have been paid out of capital and that false balance-sheets and false statements have been published, the burden is thrown upon the Directors of showing that they acted reasonably and had real grounds such as would operate on the mind of a business man, for believing that the false balance-sheets and false statement that had been published were really true. In the absence of such proof the Directors would be liable to be proceeded against under s. 235 of the Companies Act. In such a case each Director would be liable for the payment which he approved either by resolution or by signing the balance-sheets or the report by which it was recommended that dividends should be paid out of capital.

An Auditor is not a mere arithmetical machine to check the figures in the books. He must satisfy himself not only that the accounts are correct, but that the books represent the true state of affairs of the Company. He has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the Company is being conducted prudently or imprudently, profitably, or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duties to the share-holders. His business is to ascertain and state the true financial position of the Company at the time of the audit, and he must ascertain that position by examining the books of the Company. He does not discharge his duty by doing this without enquiry and without taking any trouble to see that the books themselves show the Company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, he fails to discharge his duty. Assuming the books to be so kept as to show the true position of the Company, the Auditor must frame a balance-sheet showing that position according to the books and must certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the Company.

A claim by the Liquidator of a Company against the Directors for misfeasance under s. 235 of the Companies Act is governed not by Art. 36 but by Art. 120 of Sch. I to the Limitation Act and the "right to sue" within the meaning of the latter Article would accrue only after the appointment of the Liquidator, if not after he discovers the misapplication of the money.

Registration with the Registrar of Companies is as much a registration within the meaning of Art. 116 of Sch. I to the Limitation Act as registration under the provisions of the Registration Act. A *In the matter of* THE UNION BANK ALLAHABAD, LTD., 23 A L. J. 473; L. R. 6 A. 425 Civ.; (1925) A. I. R. (A.) 519; 47 A. 669 **785**

Company, *meeting of, what amounts to—Articles of Association—Share-holders' meeting and passing of resolutions, whether meeting of Company—Receiver of assets of Company, when can be appointed.*

The only proper ways in which a meeting of a Company can be called are either by the Directors in accordance with the provisions of the Articles of Association or by the share-holders on requisition also in accordance with the provisions of the Articles of Association. A meeting of a Company may also be called by a direction of the Court to the Liquidator in winding up proceedings. The mere fact that certain persons who happen to be the share-holders of a Company met together at a private house and purported to pass resolutions appointing Directors, etc., does not make that a meeting of the Company. For a meeting to be a meeting of the Company it must be a meeting convened in one of the ways mentioned above and convened strictly in accordance with the Articles of Association.

A Court has no jurisdiction to appoint a Liquidator to conduct the business of a Company except in a debenture-holders' action when the business and assets of the Company have been charged with the payment of the claims of the debenture-holders. **C** KAILASH CHANDRA DUTTA *v.* SADAR MUNSIF, SILCHAR, 52 C. 513; (1925) A. I. R. (C.) 817 **826**

Compromise decree—Terms not relating to suit, whether can be enforced. *See* C. P. C., 1908, O. XXIII, r. 3 **648**

Confession—*Confessional statement—Whole statement to be accepted.*

Where the only evidence against an accused person is his own confessional statement, the Court must accept the whole of the statement. **M** *In re* KATIRI *alias* ARUNACHALLEM, 26 CR. L. J. 1143; (1925) A. I. R. (M.) 1069 **455**

Construction of document—Agreement—Principal and agent—Agent allowed share of profits effect of. *See* PRINCIPAL AND AGENT **107**

——— *Agreement settling dispute—Promises, mutual—Party guilty of breach, whether can enforce agreement.*

Plaintiff and defendant were both *chelas* of the *mahant* of a *muth*. On the death of the *mahant* an agreement was executed between them by which it was provided that the defendant should be declared to be the *mahant* and the plaintiff, the *adhikari* of the said *muth*, and it was declared that the parties should to the end of their lives be bound to act according to the terms set forth in the agreement. It was provided that in the event of difference between the parties the plaintiff would be entitled to a certain sum for maintenance out of the income of the properties of the *muth* and that this sum would be a charge on the properties. Notwithstanding the terms of the agreement plaintiff brought a suit against the defendant claiming the *mahantship* but the suit was dismissed. He next brought a suit to recover maintenance at the rates specified in the agreement and to have it declared that the amount was a charge on the *muth* properties:

Held, that by bringing a suit claiming the *mahantship* as against the defendant the plaintiff had broken his promise to be bound by the terms of the agreement and had defeated the whole intention of the agreement and that he was not, therefore, entitled to hold the defendant to his part of the contract. **Pat** RAM CHARAN DAS *v.* RAMLAKHAN DAS, (1925) Pat. 157; (1925) A. I. R. (Pat.) 496 **697**

——— *Ambiguity—Surrounding circumstances, whether can be considered—Finding of fact—Appeal, second.*

Where a document is ambiguous, the Court is entitled for the purpose of construing the document to look into the surrounding facts and its conclusion upon those facts would be a finding of fact binding in second appeal.

A sale certificate described the property sold as "2 annas out of 16 annas in *Mouza* T appertaining to *taluk mahal* B, *Pergana* G, *touzi* No. 1685 etc.":

Held, that the certificate meant what it said, namely, that under it 2 annas out of 16 annas in *Mouza* T had passed to the purchaser and that it was not open to the construction that what was purchased was 2 annas in the residuary share No. 1685, and that consequently there was no ambiguity in the sale certificate which entitled the Court to look into the surrounding facts for the purpose of construing the sale certificate. **Pat** LACHMI PRASAD TEWARI *v.* BABUNANDAN SINGH, (1924) Pat. 271; (1924) A. I. R. (Pat.) 805; 3 Pat. L. R. 107 **399**

——— *Compromise—Agreement, provisional, effect of—Adverse possession.*

One of several heirs of a deceased Muhammadan sued the others for recovery of her share of the property left by the deceased. Her suit was decreed by the Trial Court but was dismissed by the High Court on appeal. She preferred an appeal to the Privy Council and during the pendency of this appeal an agreement was executed which purported to be an agreement between all the heirs of the deceased but was actually signed by only some of them, which began by describing the shares to which the different heirs of the deceased were entitled, including the share of the appellant, and then proceeded to submit certain questions to the decision of certain named arbitrators, one of the questions submitted being with regard to the relinquishment of the share of the appellant in her favour. No reference to arbitration was actually made, although for several years subsequent to the agreement a certain fixed sum out of the profits of the estate continued to be paid to the appellant:

Held, (1) that the agreement being merely provisional no title was thereby conferred on the appellant with regard to her alleged share in the estate of the deceased;

(2) that the subsequent payments to the appellant were not sufficient to make out a case of adverse possession by the appellant of her share in the estate of the deceased. **P C** KARUMUNNESSA KHATUN *v.* MOHAMED FAZLUL KARIM, (1925) A. I. R. (P. C.) 70 **149**

——— Compromise—Intention of parties. *See* C. P. C., 1908, O. XXI, r. 93 **379**

——— *Gift*—Heba-bil-ewaz—*Principles applicable—Intention of parties—Hindu Law*—Mithila *School—Gift by husband to wife—Estate conferred—Execution of decree—Mortgage-decree—Executing Court, whether can question jurisdiction of Court to direct sale of property—Representatives of judgment-debtor, whether can object to sale—Remedy.*

There is nothing in the Hindu Law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power

disposal was intended to be conferred even where an estate of inheritance is granted. Where ambiguity exists in the document itself or where the words are not of sufficient amplitude to confer full powers of alienation it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu Law attaches to a woman's rights over property and this may be considered in determining the intention even where an estate of inheritance is granted. But where words are used which in their context express an intention of transferring full rights of ownership, the other principles of interpretation are of minor importance and should not be allowed to restrict the natural meaning of the words.

A deed described as a deed of *heba-bil-ewaz* recited that the donor was the proprietor of the gifted property, that a decree had been obtained against him by his creditor for a certain sum of money and was in course of execution, that the gifted property and another property belonging to the donor had been advertised for sale on the following day, that the donor had tried and had failed to raise the necessary amount to satisfy the decree and that as the sale would entail the loss of both the properties, the donor had taken the necessary amount from his wife and had made *heba-bil-ewaz* to her of the property mentioned in the deed "with trees fruit-bearing and non-fruit-bearing and *ahar* and *pokhar* and reservoir and tank and *kacha* and *pucca* wells and *sair* and salt *sair* and houses occupied by tenants and all my *zamindari* rights which up to now have been in my possession without the co-partnership of any one". The deed then recited that the donor had paid off the sum due under the decree and got the property released from sale and had put his wife in possession and directed that by becoming possessed of the property she should spend the produce "with sons generation after generation" and that the donor, his heirs and representatives would have no concern in demanding the subject of the gift or the consideration money from the donee or her heirs and representatives. The donor was governed by the *Mithila* School of Hindu Law:

Held, that the deed transferred to the donee full rights of ownership in the property gifted including the right of alienation. **Pat** HITENDRA SINGH *v.* RAMESHWAR SINGH BAHADUR, 4 Pat. 510; (1925) A. I. R. (Pat) 625 at 667; 6 P. L. T. 634 at p. 698 **141**

——— Grant—*Inam*. *See* INAM **347**

——— *Mortgage—Agreement by lessee of mortgaged property to give up possession in case property was purchased by mortgagee, effect of.*

Certain properties comprised in a mortgage-deed were held in lease by the appellant for a term of years which gave him the option of renewal for another term of years. The lessee executed an agreement in favour of the mortgagee by which he agreed to waive his right of renewal and to relinquish possession of the property which the mortgagee might himself purchase either by private sale or at a sale in execution for payment of the mortgage-debt. The mortgagee instituted a suit to enforce the mortgage and the appellant was made a party to that suit and obtained a decree which directed that the appellant would be bound to give up possession of the property leased to him if the mortgagee himself purchased any of the properties comprised in the mortgage:

Held, (1) that the agreement executed by the appellant had the effect of enlarging the security and must be taken to have been for the benefit of the mortgagee and his heirs and representatives and

was not merely a personal agreement to enure for the benefit of the mortgagee himself only;

(2) that the effect of the agreement was that if the mortgagee purchased the property the lessee would give up possession but that if an outsider or a third person purchased, then the lessee would not give up possession; what was contemplated was the case of the mortgagee becoming the auction-purchaser in contradistinction to a third person purchasing the property;

(3) that consequently the covenant contained in the agreement was for the benefit of the decree-holder, whoever he might be, at the time of the execution of the decree, and not merely for the benefit of the mortgagee personally. **Pat** MOHIT NARAIN JHA *v.* THAKAN JHA, 3 Pat. L. R. 118 Civ.; (1925) Pat. 189; (1925) A. I. R. (Pat.) 500; 4 Pat. 731 **332**

——— *One contingency mentioned—Other contingencies, whether excluded.*

Whether mention of one contingency in a document excludes all other contingencies is a question to be determined with reference to the particular circumstances of each case.

The meaning attached to a particular word in a particular place is a question of fact and a finding thereon cannot be challenged in second appeal. **C** BASANT KUMAR KAPALI *v.* SATINDRA MOHUN TAGORE **377**

——— *Power-of-attorney—Agent authorized to borrow money—Money borrowed to pay off debt due by husband of principal—Principal, whether liable.*

Where a *pardanashin* lady authorizes her agent by means of a general power-of-attorney to borrow money on mortgages, the agent has no authority to mortgage the property of his principal to pay off debts due by her husband. **O** BIBI BATUL *v.* KEDAR NATH, 12 O. L. J. 372; (1925) A. I. R. (O.) 462 **810**

——— *Riwaj-i-am* (Hoshiarpur District). *See* CUSTOM **71**

——— Sale of goods—Contract specifying place of delivery—Goods destroyed after shipment but before delivery—Property, whether passes to buyer—Liability of buyer for price of goods—Shipment of portion of goods contracted to be sold, whether performance of contract. *See* SALE OF GOODS **910**

——— *Settlement deed—Settlement on settlor and others—Prohibition against alienation without concurrence of all—Estate created—Alienation by settlor of one item, validity of.*

A deed of settlement provided "Myself, my mother and wife shall jointly enjoy the undermentioned properties. No alienation by one of us singly shall be valid. If an alienation is to be made, it shall be done by us three together, and if it is made without the consent of all the three, it shall not be valid. My heirs shall enjoy absolutely after lifetime". The settlor alienated one of the properties mentioned in the deed in favour of the plaintiff. In a suit by the alienee for possession:

Held, (1) that the words "my heirs" could not be construed as words of limitation, and that the heirs took as *grantees*, a remainder having been created in their favour;

(2) that the settlor who had only a joint interest in the properties mentioned in the deed along with his wife and mother was not entitled to alienate one specific item of property and that the plaintiff's suit must, therefore, fail. **M** SUBBIAH MOOPANAR *v.* PONNAMMAL, 21 L. W. 637; (1925) A. I. R. (M.) 669 **393**

——— Will. *See* Will **86**

Contempt of Court—*Jurisdiction of Court to punish for contempt—Ill-treatment of process-server, whether contempt.*

The jurisdiction to punish for contempt of Court is inherent in the Calcutta High Court as a Court of Record. But the Court always exercises its power of punishing a contempt with great forbearance and acts with scrupulous care. It is ordinarily chary of punishing people for contempt and when the occasion arises it deals with such questions in the interest of the public, bearing in mind that the greater the power it possesses, the more caution it is necessary to use in exercising it. In other words, the Court does not interfere where the offence is of a slight or trifling nature and it only interferes where there is a real attempt to obstruct the course of justice.

It is contempt of Court to assault, ill-treat or threaten a process-server engaged in his duty. The object in punishing for contempt where a process-server in the execution of his duty has been abused and assaulted is not to vindicate the dignity of the Court but to prevent undue interference with the administration of justice. The law has armed the Court with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to witnesses, jurymen and process-servers are not allowed. The principle is that those who have duties to discharge pursuant to orders of Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of Justice and carry out their orders.

The Court does not and will not ordinarily take notice of mere rude behaviour on the part of the person against whom the allegation is made; the test is, did the person in question abuse or maltreat the serving clerk while he was engaged in the execution of his duty. **C** A. H. SKONE *v.* V. V. N. BASON, 29 C. W. N. 766; 41 C. L. J. 515; (1925) A. I. R. (C.) 945; 26 Cr. L. J. 1205 **725**

Contract—*Sale of goods—Goods, tender of, in two consignments—Acceptance of portion of one consignment—Goods not of contract description—Non-inspection and non-acceptance of rest—Damages, suit for, maintainability of.*

In August 1918, the plaintiffs agreed to sell defendants at Madura 50 bales, each of 20 bundles, of double deer yarn from out of bales already ordered by the plaintiffs from a Bombay firm. No time was fixed for performance of the contract. Plaintiffs gave notice one month later that 20 bales were ready and another month thereafter that the remaining 30 bales were ready for delivery. Defendants took delivery of 10 bales under the first consignment but did not take delivery of or even inspect the rest. The defendants contended that the 10 bales accepted by them were not of the contract description. In a suit for damages by plaintiffs for non-acceptance of the 40 bales:

Held, (1) that assuming that the 10 bales were not of the contract description, the remaining bales which were not even inspected could not be presumed not to be of the contract description;

(2) that as no time had been fixed for the delivery of the bales by plaintiffs, if defendants had inspected

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these 40 bales and had then found and intimated plaintiffs that they were not of the contract description, they would have had time to supply other bales in place of those rejected;

(3) that the defendants were, therefore, guilty of breach of contract for which plaintiffs were entitled to damages. **M** N. M. RAYULU AIER, NAGASAMI AIER & Co. *v.* THIRUKONDA M. KUPPU IYER, 21 L. W. 503; 49 M. L. J. 1; (1925) A. I. R. (M.) 974 **241**

Contract Act (IX of 1872), s. 2—*Contract—Proposal and acceptance—Reward offered to person fulfilling certain conditions—Person fulfilling conditions, whether entitled to recover.*

A young boy of 13 or 14 years of age ran away from his father's home and the father issued a hand-bill offering a certain amount as a reward to anybody who found the boy and brought him home. Plaintiff found the missing boy and brought him to his father. The father refused to pay the reward and plaintiff brought a suit to recover the amount of the reward:

Held, that the hand-bill was an offer open to the whole world which could be accepted by any person who fulfilled the conditions contained therein, and that the plaintiff having fulfilled the conditions of the hand-bill was entitled to recover the amount of the reward offered. **A** HAR BHAJAM LAL *v* HAR CHARAN LAL, 23 A. L. J. 655; (1925) A. I. R. (A.) 539; L. R. 6 A. 486 Civ. **908**

——— **s. 16**—*Undue influence, what amounts to—Relationship of master and servant, whether undue influence.*

In order to establish a case of undue influence it is not enough to show that one party was in a position to dominate the other. It must also be established that the person in a position of domination has used that position to obtain an unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid.

The mere fact that one party to a transaction is the servant of the other is not sufficient, in the absence of other evidence, to show that undue influence was used. **N** DAULAT *v.* GULABRAO, (1925) A. I. R. (N.) 369 **295**

——— **s. 19-A**—*Undue influence—Contract set aside—Restoration of benefit, whether can be directed.*

Where the Court refuses to enforce a contract on the ground of undue influence it has power under s. 19-A of the Contract Act to annex such terms and conditions to its decree as may seem just; for instance, it may direct that any benefit received by the person at whose instance the contract has been avoided should be restored to the other party to the contract. **A** SUNDAR RAI *v.* SURAJ BALI RAI, L. R. 6 A. 483 Civ.; 23 A. L. J. 856 **1013**

——— **ss. 23, 65**—*Karnam* service *inam*—Agreement to sell, validity of—Contract, whether enforceable. *See* TRANSFER OF PROPERTY ACT, 1882, s. 6 **557**

——— **s. 23**—*Transfer of immoveable property in consideration of future illicit intercourse, whether void—Immoral condition attached to gift, effect of—Voidable transfer, whether can be avoided by successor of transferor.*

In the case of a voidable transfer of immoveable property, it is open to the heirs of the transferor to claim that there was no absolute transfer of the property in favour of the transferee but only a qualified transfer subject to the right of the transferor to

avoid it if he chose to do so, and they can claim the property by avoiding the deed of transfer which could have been avoided by their predecessor.

Where the consideration for the transfer of immoveable property is future illicit connection between the transferor and the transferee, the consideration is both immoral and opposed to public policy and the transfer is void *ab initio*.

There is a distinction between an immoral consideration for a gift and an immoral condition which is subsequently attached to the gift. If the consideration is itself immoral the transfer falls to the ground. On the other hand if a subsequent condition is tried to be attached to a perfectly valid gift then the condition being immoral is void, but the gift remains unaffected. A GHUMNA *v.* RAM CHANDRA RAO, 23 A. L. J. 376; L. R. 6 A. 331 Civ.; (1925) A. I. R. (A.) 437; 47 A. 619 **411**

——— **ss. 51, 54**—*Transfer of Property Act (IV of 1882), s. 55—Contract for sale of immoveable property—Title, doubtful—Purchaser, whether bound to complete—Brokerage, liability of purchaser to pay.*

Where in the case of a contract for the sale of immoveable property the state of the vendor's title is such that if the purchaser were to complete the purchase he would not be able to obtain possession of the property without further litigation with third parties, he is justified in not completing the purchase. In such a case the purchaser would not be liable to pay brokerage in connection with the intended purchase to the broker who proposed the sale, inasmuch as the broker may reasonably be held in effect to have committed a breach of the contract by joining with the vendor in proposing a sale which could not in fact be carried out. S SHARAFDIN *v.* ALLABHUX, (1925) A. I. R. (S.) 220 **569**

——— **s. 55.** *See* VENDOR AND PURCHASER **440**

——— **ss. 64, 65**—*Void contracts—Sections, applicability of.*

Sections 64 and 65 of the Contract Act are not applicable to cases of contracts which are void *ab initio*. B LIMBAJI RAVJI HAJARE *v.* RAHI RAVJI HAJARE, 27 Bom. L. R. 621; 49 B. 576; (1925) A. I. R. (B.) 499 **643**

——— **ss. 65, 23**—*Karnam* service *inam*—Agreement to sell, validity of—Contract, whether enforceable—Refund of consideration money. *See* TRANSFER OF PROPERTY ACT, 1882, s. 6 **557**

——— **s. 86**—Court-sale — Property burnt down after sale, but before confirmation—Sale, whether can be confirmed—Section, applicability of. *See* C. P. C., 1908, O. XXI, rr. 89, 90, 91 **693**

——— **s. 107**—*Civil Procedure Code (Act V of 1908), O. VI, r. 17—Contract for sale of ready goods, breach of—Re-sale two months after due date—Damages on basis of re-sale, whether can be recovered—Appeal—Amendment of plaint, whether can be allowed.*

Defendant agreed to purchase from the plaintiff a certain quantity of ready goods but failed to take delivery of the goods. Defendants served plaintiff with notice of re-sale and actually re-sold the goods by public auction nearly two months after the due date and then sued the defendant for the loss resulting from the re-sale. The suit was decreed but on appeal the District Judge dismissed the suit on the ground that the plaintiff was not entitled to recover damages on the basis of a re-sale which had taken place nearly two months after the due date of contract for the sale

of ready goods. Plaintiff applied for leave to amend the plaint so as to be able to sue for damages on the basis of the difference between the contract price and the market price on the due date. This application was also rejected:

Held, (1) that the lower Appellate Court had rightly held that the plaintiff was under the circumstances not entitled to recover damages on the basis of a re-sale;

(2) but that under the circumstances of the case plaintiff should have been given leave to amend the plaint and to sue on the basis of the difference between the contract price and the market price on the due date. S FIRM OF GANGARAM *v.* KODOOMAL, (1925) A. I. R. (S.) 222 **571**

——— **s. 107**—*Sale of goods—Appropriation not communicated to buyer before repudiation—Re-sale—Liability of buyer.*

Once a party has by his conduct given an indication of his intention not to abide by a contract, his neglect or refusal to reply to the communications of the other party to the contract thereafter cannot amount to an indication of his desire to keep the contract alive. On the other hand, an express or implied assent to an appropriation of goods towards the contract is an indication of such an intention.

An appropriation of goods towards the contract and the communication of such appropriation to the purchaser should both take place before there has been repudiation or breach of the contract by either party. No assent by the purchaser can be implied by his mere silence after he has actually broken the contract. If appropriation and communication thereof do not take place before there has been repudiation or breach of the contract by the purchaser the property in the goods does not vest in the purchaser and the seller is not entitled to re-sell the goods and claim the deficiency on the re-sale from the purchaser. L BIJRAJ *v.* GOVIND PERSHAD-WAZIR SINGH, (1925) A. I. R. (L.) 581 **230**

——— **ss. 211, 222.** *See* PRINCIPAL AND AGENT **54**

——— **ss. 223, 224**—*Principal and agent—Moneys spent by agent authorizedly for unlawful purpose—Agent, right of, to recover—Indemnity against unlawful acts which are not criminal—Sea Customs Act (VIII of 1878), s. 167—Acts and omissions specified in section, whether crimes.*

In a suit for an account by a principal against his agent for moneys received by the agent from or on behalf of the principal, the agent is entitled to deduct moneys authorizedly expended by him for unlawful purposes out of his principal's moneys in his hands, though the agent may not be able to claim such items specifically in a suit instituted by him for the recovery of the same.

An agent is entitled to indemnity in respect of unlawful acts which are not criminal, provided he has acted in good faith and without knowledge that such acts are unlawful.

The use of the expressions "offence" and "penalty" in s. 167 of the Sea Customs Act, in respect of the acts and omissions specified in that section is not itself sufficient to show that such acts or omissions are crimes, and whether they are crimes or not would depend upon the ordinary criminal law of the land. S FIRM MADHOWJI THAWOR *v.* YAR HUSSAIN HYDOR DASTI **980**

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——— **s. 245**—*Name used in designation of firm, effect of—Person whose name used, whether becomes partner.*

The mere use of a name in the designation of a firm should not lead any member of the public to presume that the person whose name is used is a partner in the firm. The mere fact, that the person whose name is so used does not repudiate the use of his name in the designation of the firm, does not render him liable as a partner under s. 245 of the Contract Act. O NEMCHAND *v.* GUR DAYAL, 12 O. L. J. 285; 2 O. W. N. 296; (1925) A. I. R. (O.) 451 **584**

Contribution, *suit for—Co-tenants—Set-off, equitable whether can be allowed.*

Where a co-tenant who has paid off a rent-decree in order to save the joint holding from sale in execution of the decree brings a suit for contribution against his co-tenants, the latter are entitled to put forward a claim by way of set-off in respect of payments of rent made by them on behalf of the plaintiff, and the set-off cannot be rejected merely on the ground that if the defendant brought a suit to recover the amount of the set-off it would be barred by time. C ABDUL MAJID *v.* KULSAM BIBI **696**

Co-operative Societies Act (II of 1912), s. 43 (2) (b)—*Rules framed by Local Government—Dispute between society and estate of deceased member—Arbitration—Award made by Registrar—Legal representative made personally liable—Award, validity of—Jurisdiction of Civil Court to set aside award.*

A Co-operative Society has complete power under the rules framed under sub-s. (2) (*b*) of s. 43 of the Co-operative Societies Act to refer any matter in dispute between it and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member.

An award made by the Registrar of Co-operative Societies against the legal representatives of a deceased member in respect of a liability incurred by the latter which purports to make the legal representatives personally liable is in excess of the authority of the Registrar and a Civil Court has jurisdiction to set aside the award. **Pat** MAHABIR PRASAD *v.* BASUDEO NARAYAN, 6 P. L. T. 452; (1925) Pat. 231; (1925) A. I. R. (Pat.) 575 **671**

Co-sharers—*Profits, suit for—Expenses, allowance for—Grove planted by* lambardar—*Co-sharer, whether can claim share of profits—Costs, basis of.*

In a suit for profits the *lambardar* claimed a certain sum as expenses incurred in collection of profits. He attempted to prove the expenditure of the particular sum claimed by him but failed and was awarded a sum equal to 5 per cent. on the collections in lieu of expenses. In second appeal he claimed that he should be allowed expenses at least at the rate of 10 per cent. on the collections:

Held, that the *lambardar* having failed to prove any actual expenditure and not having tendered evidence to justify any specific percentage could not be heard to say in appeal that the sum allowed by the lower Courts was insufficient.

In the absence of clear evidence of an agreement amongst the co-sharers that the *lambardar* who has planted some *usar* with groves should reimburse himself for any expense in planting the *usar* by

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taking the whole profits arising therefrom, the *lambardar* cannot claim to appropriate the whole of the profits arising from the *usar* and the other co-sharers are entitled to their shares in the profits.

In a suit for profits a plaintiff is entitled to get costs on what he is eventually allowed and not merely on the nominal sum which he orginally claimed. O GHANI AHMAD KHAN *v.* AZIZ BEGAM, 12 O. L. J. 272; 28 O. C. 217; (1925) A. I. R. (O.) 432; L. R. 6 A. (O.) 93 **134**

Counsel and client—*Compromise of suit—English rule, application of.*

The common law rule as to the authority of a Counsel to compromise a suit without reference to his client, apart from being of doubtful force even in England, should not be applied in India, especially in the *muffasil*, where people may never have heard of the practice. C TARU BALA DASI *v.* SURENDRA NATH MITRA, 41 C. L. J. 213; 29 C. W. N. 597; (1925) A. I. R. (C.) 866 **369**

——— Compromise of suit—Counsel, traditions and privileges of—Counsel, authority of, to compromise suit. *See* C. P. C., 1908, O. XXIII, r. 3 **413**

Court Fees Act (VII of 1870), s. 7 (V), Sch. II, Art. 17 (b)—*Suit for declaration and possession of* durga *and its properties—Court-fee payable.*

In determining the amount of Court-fee payable on a plaint, the sole question to be considered is what is the "subject-matter of the suit".

A suit by a plaintiff for a declaration that he is the *sajjadanashin* of a *durga* and for possession of its properties is governed by s. 7, cl. v of the Court Fees Act and not by Art. 17 (*b*) of Sch. II to the Act and an *ad valorem* Court-fee is payable on the plaint. M *In re* SYED MAHOMED GOUSE (1925) M. W. N. 252; 48 M. L. J. 571; 22 L. W. 163; (1925) A. I. R. (M.) 804 **209**

——— **s. 7 (ix), Sch. I, Art. 1**—*Foreclosure suit, dismissal of—Appeal—Court-fee payable on memorandum of appeal.*

In a suit for foreclosure the Court-fee is payable on the plaint upon the principal amount secured by the mortgage under s. 7 (*ix*) of the Court Fees Act. Where the suit is dismissed, the memorandum of appeal must bear an *ad valorem* Court-fee on the value of the subject-matter of the appeal under Art. 1 of Sch. I to the Act. A PRAG *v.* BHAGWAN DIN, L. R. 6 A. 457 Civ.; 23 A. L. J. 853; (1925) A. I. R. (A.) 734 **888**

——— **s. 19-C**—*Letters of Administration, grant of—Full fees, payment of—Application for, Letters of Administration* de bonis non—*Fresh fees, whether payable.*

Section 19-C of the Court Fees Act provides that where the full fee chargeable under the Act has been paid, no further fee is to be chargeable when a like grant, *i. e.*, a grant of Probate or Letters of Administration, is made in respect of the whole or any part of the same property belonging to the same estate. There is nothing in the wording of the section to confine its application to the case of some executors coming in to take out Probate after one of their members has already taken out Probate. It will apply equally to a subsequent application for administration of the whole estate and to an application to administer that which has been unadministered so far. When the appointment is made *de bonis non*, there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court-fees must be paid. R *In the matter of* MAUNG WIN PAN, (1925) A. I. R. (R.) 217; 3 R. 90 **759**

Criminal Law Amendment Act (XIV of 1908), ss. 16, 17 (1), (2)—*Exhortation to form unlawful association—Promoting meeting of unlawful association, what amounts to—Authority of accused to act on behalf of unlawful association, proof of.*

The offence of promoting or assisting in promoting a meeting of an unlawful association implies that the association is already in existence. A person who merely urges the forming of an association cannot be said to promote or assist in promoting a meeting of that association, when the association itself had not come into existence, within the meaning of s. 17 (2) of the Criminal Law Amendment Act.

A certain association and all "*jathas*" organized by it or affiliated to it had been declared by the Government to be unlawful associations within the meaning of s. 16 of the Criminal Law Amendment Act. Accused addressed a meeting in which he exhorted those present to organise themselves into *jathas* and to proceed to certain places in the name of the unlawful association. Accused gave out that he was acting on behalf of the association but there was no proof that he had been authorized by the association to act on its behalf:

Held, (1) that even if a *jatha* had been formed in response to the appeal of the accused it would not have been an unlawful association unless it was organized by or affiliated to the particular unlawful association which had been so declared by Government and that in the absence of evidence that the accused was authorized by that unlawful association to act on its behalf it could not be said that any *jatha* so formed was organized by or affiliated to that association;

(2) that by urging his hearers to form themselves into *jathas* it could not be said that the accused had promoted or assisted in promoting a meeting of the *jathas* which had not come into existence within the meaning of s. 17 (2) of the Criminal Law Amendment Act;

(3) that in the absence of evidence that the accused was acting on behalf or under the authority of the unlawful association the accused could not be said to have committed an offence under sub-s. (1) of s. 17 of the Criminal Law Amendment Act. L ATTAR SINGH *v.* EMPEROR, 2 L. C. 17; 6 L. 349; (1925) A. I. R. (L.) 522; 26 Cr. L. J. 1135 **367**

——— **s. 17 (2)**—*Managing or taking part in meeting of unlawful association.*

To substantiate a charge under sub-s. (2) of s. 17 of the Criminal Law Amendment Act it is necessary to prove that the association in question was an unlawful one and that the accused managed or assisted in its management, or promoted or assisted in promoting a meeting of the association, or of any of its members as such members. L SARUP SINGH *v.* EMPEROR, (1925) A. I. R. (L.) 299; 1 L. C. 538; 26 Cr. L. J. 1078 **22**

Criminal Procedure Code (Act V of 1898), s. 35. *See* PENAL CODE, 1860, s. 71 **997**

——— **ss. 87, 88**—*Absconder—Attachment of property—Ancestral property, rights in—Attachment, operation of—Property acquired by father, whether ancestral.*

In the case of ancestral lands in the Punjab all that can be attached in proceedings under ss. 87 and 88 of the Cr. P. C., is the interest of the absconder, and on his death the lands must be released in favour of his heirs.

Where waste land is granted to a person who subsequently acquires proprietary rights therein, the land becomes ancestral in the hands of his son. L SHAH MUHAMMAD *v.* EMPEROR, 2 L. C. 8; 26 Cr. L. J. 1148 **460**

——— **s. 107**—*Security proceedings—Opposing factions, whether can be proceeded against in one proceeding.*

The two opposing parties to a dispute cannot be proceeded against under s. 107 of the Cr. P. C., in one proceeding. Pat KISHORE AHIR *v.* EMPEROR, 6 P. L. T. 768 **864**

——— **s. 110**—*Joint proceedings—Prejudice to accused—Illegality.*

Proceedings under s. 110 of the Cr. P. C., were instituted jointly against two brothers who lived together and against whom there was evidence of joint acts committed by both of them. There was, however, some evidence which was relevant to the case against one of them but was not relevant to the case against the other. An order was made against them by the Magistrate and was upheld in appeal by the Sessions Judge. In dealing with the appeal, however, the Sessions Judge distinguished the evidence which was relevant to the case of each accused from the rest of the evidence and wrote two separate judgments. In revision:

Held, that as no prejudice had resulted to the accused from proceedings having been taken against them jointly and as the Sessions Judge had excluded from his consideration evidence which did not apply directly to the case of each accused, the joint proceedings were not illegal. N SHAMSUDDIN *v.* EMPEROR, 26 Cr. L. J. 1114; (1925) A. I. R. (N.) 381 **282**

——— **s. 110**—*Security proceedings—Local enquiry, whether desirable—Finding based on evidence—Information obtained in local enquiry, use of—Irregularity.*

Though local inquiry is most appropriate where it is a question whether proceedings under s. 110 of the Cr. P. C. should be instituted, such an enquiry is out of place when the accused are brought before the Court. Once the accused are before the Court the case must be decided on the evidence alone.

In a proceeding under s. 110 of the Cr. P. C. the Magistrate dealt with the evidence at great length and on that evidence came to the conclusion that it was established that the accused were habitual thieves. In his order the Magistrate stated that camping at the spot he had received information which confirmed the conclusion at which he had arrived on the evidence:

Held, that the course adopted by the Magistrate in making an enquiry at the spot was irregular but that the irregularity was not sufficient, in the circumstances of this case, to induce the Court to set aside the whole proceedings and direct a re-trial. O RAM PARGAT *v.* EMPEROR, 2 O. W. N. 350; 12 O. L. J 341; (1925) A. I. R. (O.) 441; 26 Cr. L. J. 1149 **461**

——— **ss. 110, 112**—*Security proceedings—Preliminary order, form of—Being member of gang of dacoits whether ground for proceeding—Evidence of substantive offence, whether admissible—Acquittal on previous charge—Evidence relating to previous charge, whether can be taken into consideration.*

A Magistrate who issues an order under s. 112 of the Cr. P. C. must be careful to see that the order that he is issuing is in the terms of the section which he proposes to apply.

Being a member of a common gang of dacoits is not a ground for proceeding against a person under s. 110 of the Cr. P. C.

Criminal Procedure Code—contd.

Where proceedings are taken against a person under s. 110 of the Cr. P. C. on the ground of his being a habitual robber, evidence that bad characters assemble at his house is entirely irrelevant unless it is evidence showing that the bad characters were robbers or that the assembly was for the purpose of robbery and not for instance, merely for the purpose of gambling.

There is no warrant for the proposition that evidence which might possibly form the basis of a charge of a substantive offence is necessarily to be excluded in proceedings under s. 110 and cannot form the basis of an order under s. 112 and a finding under s. 118 of the Cr. P. C.

The fact that a person against whom proceedings are being taken under s. 110 of the Cr. P. C., was acquitted of a charge brought against him of a substantive offence does not entitle him to have all evidence excluded of the incident which formed the subject of the previous trial. It is entirely a question of the value to be attached to the acquittal. If he was acquitted on the ground that the case was totally false against him no Magistrate or Judge would think of taking the case into consideration against him. On the other hand if he was only given the benefit of the doubt there is no reason why the incident should not be put in evidence and given whatever value it might be worth. The fact of acquittal may diminish and even destroy wholly the value of the evidence, but does not render it inadmissible. **A** BUDHAN *v.* EMPEROR, 23 A. L. J. 507; L. R. 6 A. 129 Cr.; 26 Cr. L. J. 1130; (1925) A. I. R. (A.) 694; 47 A. 733 **362**

——— **ss. 117, 356, 357, 360**—*Security proceedings—Evidence, record of—Procedure—Non-compliance with provisions of s. 360—Illegality.*

Per *Newbould, J.*—Section 356 of the Cr. P. C., must be held to prescribe the manner in which evidence should be recorded in warrant cases. It, therefore, follows that the provisions of s. 360 of the Cr. P. C., are applicable to proceeding under s. 117 of the Code when a person is called upon to show cause why he should not furnish security for good behaviour and failure to comply with the provisions of that section would vitiate the enquiry or trial.

Per *Ghose, J.*—The provisions of s. 360 of the Cr. P. C. are matters of procedure and having regard to the fact that the directions contained in the section are mandatory the disregard of the provisions of that section with regard to any trial or enquiry vitiates the whole trial or enquiry.

Section 360 of the Cr. P. C., only refers to evidence taken under s. 356 or 357 of the Code. Although according to the provisions of s. 117, sub-s. (2) of the Code, evidence should be recorded in cases referred to in that section in the manner prescribed for recording evidence in warrant cases that does not make s. 356 applicable in all its terms, because s. 356 specifically refers to enquiries under Chs. XII and XVIII only and does not refer to Ch. VIII of the Code. The result, therefore, is that in making enquiries under s. 117 evidence should be recorded as in a warrant case, but Ch. VIII of the Code not having been referred in s. 356, s. 360 of the Code has no application to the record of such evidence. **C** SANATAN BHATTACHARYA *v.* EMPEROR, 41 C. L. J. 352; (1925) A. I. R. (C.) 720; 52 C. 632; 26 Cr. L. J. 1240 **856**

——— **ss. 137, 138, 139-A**—*Obstruction to public way—Objection to existence of public right, taken at late stage—Duty of Magistrate—Procedure.*

Criminal Procedure Code—contd.

Under the provisions of s. 139A of the Cr. P. C., on the appearance before him of the person against whom an order is made, a Magistrate is bound to question him as to whether he denies the existence of a public right of the way, river, channel or place, and if he does so, the Magistrate must, before proceeding under s. 137 or s. 138, enquire into the matter. The Magistrate cannot refuse to enquire into the matter merely because objection was not taken until a late stage of the case. **C** SADIR *v.* SABARALI, 29 C. W. N. 649; (1925) A. I. R. (C.) 736; 26 Cr. L. J. 1168 **528**

——— **ss. 144, 145, 107**—*Dispute relating to land—Procedure—Jurisdiction of Magistrate—Order under s. 144, duration of—Observation as to possession, effect of.*

Section 144 of the Cr. P. C., is of general application and contains nothing which ousts the jurisdiction of a Magistrate in cases of *bona fide* disputes as to possession of land. Where, however, s. 107 or s. 145 of the Code will meet the requirements of the case, s. 144 is not an appropriate remedy and if it is found that the danger was not so imminent that it could not be otherwise averted an order under s. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another whose claim to possession is a mere pretence is threatening to interfere with that possession the Magistrate is entitled to resort to the special summary procedure of s. 144, if immediate provision or speedy remedy is desirable.

Where in the course of a proceeding under s. 144 of the Cr. P. C. the Magistrate finds that there is a *bona fide* dispute of possession of land likely to cause a breach of the peace he is bound immediately to take action under s. 145 of the Code. The use of s. 144 is a suitable method of avoiding a breach of the peace only if it is clear upon a reading of the Police report that the claim of the party creating the disturbance is not a claim made in good faith.

An order purporting to be under s. 144 of the Cr. P. C., has no power after the expiry of two months from the date of the order and any observation made in such an order by the Magistrate as regards the possession of any of the parties must be treated simply as an incidental observation meant to enable the Magistrate to make an order under the section. Such an observation cannot have the force of an order under s. 145 of the Code and is of no use in determining the question of actual possession, if the question arises in a subsequent proceeding. **Pat** MUNNI LAL SAO *v.* GATTI AHIR, 3 Pat. L. R. 70 Cr.; (1925) A. I. R. (Pat.) 514; 6 P. L. T. 744; 26 Cr. L. J. 1229 **845**

——— **s. 145**—*Dispute as to right to collect definite share of rents—Proceedings under section, validity of.*

Proceedings under s. 145 of the Cr. P. C., are not warranted by sub-s. (2) of the section in respect of disputed crops or other produce of land or of disputed *bhaoli* rents or profits of such property when these have been severed and removed from the land. The definition of "land" however, as extended by sub-s. (2) of the section includes the rents of the land and where there is a dispute between rival claimants as to exclusive possession of a certain share of the rents, the section is not inapplicable and proceedings may properly be instituted under the section. **Pat** BASUDEO SINGH *v.* MAHADEO LAL, 6 P. L. T. 454; (1925) A. I. R. (Pat.) 618; 26 Cr. L. J. 1187 **707**

Criminal Procedure Code—contd.

——— **ss. 145, 147**—*Right to worship in temple, dispute as to—Section applicable—Procedure.*

When a dispute arises with reference to the right to worship in a temple, the proper section under which action should be taken by a Magistrate to prevent a breach of the peace is s. 147 and not s. 145, Cr. P. C.

Where the dispute is really as regards the possession of the temple, s. 145, Cr. P. C., would be the proper section. **M** SINNASWAMI CHETTY *v.* PANNADY PALANI GOUNDAN, 48 M. L. J. 528; (1925) A. I. R. (M.) 779; 26 Cr. L. J. 1057 **2**

——— **ss. 145, 360**—*Proceedings under s. 145—Deposition of witnesses, whether must be read over.*

Held, by the majority (*Cuming, J.* dissenting) that the provisions of s. 360 of the Cr. P. C., apply to proceedings under s. 145 of the Code, subject to the qualification that in proceedings under that section there is no accused whose presence at the reading of the evidence is necessary. **C** NARENDRA CHANDRA RUDRA PAL *v.* SUBARALI BHUIYA, 29 C. W. N. 701; 41 C. L. J. 479; 52 C. 721, (1925) A. I. R. (C.) 822; 26 Cr. L. J. 1194 **714**

——— **ss. 145, 438**—*Dispute relating to immoveable property—Order by Magistrate—District Magistrate, power of, to set aside order—Reference—Procedure.*

A District Magistrate has no power to set aside an order made by a Magistrate under s. 145 of the Cr. P. C. If the District Magistrate is of opinion that the order is erroneous he should refer the matter to the High Court under s. 438 of the Code. **C** ESERUDDI HOWALDAR *v.* OTARUDDI AKON, 26 Cr. L. J. 1166 **526**

——— **s. 145 (1)**—*Dispute relating to land—Breach of the peace, apprehension of—Preliminary order, absence of, effect of—Jurisdiction of Magistrate to institute proceedings.*

Before instituting proceedings under s. 145 of the Cr. P. C. a Magistrate must satisfy himself that a dispute likely to cause a breach of the peace exists concerning any land, etc., and he must make an order in writing stating the grounds of his being so satisfied. Where no such order is made the Magistrate has no jurisdiction to institute proceedings under the section, and any proceedings started by him without making the requisite order are liable to be set aside as taken without jurisdiction. **L** SHER KHAN *v.* FAZAL ILLAHI, (1925) A. I. R. (L.) 368; 26 Cr. L. J. 1177 **601**

——— **s. 147 (2)**—*Dispute concerning immoveable property—Mandatory order, whether can be issued—Jurisdiction of Magistrate.*

Under sub-s. (2) of s. 147 of the Cr. P. C., a Magistrate has power only to issue a prohibitory order restraining any person from doing any act interfering with the right of another person when the Magistrate finds that such right exists. The power given to a Magistrate under this sub-section is analogous to the power of a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but the sub-section does not authorize a Magistrate to make an order in the nature of a mandatory injunction directing a party to perform a certain act, for instance, an act directing a party to demolish a wall that has been built by him. **C** HARI MATI DASI *v.* HARI DASI DASI, 41 C. L. J. 568; (1925) A. I. R. (C.) 991; 26 Cr. L. J. 1265 **1041**

——— **s. 162**—*Evidence Act (I of 1872), s. 92—Statement before Police—Oral evidence, whether admissible.*

It is not necessary under s. 162 of the Cr. P. C., that statements made to the Police in the course of an investigation should be reduced to writing. Section 91 of the Evidence Act has, therefore, no application and it is open to the prosecution to prove them by oral evidence. **S** PITUMAL *v.* EMPEROR, 26 Cr. L. J. 1137 **449**

——— **s. 162**—*Penal Code (Act XLV of 1860), s. 302—First Information Report, omission in, whether can be supplied by reference to Police diaries—Death caused by gun-shot—Accident or design, determination of—Benefit of doubt.*

It was contended on behalf of the defence in a criminal trial that the name of one of the accused was not mentioned in the First Information Report and that a certain material witness had not been produced by the prosecution. In dealing with these contentions the Sessions Judge stated in his judgment that the omission to mention the name of one of the accused in the First Information Report had been set right in the first *zimni* report written up by the Sub-Inspector who proceeded at once to the spot and that the *zimnis* showed that an attempt had been made to secure the attendance of the witness but that he could not be found at his residence:

Held, (1) that if the prosecution desired to explain away the omission of the name of one of the accused from the First Information Report questions should have been put to the Sub-Inspector as to when the name of the accused was first mentioned and that the omission could not be made up by a reference to the *zimnis*;

(2) that similarly with regard to the omission to produce a particular witness the Sessions Judge was not entitled to discover the explanation from the *zimnis* and that such use of the *zimnis* was improper.

During the course of a fight between the party of the accused and the party of the complainants a member of the latter party was killed by a shot from a gun but the Court was unable to determine definitely whether the shot had been fired by one of the accused or was the result of the gun going off of itself during the struggle for its possession:

Held, that the accused must be given the benefit of the doubt and that a conviction was not justified. **L** KUNDANSINGH *v.* EMPEROR, 6 L. L. J. 271; (1924) A. I. R. (L.) 720; 26 Cr. L. J. 1191 **711**

——— **s. 162 (1)**—*Statement made to Police during investigation, when admissible—Proof of statement.*

There is no presumption as to the genuineness of the statements of witnesses entered in Police diaries, and unless the statements are duly proved the evidence given in Court cannot be contradicted by them.

The statement of a Sub-Inspector as to what the witnesses told him during the course of the investigation is inadmissible in evidence under s. 162 (1) of the Cr. P. C. **L** LABH SINGH *v.* EMPEROR, (1925) A. I. R. (L.) 337; 6 L. 24; 26 Cr. L. J. 1153 **513**

——— **ss. 162 (1), 164 (2)**—*Statement made to Police Officer, whether admissible—Statement recorded by Magistrate—Absence of solemn affirmation, effect of.*

A statement recorded by a Police Officer under s. 162, cl. (1) of the Cr. P. C. is inadmissible in evidence at any inquiry or trial, in respect of any offence, under investigation at the time when such statement was made.

A statement recorded by a Magistrate under s. 164, cl. (2) of the Cr. P. C. is admissible in evidence,

whether taken on solemn affirmation or not. S BAHADUR v. EMPEROR, 26 Cr. L. J. 1063; (1925) A. I. R. (S.) 289 **7**

——— **s. 164**—*Confession, recording of—Recording Magistrate, position of—Questions, whether can be put—Record of questions—Duty of Magistrate.*

A Magistrate recording a statement or a confession under s. 164 of the Cr. P. C. is not absolutely prohibited from putting any question to the deponent but his position when recording such statement or confession is merely that of a recording Magistrate, and he is in no sense enquiring into the case and in no sense an investigating officer. There is no justification for such a Magistrate to extract by questions put to the deponent facts which the deponent has not spoken to before such Magistrate, and facts of which the Magistrate himself would only be aware because he has been supplied with some copy of a statement which somebody else alleges the deponent has made and is willing to make again before the Magistrate, or unless he is prompted by somebody who is aware of such facts. Everything must, however, depend on the nature of the question and the object of it and the mere fact that an answer was elicited by a question does not make the proceeding improper or the statement inadmissible in evidence as a confession.

Under s. 164 of the Cr. P. C. a Magistrate recording a confession is bound to record every question that he puts to person making the confession. It is of great importance that this provision of the law should be obeyed otherwise it might be impossible to tell how far the deponent has deposed voluntarily to a matter and how far his statement was extracted from him by questioning in the nature of cross-examination. A HASAN ALI v. EMPEROR, 23 A. L. J. 719; L. R. 6 A. 137 Cr.; 26 Cr. L. J. 1209 **729**

——— **s. 164**—*Confession, recording, of—Warning to accused that confession might be used as evidence against him, absence of, effect of.*

A Magistrate recording a confession under s. 164 of the Cr. P. C. must warn the accused that he need not make a confession and that if he does so, the confession might be used as evidence against him. Failure to give this warning to the accused would render the confession inadmissible in evidence against the accused. L BAHAWALA v. EMPEROR, 6 L. 183; (1925) A. I. R. (L.) 432: 26 Cr. L. J. 1238 **854**

——— **s. 164**—*Criminal trial—Conviction for offence not charged—Statement made by accused person duly recorded, whether admissible.*

The word "statement" in s. 164 of the Cr. P. C. is not limited to a statement by a witness but includes a statement made by an accused person which does not amount to a confession. C ABDUR RAHIM v. EMPEROR, 41 C. L. J. 474; (1925) A. I. R. (C.) 926; 26 Cr. L. J. 1279 **1055**

——— **ss. 164, 533**—*Confession, record of—Warning to accused that confession may be used as evidence against him, omission of, effect of—Confession, whether admissible in evidence.*

Section 164 of the Cr. P. C. requires that a Magistrate before recording any confession should explain to the person making the confession that he is not bound to make the confession and that if he does so it may be used as evidence against him. Where the memorandum made by the Magistrate at the foot of the confession does not show that this requirement was complied with and the Magistrate when called as a witness at the trial does not state that he had told the accused that he was not bound to make a confession, the confession is inadmissible in evidence. L RAO v. EMPEROR, (1925) A. I. R. (L.) 367; 26 Cr. L. J. 1175 **599**

——— **ss. 164, 533**—*Evidence Act (I of 1872), s. 80—Confession, recording of—Procedure—Memorandum, contents of—Certificate, defective—Statement of Magistrate recording confession, whether can cure defect.*

A confession was recorded by a Magistrate and at the foot of the confession the Magistrate made the following note :—"The statement was written in my presence and hearing. It was read over to the accused and he admitted it to be correct. It contains a true and full account of the statement made by him." There was a note at the head of the confession that the accused was fully made to understand that he was not subject to any compulsion or coercion and that he was at liberty to make whatever statement he liked. The Magistrate who had recorded the confession was examined as a witness at the trial and stated that he had warned the accused that any statement made by him would be used as evidence against him. He also stated that he had put a definite question to the accused whether he was making the confession voluntarily and that the accused replied that he was making the confession of his own free-will:

Held, that the certificate appended to the record of the confession did not comply with the provisions of s. 164 (3) of the Cr. P. C., but that the defect was cured by the statement made by the Magistrate who had recorded the confession and that the confession was consequently admissible in evidence.

Per *Scott-Smith, J.*—Though s. 164 of the Cr. P. C. lays down that no Magistrate shall record any such confession unless, upon questioning the person making it he has reason to believe that it was made voluntarily, yet it is nowhere laid down that the Magistrate shall record any note showing what question he has put to the person and how he has satisfied himself that the confession is being made voluntarily. At the same time it is advisable that a Magistrate recording a confession should record a memorandum showing that he has, by questioning the person making it, satisfied himself that the confession is being made voluntarily.

Per *Fforde, J.*—Section 164 of the Cr. P. C. is one of the exceptions to the main principle of evidence that a document recording a confession may not be given in evidence when the witness to the statement can be produced and can prove it by oral testimony. The section being an exception to the well-established rule of law and being applicable to criminal proceedings its provisions must also be complied with in the strictest possible manner. The essential requirements of the section are that the Magistrate who records the confession shall before doing so explain to the person making it that he is not bound to make any confession at all and that if he does so it may be used as evidence against him. And no Magistrate shall record any such confession unless upon questioning the person making it, he has reason to believe that he will make it voluntarily. The statement when duly reduced to writing, in compliance with these provisions, must contain at the foot of it a memorandum to the fact that the Magistrate has explained to the person making the confession that if he does so it may be used as evidence against him, that the Magistrate believes that the confession has been voluntarily made, that

Criminal Procedure Code—contd.

it was taken in his presence and hearing, was read over to the person making it and admitted by such person to be correct and that it contains a full and true account of the statement made by him. If the memorandum contains the proper note at the foot of it, it shall be presumed that all necessary formalities purporting in the foot-note to have been performed have in fact been performed. Where, however, the memorandum is defective the defect may be cured by recording the statement of the Magistrate who recorded the confession and if such statement shows that the requirements of s. 164 of the Cr. P. C. were complied with the confession will be admissible in evidence. L KHEMAN v. EMPEROR, (1925) A. I. R. L. 315; 6 L. 58; 26 Cr. L. J. 1074 **18**

——— **s. 165.** *See* ARMS ACT, 1878, s. 19 (*f*) **280**

——— **s. 195**—*Sanction to prosecute obtained before amendment of Code—Complaint instituted after coming into force of amended Code, whether can be entertained.*

No prosecution in respect of an offence specified in s. 195 of the Cr. P. C. can, since the amendment of the Code, be instituted except on the complaint of the authority concerned, and a complaint made by a private individual in respect of an offence alleged to have been committed in or in relation to any proceeding in a Court must be dismissed if it is instituted after the 1st of September 1923, that is to say, the date on which the amended Code came into force. L JAWAHAR LAL v. JAGGU MAL, (1925) A. I. R. (L.) 330; 6 L. 41; 26 Cr. L. J. 1163 **523**

——— **ss. 195, 476, 476-A**—*Sanction to prosecute granted before amendment of Code—Lapsing of sanction—Procedure—Superior Court, power of, to make complaint.*

Section 476-A of the Cr. P. C does not empower a superior Court to do what a subordinate Court had no power to do.

Where before the amendment of the Cr. P. C. a subordinate Court granted sanction for the prosecution of a person in respect of an offence mentioned in s. 195 of the Code, but the sanction lapsed owing to the subsequent amendment of the Code:

Held, that the remedy of the complainant was to move the subordinate Court to make a complaint under the amended s. 476 of the Code and not to move a superior Court under s. 476-A of the Code to make a complaint. M L. PATTABI CHETTY v. GOPALA CHETTY, 26 Cr. L. J. 1125 **357**

——— **s. 195 (1) (b)**—*False information to Police—False charge in Court—Prosecution for false charge—Complaint by Court, whether necessary.*

Where a person makes a false charge to the Police and subsequently institutes a prosecution in Court on the basis of the same charge, the offence of making a false charge under s. 211 of the Penal Code must be deemed to have been committed in relation to a judicial proceeding instituted in Court and before the person making the charge can be prosecuted for such offence a complaint in writing must be made by the Magistrate in whose Court the criminal case was instituted under cl. (*b*) of s. 195 of the Cr. P. C. Pat DAROGA GOPE v. EMPEROR, 6 P. L. T. 515; (1925) A. I. R. (Pat.) 717; 26 Cr. L. J. 1269 **1045**

——— **ss. 195 (1) (c), 476**—*Penal Code (Act XLV of 1860), ss. 463, 467, 471—Forgery of valuable security—Complaint by Court—Section, not specified, effect of—"Offence described in s. 463," scope of—Complaint under s. 463.*

It is not necessary that a Court making a complaint under s. 476 of the Cr. P. C. should state under what particular section the offence complained of falls, and a failure to mention the section does not render the complaint or the proceedings taken on it irregular.

Where a complaint made under s. 476 of the Cr. P. C., after narrating the facts mentions ss. 463 and 471 of the Indian Penal Code, the complaint must be deemed to cover all forms of forgery which the evidence may show to have been committed.

The words "any offence described in s. 463" in s. 195 (1) (c) of the Cr. P. C. must be taken to mean all forms of forgery under whatever section they fall. N ISMAIL PANJU v. EMPEROR, 26 Cr. L. J. 1115; (1925) A. I. R. (N.) 337 **283**

——— **s. 196 (as amended)**—*Complaint regarding the falsity of Return of Election Expenses without order of or under the authority from Government—Cognizance by Magistrate—Punjab Electoral Rules, r. 5 (4)—Words "in a judicial proceeding", whether affect s. 196, Cr. P. C., as amended.*

In r. 5 (4) of the Punjab Electoral Rules, the words "in a judicial proceeding" by a Magistrate do not override or amplify the clear provisions of the amended s. 196, Cr. P. C., and, therefore, do not empower a Magistrate to take cognizance of a complaint regarding the falsity of a Return of Election Expenses, unless the complaint is filed by the order of or under the authority from the Governor-General in Council, etc., as laid down in the amended s. 196, Cr. P. C. L LABH SINGH v. NARINJAN DAS, 6 L. 188; (1925) A. I. R. (L.) 449; 26 Cr. L. J. 1234 **850**

——— **s. 197**—*Penal Code (Act XLV of 1860), ss. 169, 403—Cattle Trespass Act (I of 1871), s. 14—U. P. District Boards Act (X of 1922), ss. 31, 89—Sale of impounded cattle—Member of District Board directed to hold sale—Purchase by such member—Member, whether public servant not removeable from office except by Local Government—Prosecution—Sanction of Local Government, whether necessary.*

A member of a District Board appointed by the Board as an officer for the purpose of holding a sale by auction of cattle impounded under the Cattle Trespass Act is a public servant who by virtue of the provisions of s. 31 of the U. P. District Boards Act is not removeable from his office save by or with the sanction of the Local Government within the meaning of s. 197 of the Cr. P. C. If such an officer proceeds to purchase the cattle himself through a servant, the offence committed by him is committed in the discharge of his official duty, and he cannot be prosecuted in respect of such offence except with the sanction of the Local Government under s. 197 of the Cr. P. C. O EMPEROR v. KRISHNA KANT, 2 O. W. N. 395; 28 O. C. 155; 12 O. L. J. 498; 26 Cr. L. J. 1157; (1925) A. I. R. (O.) 565 **517**

——— **ss. 197, 360**—*Chairman of Union Committee, removeable under certain circumstances by Commissioner—Prosecution—Sanction of Local Government, whether necessary—Deposition read by witness—Statement, whether duly recorded.*

A Chairman of a Union Committee who can under certain circumstances be removed from his office by the Commissioner, cannot be said to be not removeable from his office save by the Local Government, within the meaning of s. 197 of the Cr. P. C. Consequently the sanction of the Local Government is not necessary for the prosecution of such a person under s. 197.

Where the deposition of a witness instead of being read over to him in the presence of the accused is

handed over to the witness and is read by the witness himself, there is no compliance with the provisions of s. 360 of the Cr. P. C. and the deposition cannot be used as the foundation of a conviction. **C** MAHAMMAD YASIN *v.* EMPEROR, 29 C. W. N. 650; 52 C. 431; (1925) A. I. R. (C.) 782; 26 Cr. L. J. 1178 **602**

——— **s. 200**—*Examination of complainant, object of—Asking complainant to subscribe on oath to complaint, whether sufficient—High Court, when will interfere—Partner falsifying accounts—Penal Code (Act XLV of 1860), s. 477A.*

The object of the examination under s. 200, Cr. P. C, is to ascertain whether there is a *prima facie* case and to prevent the issue of process in cases where the examination of the complainant would show that the complaint was clearly false, frivolous or vexatious and that further proceedings would tend merely to harass unnecessarily an accused person and waste the time of the Court.

When a complaint is in writing and is sufficiently clear it would be a sufficient compliance of s. 200 of the Cr. P. C., if the Magistrate reads it over to the complainant and the complainant on oath is asked to subscribe it and it is only when the written complaint is obscure or vague that the Magistrate is bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made. **S** MAHOMED *v.* MAHOMED IDRIS, 26 Cr. L. J. 1101 **189**

——— **ss. 200, 202, 203, 204, 345, 439**—*Case instituted on complaint—Cross-cases—Postponement of issue of process in one case till after disposal of other case—Order, legality of—Discretion of Court—Revision—Interference by High Court.*

Section 344 of the Cr. P. C., is applicable to a case even before the issue of process under s. 204 of the Code and a Magistrate is entitled under the former section, if there be a reasonable cause for doing so, to postpone an enquiry or trial and to postpone the issue of process under s. 204. Section 202 of the Code deals with enquiries after a Magistrate has taken cognizance of an offence on complaint, and before he dismisses it under s. 203 or issues process under s. 304 and there is nothing in the law which prevents a Magistrate from postponing the issue of process under s. 204 if there is reasonable cause for doing so even if the case be a warrant case.

It is the policy of the law that a Court should proceed to enquire into and try the case as soon as it takes cognizance of a complaint, but it is not prevented by any provision of the law from postponing the enquiry or the trial if there are sufficient and reasonable grounds for so doing.

Where a Magistrate postpones the issuing of process in a cross-case till after the disposal of the other case, the only question is as to whether there is any reasonable cause for such order. If there be such cause it is a matter of discretion and if the Magistrate does not exercise his discretion judicially in postponing the case, the High Court will interfere and set aside the order. But if the discretion is exercised in a sound and judicial manner there is no reason why the High Court should interfere with the exercise of the discretion. **Pat** RAM SARAN SINGH *v.* NIKHAD NARAIN SINGH, 6 P. L. T. 477; 3 Pat. L. R. 134 Cr.; (1925) A. I. R. (Pat.) 619; 26 Cr. L. J. 1179 **603**

——— **ss. 203, 436**—*Dismissal of complaint—Further enquiry, order directing—Notice to accused, whether necessary.*

Where no process has been issued to the accused at all and he does not appear in Court and the complaint against him is dismissed summarily under s. 203 of the Cr. P. C. the accused cannot be said to have been "discharged" within the meaning of s. 436 of the Code. It is only after he has appeared in Court and the evidence against him in Court is found to be insufficient so as to make it unnecessary to call upon him to enter upon his defence that he can be discharged. An order dismissing a complaint under s. 203, therefore, may be set aside and further enquiry ordered under s. 436 of the Cr. P. C. without any notice to the accused. **A** GAJRAJ SINGH *v.* EMPEROR, 23 A. L. J. 451; L. R. 6 A. 119 Cr.; (1925) A. I. R. (A.) 537; 26 Cr. L. J. 1176; 47 A. 722 **600**

——— **s. 215**—*Commitment when can be quashed.*

Commitments should only be quashed where on the face of it, there is something in the nature of a fatal flaw in the prosecution. **A** GULAB SINGH *v.* EMPEROR, L. R. 6 A. 148 Cr.; 26 Cr. L. J. 1233 **849**

——— **ss. 215, 360**—*Commitment proceedings—Deposition of witnesses not read over—Commitment, whether can be quashed at instance of Crown—Application opposed by accused, effect of.*

The provisions of s. 360 of the Cr. P. C. were enacted for the benefit of the witnesses as also for that of the accused persons. Where the provisions of the section are not complied with by a Committing Magistrate and also with respect to some of the witnesses in the Sessions Trial, the commitment to the Sessions Court will not be quashed on the application of the Crown where it is opposed by the accused who do not complain of any inaccuracy in the commitment record or in the record of the Sessions Court. **C** EMPEROR *v.* ABDUR RAHIM, 29 C. W. N. 698; (1925) A. I. R. (C.) 928; 26 Cr. L. J. 1276 **1052**

——— **ss. 221, 289**—*Charge to Jury—Unreliability of evidence—Direction to Jury—Error of law.*

A statement in the heads of charge that such and such sections of the Penal Code were "read and explained" to the Jury is bad if it is not shown in what manner the sections concerned were explained.

Where there is evidence against an accused it is for the Jury and not for the Judge to say that that evidence is such that no reliance should be placed on it.

A Judge commits an error of law if he directs the Jury to return a verdict of non-guilty because he holds that there is "no evidence worth the name" against an accused.

"No evidence worth the name" is under the law a very different thing from "no evidence." **C** RAHAM ALI HOWLADAR *v.* EMPEROR, 26 Cr. L. J. 1151; (1925) A. I. R. (C.) 1055 **463**

——— **ss. 227, 237**—*Penal Code (Act XLV of 1860), s. 279—Police Act (V of 1861), s. 34—Charge under s. 34, Police Act—Conviction under s. 279, Penal Code, legality of—Charge—Information to accused as to contents of charge, whether necessary.*

A summons was issued to the accused to answer a charge under s. 34 of the Police Act for driving a bicycle rashly. The accused was tried on this charge but the Magistrate held that the facts proved did not constitute an offence under s. 34 of the Police Act. The accused was, however, convicted under s. 279 of the Penal Code:

Held, (1) that the finding that the accused was not guilty of an offence under s. 34 of the Police Act necessarily and logically meant that the accused could not be convicted of an offence under s. 279 of the Penal Code;

(2) that the accused was entitled to know of the charge he had to answer and that not having been informed of any charge under s. 279 of the Penal Code he could not be convicted of an offence under that section.

Sections 227 and 237 of the Cr. P. C. necessarily go together and it is not the intention of the Legislature to empower a Court to convict an accused person of an offence of which he has not been told anything. A DHUM SINGH v. EMPEROR, 23 A. L. J. 436; (1925) A. I. R. (A.) 448; L. R. 6 A. 143 Cr.; 26 Cr. L. J. 1057 **1**

——— **ss. 235, 239**—*Offences committed in separate transactions—Joint trial, legality of.*

Certain accused were charged with an offence under s. 307 of the Penal Code and one of them was also charged with an offence under s. 20 of the Arms Act. The offence under the Arms Act was not committed in the course of the same transaction as that in which the alleged attempt to murder took place, but the accused were tried jointly in respect of both the offences:

Held, that the joint trial was illegal. L NUR KHAN v. EMPEROR, 7 L. L. J. 64; (1925) A. I. R. (L.) 326; 26 Cr. L. J. 1167 **527**

——— **ss. 236, 237**—*Penal Code (Act XLV of 1860), ss. 201, 302—Charge under s. 302—Conviction under s. 201, legality of.*

Under s. 237 of the Cr. P. C. a man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made under the provisions of s. 236 of the Code.

The accused were charged with an offence under s. 302 of the Penal Code but were on the evidence convicted of an offence under s. 201 of the Penal Code, that is to say, of making away with the evidence of the crime by assisting in removing the body of the deceased after the murder was committed:

Held, that having regard to the provisions of ss. 236 and 237 of the Cr. P. C. the conviction was perfectly legal. P C BEGU v. EMPEROR, 48 M. L. J. 643; 2 O. W. N. 447; 41 C. L. J. 437; 27 Bom. L. R. 707; 3 Pat. L. R. 95 Cr.; (1925) A. I. R (P. C.) 130; 6 L. 226; 23 A. L. J. 636; (1925) M. W. N. 418; 26 Cr. L. J. 1059 (P. C.) **3**

——— **s. 252 (2)**—*Warrant case—Prosecution evidence, production of—Duty of Magistrate—Necessary witness not produced, effect of.*

Clause (2) of s. 252 of the Cr. P. C. throws upon the Magistrate, in a warrant case, the duty of seeing that all the evidence essential to the prosecution case is before the Court. It is not open to a Magistrate to acquit the accused in a warrant case on the ground that the prosecution has failed to produce a necessary witness. O EMPEROR v. MAIKU LAL, 2 O. W. N. 584; 12 O. L. J. 632; (1925) A. I. R. (O.) 667; 26 Cr. L. J. 1266 **1042**

——— **ss. 256, 537**—*Further cross-examination of prosecution witnesses—Opportunity to accused to make up his mind, refusal of—Reasons not recorded—Irregularity—Prejudice.*

By s. 256 of the Cr. P. C. the Legislature has conferred upon an accused person the privilege that ordinarily, after being charged with an offence, he shall have a period of not less than 24 hours to consider the method in which he will meet the charge, and if the Magistrate trying the accused person, without assigning any reason for departing from the normal procedure and probably because he overlooks or is unaware of the change in the law, does not allow that privilege to the accused, it is difficult to say that the accused has not been prejudiced.

Where an accused person is not defended by Counsel he is more in need of the privilege designed by the Legislature to be granted ordinarily to all accused persons than he would be if his case were in the hands of a Pleader. L PHUMAN SINGH v. EMPEROR, (1925) A. I. R. (L.) 339; 26 Cr. L. J. 1158 **518**

——— **s. 288**—*Evidence before Committing Magistrate, when can be used at trial.*

Evidence of a witness taken before a Committing Magistrate may under s. 288 of the Cr. P. C., be used as substantive evidence in the case at trial in the Sessions Court where for the purposes of justice, the adoption of such a course is found necessary by the Judge.

The words "subject to the provisions of the Indian Evidence Act, 1872" in s. 288 of the Cr. P. C. are intended to prevent the admission of irrelevant evidence in the Sessions Court merely on the ground that it had been recorded by the Committing Magistrate. S BAHADUR v EMPEROR, 26 Cr. L. J. 1063; (1925) A. I. R. (S.) 289 **7**

——— **s. 288**—*Words "for all purposes subject to the provisions of Evidence Act", purpose of—Retracted statement of witness transferred to Trial Court's record—Such statement, whether substantive evidence or only of corroborative or contradictory force.*

The words "for all purposes subject to the provisions of the Indian Evidence Act", are introduced in s. 288, Cr. P. C., for the purpose of removing any doubt as to the right of the Court to treat the evidence given before the Committing Magistrate as substantive evidence in the trial, when such evidence has been transferred to that Court's record. Therefore, where a witness after corroborating the statement of an approver before the Committing Magistrate goes back upon his statement before the Sessions Judge, and the latter transfers, under s. 288, Cr. P. C., to his own record the statement of the witness made before the Committing Magistrate, the statement so transferred may be used as substantive evidence in the case precisely as if it had been made before the Sessions Judge himself. There is nothing to restrict the use of such statement only to corroborate or contradict the evidence given before the Sessions Judge. L AMIR ZAMAN v. EMPEROR, 6 L. 199; (1925) A. I. R. (L.) 452; 26 Cr. L. J. 1245 **861**

——— **s. 297**—*Charge to Jury, contents of—Duty of Judge.*

A charge to the Jury, in order to comply with the provisions of s. 297 of the Cr. P. C., must sum up the evidence for the prosecution and lay down the law by which the Jury are to be guided. It is defective if it states that the law on the subject has already been presented to the Jury by the Public Prosecutor and that in the opinion of the Sessions Judge no difficult point of law arises in the case. N RAMPRASAD v. EMPEROR, 26 Cr. L. J. 1090 **178**

——— **s. 297**—*Trial by Jury—Charge to Jury—Accomplice—Corroboration—Possession of stolen goods—Presumption—Misdirection—Criminal case—Burden of proof.*

In a criminal case the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused and that onus never changes.

Before a presumption can arise under Illustration (a) of s. 114 of the Evidence Act, it must be proved

Criminal Procedure Code—contd.

that the goods found in the possession of the accused have been stolen. No such presumption will arise in a case where it may reasonably be presumed that the property in question is stolen property.

Where in a trial by Jury in respect of an offence of dacoity a witness is examined on behalf of the prosecution with regard to whom the case of the prosecution is that he was himself probably concerned in the dacoity, the Jury must be directed not to accept the evidence of the witness without the most careful scrutiny. Such a witness may not actually be an accomplice but he is little better than an accomplice witness. Failure to direct the Jury in this behalf amounts to a serious misdirection.

In a case of dacoity the Judge in explaining Illustration (*a*) to s. 114 of the Evidence Act gave the Jury the following directions:—"The Court may presume that a man who is in possession of stolen goods, soon after the theft, is either the thief or has received the goods knowing them to be stolen. When it is proved, or may be reasonably presumed, that the property in question is stolen property, the burden of proof is shifted, and the possessor is bound to show that he came by it honestly, and if he fails to do so the presumption is that he is the thief or the receiver according to circumstances. I have already referred to the defence of these two accused. If the gentlemen of the Jury find that the accused have failed to account for their possession, then they may presume that the accused came by them dishonestly:"

Held, that the direction amounted to a serious misdirection inasmuch as

(*a*) no presumption could arise under Illustration (*a*) to s. 114 of the Evidence Act with regard to property which could be merely presumed to have been stolen;

(*b*) the burden of proof was throughout on the prosecution and could not be shifted;

(*c*) the Jury were not properly directed that it was their duty to weigh all the circumstances of the case, consider the accused's explanation and then decide whether or not they should make the presumption laid down in the Illustration to the section. **C** SATYA CHARAN MANNA *v.* EMPEROR, (1925) A. I. R. (C.) 666; 52 C. 223; 26 Cr. L. J. 1155 **515**

——— **s. 298**—*Sessions trial—Charge to Jury, contents of—Duty of Judge.*

In the heads of a charge to a Jury the Judge should state how he explained the various relevant sections of the Penal Code to the Jury and should not content himself with a statement that the sections had been read and explained. In explaining the sections he should do so by applying them to the facts of the case and should tell the Jury what is necessary for them to find with reference to the facts in order to give a verdict of guilty on the various charges framed. **C** ABDUL RAHIM *v.* EMPEROR, 41 C. L. J. 474; (1925) A. I. R. (C.) 926, 26 Cr. L. J. 1279 **1055**

——— **s. 303**—*Verdict on several charges, mode of recording.*

It is necessary for the Judge under s. 303 (1) of the Cr. P. C. to elicit from the Jury a separate verdict on various charges by questions and to record the questions and answers under s. 303 (2). A statement that the verdict is of guilty where there are several charges, is not a sufficient compliance with the provisions of law. **N** RAM PRASAD *v.* EMPEROR, 26 Cr. L. J. 1090 **178**

——— **s. 307**—*Sessions trial—Disagreement between Judge and Jury—Reference to High Court—Verdict of Jury, when can be rejected.*

Before the High Court can refuse to accept the verdict of the Jury in a reference under s. 307 of the Cr. P. C., it must find that the verdict is unreasonable. **C** EMPEROR *v.* PREMANANDA DUTT, 29 C. W. N. 738; (1925) A. I. R. (C.) 876; 42 C. L. J. 247; 26 Cr. L. J. 1256 **1000**

——— **ss. 307, 418, 449, Ch. XXXIII**—*Trial by Jury—Disagreement between Judge and Jury—Reference to High Court—Procedure.*

In ordinary cases tried by Jury there is no appeal except on a matter of law under s. 418 of the Cr. P. C. Where, however, a case is tried by Jury under the provisions of Ch. XXXIII of the Code, an appeal lies to the High Court on matters of fact as well as on matters of law under s. 449 of the Code. In such a case the findings of the Jury on questions of fact are not final, and if there is a disagreement between the Judge and the Jury and the case is referred to the High Court under s. 307 of the Code, the High Court must consider all the evidence in the case and give judgment after considering it as well as the opinions of the Judge and the Jury. **L** EMPEROR *v.* BIMAL PARSHAD, 1 L. C. 467; 6 L. 98; (1925) A. I. R. (L.) 401; 26 Cr. L. J. 1241 **857**

——— **s. 309**—*Sessions trial—Assessors, opinions of, delivered in writing—Irregularity.*

Where in a Sessions trial held with the aid of assessors, the assessors delivered their opinions in writing, instead of orally to the Judge, this contravention of the provisions of s. 309 of the Cr. P. C. does not affect the legality of the trial in the absence of a finding that it led to a miscarriage of justice. **P C** BEGU *v.* EMPEROR, 2 O. W. N. 447; 48 M. L. J. 643; 41 C. L. J. 437; 27 Bom. L. R. 707; 3 Pat. L. R. 95 Cr.; (1925) A. I. R. (P. C.) 130; 6 L. 226; 23 A. L. J. 636; (1925) M. W. N. 418; 26 Cr. L. J. 1059 (P. C.) **3**

——— **s. 337**—*Requirements—Approver—Pardon, validity of—Inducement to approver, effect of.*

All that s. 337 of the Cr. P. C. requires is that there should be an investigation in progress regarding an offence triable exclusively by the High Court or the Court of Session or an offence punishable with imprisonment which may extend to ten years.

Where on the date of the tender of pardon to an approver proceedings were going on against the accused under ss. 467, 471 of the Penal Code, the pardon granted to the approver is perfectly legal and the approver is a competent witness against the accused

No analogy exists between the case of a confession obtained from an accused person by an inducement and the case of an approver, and the evidence of an approver does not become inadmissible merely because it is shown that some inducement was offered to the approver to give evidence. **N** ISMAIL PANJU *v.* EMPEROR, 26 Cr. L. J. 1115; (1925) A. I. R. (N.) 337 **283**

——— **s. 337 (2-A)**—*Approver—Commitment to Sessions—Approver, whether must be committed along with accused.*

The meaning of the provision contained in s. 337 (2-A) of the Cr. P. C. is that whenever an approver is examined the Magistrate has no jurisdiction to proceed with the trial but must commit the accused persons for trial to the Court of Session. It does not mean that the approver should be committed for trial along with the accused persons. **O** EMPEROR *v.* PERU, 2 O. W. N. 464; (1925) A. I. R. (O.) 472; 12 O. L. J. 542; 26 Cr. L. J. 1216 **736**

Criminal Procedure Code—contd.

——— **s. 342**—*Examination of accused before recording prosecution evidence, legality of.*

An accused person cannot be examined under s. 342 of the Cr. P. C. before any evidence for the prosecution has been recorded, inasmuch as there is no evidence against him and there is no circumstance which he can be called upon to explain. **L** BAHAWALA *v.* EMPEROR, 6 L. 183; (1925) A. I. R. (L.) 432; 26 Cr. L. J. 1238 **854**

——— **s. 352**—*Police Officer, whether can be excluded from Court-room—Duty of Court—Special treatment accorded to Police Officer, effect of.*

Section 352 of the Cr. P. C. gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exception in the case of a Police Officer. When an accused person objects to the presence of a Police Officer or other person the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs and not merely whether his presence is convenient or helpful to the Court or the prosecution. In the case of a person interested in the prosecution, such as a Police Officer, other than the Prosecuting Officer, even where the Court itself does not see sufficient reason to order that he shall not remain in the Court-room, it may put it to that or to the Prosecuting Officer whether in view of the accused's objection he will withdraw or be advised to withdraw from the Court-room.

It is not advisable that a Police Officer interested in a case proceeding before a Magistrate should receive exceptional treatment as a seat on the *dais*, as such treatment is calculated to breed suspicion in the mind of the accused as to the independence of the Magistrate. **N** NATHUSINGH *v.* EMPEROR, 8 N. L. J. 95; (1925) A. I R. (N.) 296; 26 Cr. L. J. 1130 **362**

——— **s. 360**—*Commitment proceedings—Deposition read over to witness during examination of other witnesses, effect of.*

Reading over to a witness his deposition while other witnesses are being examined is not sufficient compliance with the provisions of s. 360 of the Cr. P. C., since the object of that section is that the accused may have the opportunity of ascertaining that the evidence has been correctly recorded. This is of great importance in an enquiry with a view to commitment, since under certain circumstances the evidence then taken may be used as evidence against the accused at the trial. **C** MANIK *v.* EMPEROR, 41 C. L. J. 393; (1925) A. I. R. (C.) 933; 26 Cr. L. J. 1267 **1043**

——— **s. 360**—*Evidence Act (I of 1872), ss. 80, 91—Omission to read deposition to witness, effect of.*

No amount of pressure of work and inconvenience and other considerations of that kind in the slightest degree can justify any Court for the deliberate breach of the provisions of the law. Section 360 is direct and positive and instructions laid down by the law to the administrators of the law should be rigorously complied with both in the interests of the accused, Court and witnesses.

If a statement is properly recorded under s. 360 then under s. 80 of the Evidence Act a strong presumption arises that the deponent stated in his evidence what appears in the deposition. If, however, s. 360 is not complied with, that presumption does not arise, and it is necessary for the person who alleges that the memorandum, which purports to be a deposition, but has been irregularly recorded, is accurate, to prove that it is accurate, if its accuracy is challenged.

The omission to read out a deposition to a witness as required by s. 360 of the Cr. P. C. does not necessarily render it inadmissible in evidence, at any rate against a person charged with abetment of perjury and it can also be proved by extraneous evidence notwithstanding s. 91 of the Indian Evidence Act. **S** PITUMAL *v.* EMPEROR, 26 Cr. L. J. 1137 **449**

——— **s. 360**—*Reading over deposition to witness while another witness is being examined, legality of.*

To read over the deposition of a witness while another witness is being examined by the Court is not sufficient compliance with the terms of s. 360 of the Cr. P. C., since the intention of that section is that the evidence should be read in such a manner that the accused can hear what is being read and take objection to it. An accused person cannot be expected at one and the same time to listen to the evidence that is being read over and to the evidence of a fresh witness that is being recorded.

Under s. 360 of the Cr. P. C. the evidence of a witness must be read over before the examination of another witness is commenced. **C** DURGHI *v.* EMPEROR, 52 C. 499; (1925) A. I. R. (C.) 831; 26 Cr.L.J. 1213 **733**

——— **s. 360**—Witness, deposition of, whether must be read over in proceedings under s. 145 of the Cr. P. C. *See* CR. P. C., 1898, s. 145 **714**

——— **s. 360**—Witness reading deposition himself—Effect. *See* CR. P. C., 1898, s. 197 **602**

——— **ss. 360, 110**—*Security proceedings—Deposition not read over to witnesses, effect of—Illegality.*

Where in a proceeding under s. 110 of the Cr. P. C. the provisions of s. 360 of the Code are not complied with, the enquiry is vitiated and the order passed by the Magistrate in the proceedings must be set aside. **C** NAWAB ALI *v.* EMPEROR, 52 C. 470; (1925) A. I. R. (C.) 816; 26 Cr. L. J. 1233 **849**

——— **ss. 360, 117, 356, 357**—Security proceedings—Evidence, record of—Procedure—Non-compliance with provisions of s. 360—Illegality. *See* CR. P. C., 1898, s. 117 **856**

——— **s. 364**—*Examination of accused, record of—record not made, effect of—Breach—Irregularity.*

At the close of the prosecution case in a Sessions trial the Judge made the following note:—"The statements of the accused were read out to each of them and they were asked if they would add anything here. They stated that they would not, except *C*. What he stated here is recorded by the Court." The Court then examined a Court witness and further examined the accused and made the following note:—"After the conclusion of the examination of the witness the Court examined the accused again. They stated that they had nothing further to say and declined to examine any witness in defence." No record was made of the examination of the accused except in the case of the examination of *C*:

Held, that a record of the examination of the accused under the provisions of s. 364 of the Cr. P. C. was obligatory and that the absence of it had caused serious prejudice to the accused and that, therefore, the trial was vitiated and must be set aside. **C** SARAT CHANDRA KAR *v.* EMPEROR; 52 C. 446; (1925) A. I. R. (C.) 821; 26 Cr. L. J. 1224 **860**

——— **ss. 369, 444**—Appeal—Several accused—Appellate Court, duty of—Consideration of case against each accused. *See* APPEAL (CRIMINAL) **177**

Criminal Procedure Code—contd.

——— **s. 386**. *See* KARACHI PORT TRUSTS ACT, 1866, s. 84 **1007**

——— **ss. 403, 236**—*Penal Code (Act XLV of 1860), ss. 401, 413—Being member of gang for the purpose of habitually committing theft, trial for—Acquittal—Receiving stolen property, trial for, whether barred.*

Accused was tried along with several other persons for an offence under s. 401 of the Penal Code and was acquitted. The case against him consisted of an approver's statement as to his having attended a meeting held with the object of forming a gang for the commission of theft and of evidence as to the discovery of proceeds of certain thefts in his house. The approver's statement was considered unreliable and the evidence as to the discovery of stolen property was held to be insufficient to prove that the accused was a member of the gang. The accused was subsequently prosecuted for an offence under s. 413 of the Penal Code in respect of the discovery of stolen property:

Held, that the two trials were not based on the same facts and that the accused could not in the former trial, when he was tried along with other persons, have been charged with an offence under s. 413 of the Penal Code and that, therefore, s. 403 of the Cr. P. C., did not bar the subsequent trial. **L** CHHAJJU *v.* EMPEROR, 26 Cr. L. J. 1097; (1925) A. I. R. (L.) 537 **185**

——— **s. 403 (4)**—*Acquittal—Prosecution on same facts—First Court not competent to try subsequent charge, effect of.*

Clause (4) of s. 403 of the Cr. P. C. permits a second prosecution for an offence constituted by the same acts if the Court by which the accused was first tried was not competent to try the offence subsequently charged. **M** *In re* PALANI GOUNDAN, 48 M. L. J. 490; (1925) A. I. R. (M.) 711; 22 L. W. 205; 26 Cr. L. J. 1087 **31**

——— **s. 417**—*Evidence Act (I of 1872), s. 114, Illus.* (b)—*Penal Code (Act XLV of 1860), s. 302—Acquittal, appeal against—Interference, when justified—Approver, statement of—Corroboration—Accused seen talking to deceased.*

An order of acquittal arrived at upon evidence should not as a rule be set aside unless the Appellate Court holds it to be manifestly wrong or perverse or unless it can be said that the Court which tried the case has manifestly erred. An order of acquittal should not be set aside merely because the Appellate Court is of opinion that if it had been trying the case itself it would have arrived at a different conclusion.

Two little girls were collecting fodder near their village and the accused was seen talking to them shortly before sunset. Two days afterwards the bodies of the girls were discovered lying in a field with injuries on their persons which indicated that their death was due to violence. An approver gave evidence that the girls had been put to death by the accused and himself for the sake of their ornaments:

Held, that the evidence that the accused was seen talking to the girls on the evening on which they disappeared did not amount to a material corroboration of the approver's statement. **L** EMPEROR *v.* RAM KARAN, 2 L. O. 2; 26 Cr. L. J. 1141 **453**

——— **ss. 421, 561-A**—*Appeal—Reasonable opportunity to accused or his Counsel of being heard not given—Appeal, dismissal of—Inhe* [illegible] *direct re-hearin*[illegible]

Criminal Procedure Code—contd.

The language of s. 421 of the Cr. P. C. requires a reasonable opportunity to be given to the appellant to be heard in support of his appeal and if such reasonable opportunity is not given the Court has no jurisdiction to dismiss the appeal. Where a criminal appeal is dismissed without reasonable opportunity having been given to the appellant or his Counsel of being heard, the Court has inherent power to make an order that the appeal should be re-heard after giving the appellant or his Counsel a reasonable opportunity of being heard in support of the appeal. **L** MUHAMAD SADIQ *v.* EMPEROR, (1925) A. I. R. (L.) 355; 26 Cr. L. J. 1169 **593**

——— **s. 423.**

There is no restriction on the powers of an Appellate Court to deal with the case of which it has complete seisin in any of the manners provided by s. 423, Cr. P. C. **N** RAM PRASAD *v.* EMPEROR, 26 Cr. L. J. 1090 **178**

——— **ss. 423, 439**—*Penal Code (Act XLV of 1860), ss. 366, 376—Rape, charge of—Appeal—Conviction for abduction, whether justified—Acquittal in respect of charge of rape—Revision—Acquittal, whether can be set aside and conviction substituted.*

Section 423 of the Cr. P. C. empowers an Appellate Court to reverse *inter alia* the finding and to order the accused to be re-tried by a Court of competent jurisdiction or to be committed for trial. It does not empower an Appellate Court to try the accused person itself.

It is not competent to an Appellate Court to alter a charge under s. 376 of the Penal Code to one under s. 366 of the Code, inasmuch as the charge under the latter section involves different elements and different questions of fact from a charge under s. 376.

Accused was charged with an offence under s. 376 and was convicted. On appeal the Sessions Judge set aside the conviction under s. 376 and proceeded to frame a charge under s. 366 of the Penal Code and called upon the accused to plead to the charge, examined him upon it and allowed him to call witnesses in defence. As a result of the trial the accused was convicted of an offence under s. 366 of the Penal Code:

Held, (1) that the Sessions Judge had no jurisdiction to try the accused as an Appellate Court, without any commitment having been made to it;

(2) that the conviction of the accused by the Sessions Judge under s. 366 of the Penal Code was, therefore, illegal;

(3) that in revision the High Court had no jurisdiction to convert the acquittal with regard to the charge under s. 376 of the Penal Code into a conviction and to convict the accused of that offence. **R** C. C. SIRCAR *v.* EMPEROR, 4 Bur. L. J. 29; (1925) A. I. R. (R.) 230; 3 R. 68; 26 Cr. L. J. 1119 **287**

——— **ss. 428, 439**—*Appeal—Additional evidence, when can be admitted—Power of Court, scope of—Admission of additional evidence—Revision—Interference by High Court, when justified.*

The scope of s. 428 of the Cr. P. C. is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons for such opinion. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure of the prosecutor or the Magistrate, as the vindication of the

innocence of a person wrongfully accused where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth.

In India the onus is placed on the Court not merely to listen to the evidence but to enquire to the utmost into the truth of the matter and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on an Appellate Court by s. 428 of the Cr. P. C., it cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a mis-carriage of justice; on the contrary the section is directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case.

The powers given by s. 428 of the Cr. P. C. to a Criminal Court are not less than are given to a Civil Court in the matter of admission of evidence at the appellate stage and Courts ought not to circumscribe them where the Legislature has not seen fit to do so.

Even where it might itself in the exercise of its discretion as an Appellate Court have declined to admit additional evidence, the Court of revision will by no means always interfere with an order of the Appellate Court admitting additional evidence. To justify interference in revision in such a case the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits. **Pat** AKHTAR HUSSAIN *v.* EMPEROR, 6 P. L. T. 431; 3 Pat. L. R. 101 Cr.; (1925) A. I. R. (Pat) 526; 26 Cr. L. J. 1171 **595**

——— **ss. 435, 439**—*Conviction by Panchayat Court established under Madras Panchayat Courts Act (II of 1920), Powers of High Court to interfere.*

The provisions of the Cr. P. C. are not made applicable to Panchayat Courts under the Madras Panchayat Courts Act. The High Court cannot, therefore, interfere with an order of a Panchayat Court under ss. 435 and 439 of the Code. But under s. 107 of the Government of India Act, the High Court has powers of supervision over all Criminal and Civil Courts in the Presidency and when a grave error of a Panchayat Court, which is not governed by the provisions of the Cr. P. C., appears on the face of the record, the powers given by s. 107 of the Government of India Act could be invoked to correct such error. **M** MUNI GADU *v.* EMPEROR, (1925) M. W. N. 600; 26 Cr. L. J. 1161 **521**

——— **ss. 436, 133, 438**—*Nuisance, proceeding, relating to—Further enquiry, order of, whether can be made—Reference to High Court.*

Proceedings under s. 133 and Chap. X of the Cr. P. C. are not covered by s. 436 of the Code and a Sessions Judge has, therefore, no power to order further enquiry in the case of such proceedings. He would have power, however, in a proper case to make a reference to the High Court under s 438 of the Code. **O** PRITHIPAL *v.* EMPEROR, 2 O. W. N. 549; 26 Cr. L. J. 1251 **995**

——— **s. 439**—*Pending case—Charge, quashing of—Revision—High Court, power of—Evidence, absence of.*

The High Court has power to interfere in a pending criminal case but such power is only to be exercised in exceptional circumstances which cannot be laid down with precision, the main test being that the intervention should be necessary in the interests of justice and that a bare statement of the facts without any elaborate argument should be sufficient to convince the Court that it is a fit one for its interference at an intermediate stage.

Quære.—Whether a trial before a Committing Magistrate can be quashed on the ground that there is no evidence to support the charge? **N** MADHAV BHAGWANT *v.* EMPEROR, 26 Cr. L. J. 1093; (1925) A. I. R. (N.) 345 **181**

——— **s. 439**—*Pending case—Interference by High Court.*

No doubt it is undesirable that the discretionary powers of Courts should become crystallized but it is well-established that only in exceptional cases should the High Court interfere in revision in pending cases. **S** MAHOMED *v.* MAHOMED IDRIS, 26 Cr. L. J. 1101 **189**

——— **s. 443, Ch. XXXIII**—*Trial under Ch. XXXIII, when can be claimed—European British subject—Procedure—Claim not made before Committing Magistrate, whether can be made at trial—Penal Code (Act XLV of 1860), ss. 24, 120-B, 409—Criminal breach of trust by public servant—Ingredients of offence—Conspiracy—"Dishonestly," meaning of.*

A claim by the accused under s. 443 and a finding by the Magistrate are necessary ingredients for the application of the provisions of Ch. XXXIII of the Cr. P. C. If no such claim is made prior to commitment and there is no finding by the Magistrate the question cannot be raised in the Court of Session. If such a claim is made and a finding favourable to the accused is recorded by the Magistrate, the Sessions Judge is bound to act under the provisions of Ch. XXXIII and cannot refuse to do so on the ground that those provisions do not apply. In the case of acceptance of the claim of the accused person the finding of the Magistrate is final. When the finding of the Magistrate is adverse to the claim it is final, unless the claimant appeals and in the case of an appeal the decision of the Sessions Judge is final.

By the provisions of the second paragraph of s. 443 of the Cr. P. C. the Legislature desired the matter of the benefit of the provisions of Ch. XXXIII to be decided finally by the Sessions Court so as to make it impossible that it could be raised in the High Court after a prolonged trial in the Sessions Court.

The Sessions Judge has, however, no power to determine the matter except on appeal under cl. (2) of s. 443 of the Cr. P. C.

When once an opportunity to make a claim under s. 443 of the Cr. P. C. is missed by the accused and the case is committed under s. 213 of the Code the provisions of Ch. XXXIII do not give him another opportunity of claiming the benefit of the special provisions.

The mere fact of a person being a European British subject does not entitle him to the benefit of Ch. XXXIII, which is devised for the benefit both of a European British subject and an Indian British subject. An Indian British subject has certain privileges just as a European British subject has under that Chapter. The distinctive rights of a European British subject are detailed in Ch. XLIV A, which also deals with the distinctive rights of an Indian British subject. The determination of this question of the class of British subjects is necessary for the application of the provisions of s. 275 of the Cr. P. C., in the case of Jury and the provisions of s. 284-A in the case of Assessors. **O** HAY *v.* EMPEROR, 2 O. W. N. 469; (1925) A. I. R. (O.) 469; 28 O. C. 230; 26 Cr. L. J. 1217 **833**

——— **s. 476**—Court, complaint by—Section, not specified, effect of—"Offence described in s. 463"

scope of—Complaint under s. 463. *See* s. 195 (1) (c), CR. P. C. 283

——— s. 476—*"Court," meaning of—Suit heard by one Judge of High Court—Complaint, whether can be made by another Judge.*

Where a suit is tried by a Judge of the High Court the word "Court" in s. 476 of the Cr. P. C. in respect of proceedings arising out of such suit must be taken to mean the High Court. Any Judge of the High Court can, therefore, dispose of an application under s. 476 of the Code, whether the matter out of which the application arose was heard by him or some other Judge of the Court. B BAI KASTURBAI *v.* VANMALIDAS LAKMIDAS, 27 Bom. L. R. 616; 26 Cr. L. J. 1189; (1925) A. I. R. (B.) 436; 49 B. 710 709

——— s. 476—*Forgery—Finding by Trial Court—Appeal pending in High Court—Proceeding under s. 476, whether can be started.*

A receipt filed by the defendants in a suit to substantiate their plea of a payment in a suit for a money claim was found by the Trial Court to be a forgery. An appeal was filed in the High Court against the decision. Meanwhile the Trial Court issued a notice to the defendants to show cause why they should not be prosecuted for producing a forged document in evidence:

Held, that inasmuch as the question whether the receipt was a forged one or not had to be finally decided by the High Court, it was not proper that proceedings under s. 476 of the Cr. P. C. should be taken against the defendants before the decision of the appeal. L HARNAM SINGH *v.* ATRI, (1925) A. I. R. (L.) 323; 26 Cr. L. J. 1166 526

——— ss. 476, 195, 476A—Sanction to prosecute granted before amendment of Code—Lapsing of sanction—Procedure—Superior Court, power of, to make a complaint. *See* CR. P. C., 1898, s. 195 357

——— ss. 476, 476-A, 476-B — *Subordinate Court, refusal of, to make complaint—Order of Appellate Court making complaint—Appeal, whether lies.*

Section 476-B of the Cr. P. C. gives a right of appeal only when a Court has made or refused to make a complaint under s. 476 or 476-A of the Code and neither of those sections relates to a complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint. From such an order, therefore, no appeal lies. L MAHOMMED IDRIS *v.* EMPEROR, 1 L. C. 480; (1925) A. I. R. (L.) 322; 6 L. 56; 26 Cr. L. J. 1168 528

——— ss. 476, 476-B—*"Offence which appears to have been committed," meaning of—Order directing complaint to be made—Appeal—Appellate Court, power of.*

The intention of the Legislature is that in cases of appeals under s. 476-B of the Cr. P. C. the Appellate Court should re-consider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below should nevertheless re-consider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the Appellate Court is not satisfied that a *prima facie* case has been made out the order appealed against must be set aside.

The words "offence which appears to have been committed" in s. 476 of the Cr. P. C. mean that the facts before the Court unless rebutted show that an offence has been committed. A RAM CHARAN DAS *v.* EMPEROR, 23 A. L. J. 515; (1925) A. I. R. (A.) 544; 26 Cr. L. J. 1126 358

——— s. 488—*"Living in adultery", meaning of—Birth of illegitimate child—Forfeiture of maintenance.*

The expression "living in adultery" in sub-s. (5) of s. 488 of the Cr. P. C. points to a continuous course of conduct and not merely to isolated acts of immorality. Unless continuity of conduct is established it cannot be inferred from a single act of adultery that the woman is "living in adultery".

Although a woman has given birth to an illegitimate child it is open to a Magistrate, to find that apart from that circumstance, she is not "living in adultery" within the meaning of sub-s. (5) of s. 488. C JATINDRA MOHUN BANERJI *v.* GOURI BALA DEBI, 29 C. W. N. 647; (1925) A. I. R. (C.) 794; 26 Cr. L. J. 1184 608

——— s. 503—*Penal Code (Act XLV of 1860), s. 235—Possession of materials for counterfeiting coins—Assistant Mint Master of Calcutta Mint, whether expert witness—Commission, issue of, legality of.*

The Assistant Mint Master of the Calcutta Mint is an expert witness with regard to coins and instruments for coining and a Magistrate does not act illegally in allowing him to be examined on commission instead of insisting on his personal attendance. O GILLI *v.* EMPEROR, 2 O. W. N. 377; 12 O. L. J. 497; (1925) A. I. R. (O.) 616; 26 Cr. L. J. 1232 848

——— s. 517—*Embezzlement by servant—Money paid by accused to creditor handed over by latter to Police—Order directing return of money to complainant, legality of.*

The Sub-Agent of a Bank embezzled a certain amount of money belonging to the Bank and paid a part of it to his creditors in payment of his debts. The Police traced one of these payments and the creditor to whom the payment had been made handed the money back to the Police. The Sub-Agent was tried and convicted of the offence of embezzlement and at the conclusion of the trial the Court ordered that the money which was handed over to the Police by the creditor of the accused should be handed over to the complainant Bank as property in respect of which an offence appeared to have been committed:

Held, that the order was justified by the terms of s. 517 of the Cr. P. C. under which the Court purported to Act. A BANKEY LAL KAPOOR *v.* ALLAHABAD BANK, LTD., MORADABAD, 23 A. L. J. 889; 26 Cr. L. J. 1232 848

——— s. 526—*Relationship between Magistrate and lawyer—Transfer of case.*

It is undesirable that a member of the legal profession should practice in a Court presided over by a near relation.

Where one of the lawyers engaged in a case is a near relation of the presiding Magistrate the case should be transferred from the Court of that Magistrate to that of some other competent Magistrate. C NITYARANJAN MONDAL *v.* EMPEROR, 29 C. W. N. 648; (1925) A. I. R. (C.) 806; 26 Cr. L. J. 1183; 26 Cr. L. J. 1232 607

——— s. 526—*Transfer of case—Accused, inability of, to secure services of Counsel, whether ground for transfer.*

The fact that an accused person is unable, owing to the influence of persons interested in the prosecution, to secure the services of a competent member of the local bar for his defence is a sufficient ground for the

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transfer of the case to some other District. O LALTA v. ZAHOOR AHMAD, 2 O. W. N. 682; (1925) A. I. R. (O.) 672 1048

——— **s. 526**—*Transfer of case—Magistrate making remarks adverse to prosecution, whether ground for transfer—Person at whose instance prosecution started, whether can apply for transfer.*

That in the course of the examination of the prosecution witnesses the Magistrate trying the case has made observations which go to show that he is not favourable to the prosecution is a sufficient ground for the transfer of the case to the Court of another Magistrate.

A person at whose instance a criminal case is lodged is a party interested within the meaning of cl. (3) of s. 526 of the Cr. P. C., and is entitled to apply for transfer of the case, but his rights are subordinate to those of the Crown; in other words, if the Public Prosecutor or the person who is conducting the prosecution on behalf of the Crown is unwilling to have the case transferred, the person at whose instance the case was started has no power to get the case transferred. **Pat.** SHEODHARI RAI v. JHINGUR RAI, 26 Cr. L. J. 1249 993

——— **s. 530**—*Trial by Magistrate for offence within his jurisdiction—Facts disclosing offence triable by Court of Session—Procedure—Conviction by Magistrate, whether illegal.*

Where the facts disclose an offence within the jurisdiction of a Magistrate, it is not correct to say that he is not empowered by law to try the person charged for the offence which is within his jurisdiction, because the facts disclose a more serious offence which is beyond his jurisdiction. No doubt, it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction has in fact been committed as well as an offence within his jurisdiction, but his proceedings would not be void.

Where a Magistrate in trying an offender for an offence which he is empowered to try discovers that there is a *prima facie* case of an offence triable by the Court of Session, the proper course for the Magistrate to adopt is to commit the case to the Court of Session and if he fails to do so his proceedings may have to be set aside but they cannot be regarded as being absolutely void. **R** DAWSON v. EMPEROR, 2 R. 455; (1925) A. I. R. (R.) 45; 26 Cr. L. J. 1108 276

——— **s. 533**—Confession—Recording of—Procedure—Memorandum, contents of—Certificate, defective—Statement of Magistrate recording confession, whether can cure defect. *See* Cr. P. C., 1898, s. 164 18

——— **s. 535**—*Criminal trial—Conviction for offence not charged—Charge, absence of, whether curable.*

Section 535 of the Cr. P. C. is not limited in its application to a trial where no charge at all has been framed. It is also applicable to cases in which no charge has been framed of the offence of which an accused person has been convicted. **C** ABDUL RAHIM v. EMPEROR, 41 C. L. J. 474; (1925) A. I. R. (C.) 926 26 Cr. L. J. 1279 1055

——— **s. 562 (1) (a)**—*Previous conviction not proved, effect of—Character and antecedents of accused, consideration of.*

The law is no respecter of persons and the members f a District Board are liable for their criminal acts ke other people.

Criminal Procedure Code—concld.

Semble.—Section 562 (1) (*a*) of the Cr. P. C. is applicable to the case of an accused person against whom no previous conviction is proved, although as a matter of fact such a conviction exists.

The terms of s. 562 (1) (*a*) of the Cr. P. C. are wide enough to entitle the Court to take into consideration the character and antecedents of the accused person. **O** EMPEROR v. PARTAB NARAIN, 2 O. W. N. 593, 26 Cr. L. J. 1278 1054

Criminal trial—*Conviction set aside by High Court—Committal to Sessions directed—Procedure in Committing Magistrate's Court.*

Where an accused person is tried and convicted by a Magistrate, but the conviction and sentence are set aside by the High Court and the latter directs that the accused be committed to Sessions, all that the Magistrate should do is to re-open the original proceedings, frame a fresh charge, explain it to the accused, require him to give in his list of witnesses for Sessions, examine, if he thinks fit, any of those witnesses, who have not already been examined and then to write a short formal order of committal as under the orders of the High Court. It is not necessary in such a case to open a new proceeding and take all the evidence over again. **R** NGA MYAING v. EMPEROR, 2 R. 447; (1925) A. I. R. (R.) 82; 26 Cr. L. J 1106 274

Custom.

See ALSO HINDU LAW.
See ALSO PRE-EMPTION.
See ALSO SUCCESSION.

——— *Occupiers of houses in village, whether entitled to transfer houses—Instances, large number of, effect of—Presumption—Burden of proof—Appeal, second—Finding as to custom, whether can be questioned.*

Although the findings of an Appellate Court so far as they are findings of fact are binding in second appeal, nevertheless it is open to a Court in second appeal to consider whether evidence which has been found to be proved and instances which have been established do or do not establish a custom having the force of law.

Where the question for decision is whether the occupiers of houses in a village are entitled by custom to transfer their houses and a large number of sale-deeds are proved which show that occupiers in the village have been transferring their houses, the presumption is that such a large number of transfers could not have taken place unless there was a right in the occupiers to make such transfers. When a large number of such instances has been established the burden lies on the *zemindar* to explain how it is that so many transfers were allowed to be made and the Courts are entitled to draw an inference in such a case that there must have been a custom to which the *zemindar* submitted. **A** TAJUMMAL HUSAIN v. BANWARI LAL, 6 L. R. 6 A. 179 Rev.; 23 A. L. J. 932 752

———, proof of. *See* PRE-EMPTION] 133

——— Proof—Burden of proof—Instances, value of. *See* HINDU LAW—CUSTOM 891

——— **Landlord and tenant**—Abadi *land—Plot lying close to tenant's house, user of—Tenant, rights of.*

Where an open piece of land in a village lying close to a tenant's house has been used by him for his domestic or agricultural purposes, there may be a presumption that his occupation of the plot is a part of his original contract of tenancy and that he is

Custom—contd.

entitled to its user so long as he is not turned out of the village; but the user must be confined to the way in which it has been exercised in the past for the grant of which alone there can be a presumption. The tenant is a licensee of the plot for the purpose for which he has been using it, and he has no right to alter its user and to utilize it for a different purpose altogether. For instance, a tenant would not be entitled to make constructions on an open site when he has been allowed to use the site for tying cattle or storing heaps of cow-dung cakes. **A** BHAGWAN RAI *v.* JADDU RAJ RAI, L. R. 6 A. 184 Rev. **746**

——— **Pre-emption**—Wajib-ul-arz, *entry in, construction of—Partition, effect of*—Shurkayan deh, *meaning of—Resumed* muafi *land, sale of—Pre-emption, whether can be claimed.*

An entry in a *wajib-ul-arz* recording a custom of pre-emption gives rise to the presumption that the custom exists in the village.

The paragraph in a *wajib-ul-arz* recording a custom of pre-emption stated generally that the custom prevailed in the village and the list contained in the paragraph comprised shares both in *khalsa* and resumed *muafi* and there was nothing to indicate that the entry was confined to sale of shares in *khalsa* land alone. Subsequent to the date of the *wajib-ul-arz* the village was partitioned into distinct *mahals.* One of the *mahals* consisted entirely of proprietors who were originally proprietors of resumed *muafis.* One of these proprietors sold certain land and plaintiff, who was a proprietor in the same *mahal* as the vendor, brought a suit for pre-emption. The *wajib-ul-arz* gave the right of pre-emption to *shurkayan deh*:

Held, (1) that the custom of pre-emption must be deemed to exist in the *mahals* into which the village had been divided after the partition;

(2) that the custom was applicable to resumed *muafi* lands and was not confined to *khalsa* lands alone;

(3) that the words *shurkayan deh* must after the partition be interpreted as meaning *shurkayan mahal* and that although the custom of pre-emption continued after the partition it must now be confined only to those co-sharers who had a joint interest in the same *mahal* with the vendor;

(4) that the plaintiff being a co-sharer in the same *mahal* with the vendor had a preferential right of pre-emption as against the vendee who was a co-sharer in another *mahal* and, therefore, a stranger to the vendor. **A** ABDUL WAHID *v.* HATIM ALI, L. R. 6 A. 317 Civ.; (1925) A. I. R (A.) 554 **434**

——— **Succession**—*Ancestral property*—Jats *of Khurchanpur, Tahsil Ambala—Daughters* v. *collaterals of 6th degree—Burden of proof.*

Amongst *Jats* of village Khurchanpur in the Ambala Tahsil, the burden of proving that collaterals of the 6th degree exclude daughters from succession to ancestral property is on the collaterals.

Amongst *Jats* of the Ambala District, the collaterals of the 6th degree do not exclude daughters from succession to ancestral property. **L** GANGA RAM *v.* INDI, 1 L. C. 458; 6 L. 193; (1925) A. I. R. (L.) 414 **902**

——— *Self-acquired property — Daughter* versus *collaterals*—Arains *of Hoshiarpur District*—Riwaj-i-am, *entry in, applicability of.*

Where a *riwaj-i-am* talks of landed property and succession to it without making any discrimination between ancestral and self-aquired property, the rules laid down therein must be taken to be applicable to ancestral property only.

Among *Arains* of the Hoshiarpur District daughters exclude the brothers of the last male-holder in succession to the latter's self-acquired property. **L** PIR BUKSH *v.* ABO, (1925) A. I. R. (L.) 306; 6 L. 332; 2 L. C. 172 **71**

——— **Succession**—Syeds *of Kharkhanda in Rohtak District—Exclusion of sisters by brothers—Representation—Ejectment suit—Burden of proof.*

Where a person sues to recover property of which he is not in possession he can only recover possession by establishing his own title as against the defendant, regardless of what has been determined in other suits in which the same property was claimed by rival claimants of the plaintiff as against the defendants. Among *Syeds* of Kharkhanda in the Rohtak District custom is followed in matters of inheritance in preference to the Muhammadan Law, and brothers succeed to the property of a deceased brother to the exclusion of sisters, the heirs of a pre-deceased brother being entitled to the share which their father would have taken had he been alive. **P C** HASHMAT ALI *v.* NASIB-UL-NISA, (1925) A. I. R. (P. C.) 99; 6 L 117 (P. C.) **114**

Decree—*For rent—Direction that if decree is not satisfied within a certain time, defendant shall be ejected—Legality of.*

Such a direction is improper and cannot be allowed to stand. **O** MATADEEN *v.* MUSTAFA HUSAIN, 12 O. L. J. 200; L. R. 6 A. (O.) 72; 2 O. W. N. 217; (1925) A. I. R. (O). 379 **165**

Divorce Act (IV of 1869), ss. 7, 14, 17—*Matrimonial jurisdiction—Principles to be followed—Petition for divorce—Petitioner guilty of adultery—Discretion of Court—Decree* nisi, *confirmation of.*

The Courts in India in the exercise of their matrimonial jurisdiction are bound to act on the principles followed by the Divorce Court in England.

Adultery on the part of a petitioner for divorce is very rarely condoned by the Court. Where, however, it appears that the adultery was committed in ignorance of fact as where a petitioner whose wife has left him marries again in the belief that his wife is dead, the Court may grant relief. Another ground is where a petitioner acts in ignorance of law, as where a man marries again after a decree *nisi* has been passed but before it is made absolute in the *bona fide* belief that his marriage has already been dissolved. Another class of cases in which a discretion may be exercised in favour of the petitioner is where a wife commits adultery in consequence of threat and personal violence by which she is coerced into committing the act. The last case is where the petitioner had committed adultery to the knowledge of the respondent which the respondent had long since pardoned and condoned.

Petitioner, who was a Burmese Buddhist, was married to the respondent who was a Christian. She had five children from him and was subsequently deserted by the respondent. Some years afterwards she sued the respondent for divorce on the ground of adultery coupled with desertion and obtained a decree *nisi*. Shortly before she obtained the decree she began to live with another man. On the decree coming up before the High Court for confirmation:

Held, that although there were several features in the case which accounted for the petitioner's guilty

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conduct they could not be taken to extenuate it and that the Court could not, therefore, exercise its discretion in her favour and must decline to confirm the decree *nisi*. R MA OHN MAY *v.* J. C. SUTHERLAND, 4 Bur. L. J. 47; (1925) A. I. R. (R.) 257 1009

Easements Act (V of 1882), s. 13 (b)—*Partition—Right to carry water through channel existing on joint lands, whether transferred.*

A and B, were members of a joint Hindu family. They partitioned their lands, some fell to *A's* share and the rest to *B's*. On the lands allotted to *B*, there had existed a channel for a long number of years which was used for carrying water to the field which had been allotted to *A*.

Held, that under s. 13, cl. (*b*) of the Easements Act the right of carrying water through the channel to their fields passed to the complainants on partition; M KRISHNA IYER *v.* AYYAPPA NAICK, (1925) M. W. N. 45; 21 L. W. 641; (1925) A. I. R. (M.) 577; 26 Cr. L. J. 1100 188

Equity—*Fraud, whether will allow to be committed—Interference.*

Equity will not allow the provisions of the Transfer of Property Act to be invoked to enable fraud to be committed. R MA HTAY *v.* U THA HLINE, (1925) A. I. R. (R.) 184; 2 R. 649 66

——— High Court—Jurisdiction over foreign land. *See* LETTERS PATENT (BOM.), CL. 12 92

Equity, Court of—*Powers.*

A Court of Equity has jurisdiction to impose terms on reliefs that it might think proper to grant to one or other of the parties to a litigation. O GAURI SHANKAR *v.* BADRI NATH 474

Evidence Act (I of 1872), s. 13—*Judgment not inter partes, admissibility of.*

A judgment not *inter partes* pronounced by a Court of competent jurisdiction in a suit in which the right in dispute has been asserted and either recognised or denied is admissible in evidence under s. 13 of the Evidence Act. N RAMDHAN *v.* PURUSHOTTAM 699

——— **s. 13**—*Landlord and tenant—Rent suit—Chittas, whether admissible—Probative value.*

The *chittas* or the *zemindar's* private survey papers, although prepared by the *zemindar* in the absence of the tenants, are not wholly inadmissible in evidence in a rent suit by the *zemindar*; but according to the circumstances of each particular case, there may be a great deal of difference in their probative value, which may range from zero to hundred. C APTABUDDI *v.* ALLA HAFIJ, (1925) A. I. R. (C.) 1104 548

——— **s. 24**—*Confession made to Pleader's clerk—Inducement—Confession, validity of.*

An inducement offered by a Pleader's clerk to an accused person to obtain a confession does not invalidate the confession inasmuch as the clerk is not a person in authority with reference to the charge. O EMPEROR *v.* RAM AVADH, 2 O. W. N. 398; 12 O. L. J. 495; 26 Cr. L. J. 1154; (1925) A. I. R. (O.) 597 514

——— **s. 25**—*Berar Patels and Patwaris Law, 1900, s. 21, rules framed under, rr. 19, 21—Police Patel, whether Police Officer—Confession made to Police Patel, whether admissible.*

A Police Patel in Berar is a Police Officer within the meaning of s. 25 of the Evidence Act, and a confession made by an accused person to a Police Patel is, therefore, inadmissible in evidence by virtue of the provisions of that section. N MECHI *v.* EMPEROR, 26 Cr. L. J. 1088; (1925) A. I. R. (N.) 340 32

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——— **ss. 32, 35**—*Relationship, proof of—Inam statement, admissibility of.*

An *inam* statement is irrelevant and inadmissible in evidence for proving relationship, where the person making the statement was in no way related to the family concerned and is not proved to have had any special means of knowledge. M KANDALAM KRISHNAMACHARYULU *v.* SATHULURI VIJAYASARATHI, (1925) M. W. N. 117; 48 M. L. J. 467; 22 L. W. 73; (1925) A. I. R. (M.) 823 646

——— **s. 32 (1)**—*Dying declaration whether can be accepted in part—Statement made by deceased in answer to questions, value of.*

A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisement of evidence is very often very unsafe. As regards a dying declaration to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it could be acted upon. In the case of a dying declaration, which by the law of this country assumes a character very widely different from what it is under the English Law, which is relevant under the provisions of the Evidence Act, whether the person who made it was or was not at the time when it was made under the expectation of death, and the weight to be attached to which depends not upon the expectation of death which is a guarantee of its truth but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it, it becomes almost always a question of fact as to whether it should be relied upon or not. Where the dying declaration is not couched in the very words of the person making it but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place the questions put to the deceased may have been leading questions and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being properly comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer so as to discover how much was suggested by the Examining Magistrate and how much was the production of the person making the statement. C EMPEROR *v.* PREMANANDA DUTT, 29 C. W. N. 738; (1925) A. I. R. (C.) 876; 42 C. L. J. 247, 26 Cr. L. J. 1256 1000

——— **s. 32 (1)**—*Murder—Youth of accused—Sentence—Report made by deceased to Police concerning incident showing motive for attack, admissibility of.*

The deceased was in charge of certain property on behalf of his employer. A party of men employed by a rival claimant of the property demanded the keys of the property from the deceased and on the latter's refusal to deliver up the keys he was assaulted by the accused. The deceased made a report of the incident to the Police. The following morning the deceased

Evidence Act—contd.

was stabbed with a knife and died as the result of the wound:

Held, that the report made by the deceased to the Police of the assault upon him by the accused on the previous day in connection with the dispute relating to possession was admissible in evidence under s. 32 cl. (1) of the Evidence Act. **N** CHUNILAL *v.* EMPEROR, 7 N. L. J. 144; (1924) A. I. R. (N.) 115; 26 Cr. L. J. 1121 **353**

——— **s. 33**—*Death of witness—Statement made in enquiry, whether admissible—Cross-examination, absence of, effect of—Witness changing sides and making contradictory statements, evidence of, value of—Identification in jail, value of.*

Where a statement made by a witness in an enquiry is sought to be used against the accused at the trial under s. 33 of the Evidence Act, the fact that there was practically no cross-examination of the witness on the occasion when he made the statement, although there was opportunity to cross-examine, renders the evidence of little or no value.

A witness who is shown to be capable of changing sides and who has made statements in favour of both the prosecution and the accused is an unreliable witness, and no guarantee of truth remains in respect of either of his statements.

Identification in jail is no substantive evidence. It can only be used as corroborative of identification made at the trial in the presence of the Judge. **O** SARJU SINGH *v.* EMPEROR, 26 Cr. L. J. 1236 **852**

——— **s. 33**—*Deposition before Committing Magistrate—Witness disappearing at the time, of Sessions Trial—Transfer of deposition—Procedure.*

Where a witness who has been examined before a Committing Magistrate has left the District at the time of the trial in the Sessions Court, his statement before the Committing Magistrate cannot be transferred to the Sessions file without taking evidence in proof of facts which would render the statement admissible within the provisions of s. 33 of the Evidence Act. **L** KHEM SINGH *v.* EMPEROR, (1925) A. I. R. (L.) 319; 26 Cr. L. J. 1086 **30**

——— **s. 33**—*Deposition of witness before Committing Magistrate—Not read over to witness as required by law—Use of same at trial—Procedure.*

Where the deposition of a witness made before a Committing Magistrate is sought to be used at the trial under the provisions of s. 33 of the Evidence Act, the Court must first be satisfied that it was recorded after due compliance with the provisions of s. 360 of the Cr. P. C. **C** DARGAHI *v.* EMPEROR, 52 C. 499; (1925) A. I. R. (C.) 831; 26 Cr. L. J. 1213 **733**

——— **s. 34**—*Book of account, entries in, corroboration of—Surrounding circumstances, whether may be referred to.*

Section 34 of the Evidence Act does not limit in any way the nature of the material upon which the Court may rely to support the entries in a book of account.. Such material may be in the shape of temporary vouchers, receipts or other documentary evidence. It might take the shape of sworn oral testimony. It is open to a Court to arrive at a finding as to the genuineness of a book of account by reference to the circumstances surrounding the transactions entered therein and the circumstances surrounding the existence of the account book. **A** KALLU MAL-DHAKKAU LAL *v.* BHAWANI DAS-REKHAB DAS, L. R. 6 A. 375 Civ. **383**

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——— **s. 65**—*Copy of document admitted without objection—Appeal—Objection, whether can be taken in Appellate Court.*

No objection should be allowed to be taken in an Appellate Court as to the admissibility of a copy of a document, which was admitted in the lower Appellate Court without any objection. **L** JIWAN LAL *v.* JIWAN (1925) A. I. R. (L.) 347 **541**

——— **ss. 80, 91.** *See* CR. P. C., 1898, s. 360 **449**

——— **s. 81**—*Local Gazette—Genuineness, presumption of.*

The genuineness of a Local Gazette must be presumed under the provisions of s. 81 of the Evidence Act. **L** SARUP SINGH *v.* EMPEROR, (1925) A. I. R. (L.) 299; 1 L. C. 538; 26 Cr. L. J. 1078 **22**

——— **s. 90**—Document thirty years old—Presumption as to execution and attestation and authority of attorney. *See* REGISTRATION ACT, 1908, ss. 34, 35 **33**

——— **s. 92.** *See* CR. P. C., 1898, s. 162 **449**

——— **s. 92.** *See* PROMISSORY NOTE **336**

——— **s. 92**—*Settlement of lands—Antecedent documents and maps, whether can be referred to, for defining boundaries.*

It is not open to a Court to admit antecedent documents and maps for the purpose of contradicting the terms of a Settlement. Such documents and maps may, however, be referred to for the purpose of identifying the thing demised. **P C** TILAKDHARI SINGH *v.* KESHO PRASAD SINGH, 48 M. L. J. 611; 6 P. L. T. 319; (1925) A. I. R. (P. C.) 122; 2 O. W. N. 403; 41 C. L. J. 386 3 Pat. L. R. 114 Civ.; L. R. 6 (P. C.) 109; 27 Bom. L. R. 819; (1925) M. W N. 403 (P. C.) **103**

——— **s. 92, proviso 3** **435**

——— **s. 102**—*Unregistered document—Execution proved or admitted—Consideration—Burden of proof.*

Where an unregistered document, such as a bond, receipt or an entry in an account book, the execution of which is admitted or proved, contains an admission or recital of the payment of consideration, the onus lies on the person executing the document to prove that he did not receive the consideration, and not on the opposite party to prove payment of the consideration.

Per *Shadi Lal, C. J.*—If *A* sues *B* for money due on a document such as a bond, a receipt or an entry in an account-book, the burden of proving the existence of facts upon which the legal liability of *B* depends lies on *A*. When *A* has proved the execution of the document by *B* either by producing evidence or by an admission made by the latter, and the document contains an acknowledgment of the receipt of consideration it is the duty of *B* to show that what he himself admitted in the document to be true was, as a matter of fact, false, and that he did not receive the consideration. **L** RAM CHAND *v.* CHHUNUN MAL, 2 L. C. 85; (1925) A. I. R. (L.) 471; 6 L 470 **301**

——— **s. 114, Ill. (b).** *See* CR. P. C., 1898, s. 417 **453**

——— **s. 114, Ill. (f).** *See* PENAL CODE, 1860, s. 124 A **356**

——— **s. 114, Ill. (a), (b)**—*Presumption.*

Before a presumption can arise under Illustration (*a*) of s. 114 of the Evidence Act, it must be proved that the goods found in the possession of the accusad have been stolen. No such presumption will arise in a case where it may reasonably be presumed that the

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property in question is stolen property. C SATYA CHARAN MANNA v. EMPEROR, (1925) A. I. R. (C.) 666; 52 C. 223; 26 Cr. L. J. 1155 515

——— s. 116. *See* REGISTRATION ACT, 1908, s. 17 872

Execution of decree—*Mortgage decree—Executing Court, whether can question jurisdiction of Court to direct sale of property—Representatives of judgment debtor, whether can object to sale—Remedy.*

An Executing Court is bound to execute the decree and cannot, apart from fraud, consider whether a decree ordering sale of certain property was one which the Trial Court ought rightly to have passed.

The representatives of a deceased mortgagor judgment-debtor cannot, in execution of a mortgage decree, agitate the question that the mortgagor had no power to execute the mortgage and that consequently the mortgaged property could not be sold in execution of the decree. Any such contention must be raised in a separate suit brought for the purpose of challenging the mortgage the mortgage-decree and the sale held thereunder. Pat HITENDRA SINGH v. RAMESHWAR SINGH, 4 Pat. 510; (1925) A. I. R. (Pat.) 625 at p. 667; 6 P. L. J. 634 at p. 698 141

Fishery, *right of, proof of—Grant, absence of, effect of—Long user—Evidence, nature of—River-bed settled with owners of particular village—Presumption—Adverse user.*

In order to establish a right of fishery it is not absolutely essential to prove an express grant after a considerable lapse of time. Plaintiff can establish his right by proof of uninterrupted user of the fishery prior to his dispossession by the defendant. The evidence, however, must be clear and unambiguous showing the plaintiff's exercise of the right of fishery over the particular spot in respect of which he claims the right, particularly where the bed of that part of the river to which the claim relates belongs to the defendant.

Where the bed of a public river is settled with the owners of a certain village it ceases to be Government property or a public domain, and ordinarily the owners of the bed of the river would be the owners of the right of fishery, and a person claiming the right of fishery as against such owners must show that he has been using the waters of the river in question for the purpose of catching fish and has been exercising his right of fishery to the exclusion of the owners of the bed of the river for the requisite period. Pat KEDAR NATH GOENKA v. AMRIT MANDAL (1925) Pat. 170; (1925) A. I. R. (Pat.) 676 568

Fraud—*Decree passed by consent—Suit to set aside decree—Agreement to recover smaller sum than that mentioned in decree, whether evidence of fraud.*

Plaintiff was a defendant in a former suit in which a decree was passed against him for a certain sum by consent. He brought the present suit to set aside the decree on the ground that it was obtained by fraud. The fraud alleged was that the previous suit had been compromised on the plaintiff agreeing to pay a certain sum to the defendant and that the defendant induced the plaintiff to allow a decree to be passed against him for a larger sum on the representation that only the smaller sum which was the basis of the compromise would be actually recovered:

Held, that plaintiff having allowed a decree to be passed against him by consent with knowledge of all

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the facts, it could not be said that he had in any way been defrauded and that his suit was consequently liable to be dismissed. L BHAGAT SINGH v. NIKKA, (1925) A. I. R. (L.) 357 572

——— *Decree, setting aside of.*

It is not permissible to raise pleas of fraud and production of false evidence in a suit to set aside a decree passed on contest, or, in the case of an *ex parte* decree, where process was served and the proceedings were in fact watched by the defendant. C BAIKUNTHA CHANDRA DHUPI v. PRAHLAD CHANDRA DHUPI 583

General Clauses Act (X of 1897), s. 8 (2). *See* C. P. C., 1908, O. III, R. 4. (3) 91

Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—*Conviction by* panchayat—*Interference by High Court.*

The provisions of the Cr. P. C. are not made applicable to Panchayat Courts under the Madras Panchayat Courts Act. The High Court cannot, therefore, interfere with an order of a *Panchayat* Court under ss. 435 and 439 of the Code. But under s. 107 of the Government of India Act, the High Court has powers of supervision over all Criminal and Civil Courts in the Presidency and when a grave error of a Panchayat Court, which is not governed by the provisions of the Cr. P. C., appears on the face of the record, the powers given by s. 107 of the Government of India Act could be invoked to correct such error. M MUNIGADU v. EMPEROR, (1925) M. W. N. 600; 26 Cr. L. J. 1161 521

Government of India Act, 1919 (9 & 10, Geo. V Ch. 101), ss. 45, 47. *See* C. P. C., 1908, O. III, R. 4 (3) 91

——— s. 80—*Local Legislature, power of, to repeal laws passed by itself—Agra Pre-emption Act (XI of 1922)—Agra Pre-emption (Amendment) Act (VIII of 1923).*

Under s. 80, sub-s. 1 of the Government of India Act the Local Legislature of any Province has power, subject to the provisions of the Act, to make laws for the peace and good government of the territories for the time being constituting that Province and this power includes the power to amend and alter, or, if necessary, repeal laws previously enacted by that Local Legislature.

The Agra Pre-emption (Amendment) Act of 1923 was not *ultra vires* of the U. P. Legislature. A SARJU PRYSAD v. BHAGWATI PRASAD, 23 A. L. J. 373; L. R. 6 A. 337 Civ. (1925) A. I. R. (A.) 542 297

Guardian ad litem—Appointment of, effect of—Enures for the whole *lis*. *See* C. P. C., 1908, O. I, R. 10 235

——— *Insolvent whether competent.*

There is no law that an insolvent cannot be the guardian *ad litem* of an infant. M MANIK RAO v. NUR-HASSAN 254

Guardian and minor—Minor co-parcener, how far bound by acts of manager—Manager, position of—Guardian, authority of—Contract entered into by guardian—Minor, whether can sue for specific performance—Natural guardian, power of. *See* HINDU LAW—JOINT FAMILY 116

Guardians and Wards Act (VIII of 1890), s. 22—*Injunction,* ad interim, *restraining marriage of minor, whether can be passed—Powers of Court extent of.*

Guardians and Wards Act- contd.

The powers of the High Court in the matter of protection of the person and property of a minor embrace a wide field and the Court has jurisdiction to pass such orders as it considers necessary and proper in the interests of a minor.

Under the Guardians and Wards Act, the Court has jurisdiction to grant an *ad interim* injunction restraining the marriage of the minor pending the decision of certain proceedings pending in the Court. **L** MURARI LAL *v.* SARASWATI, (1925) A. I. R. (L.) 358 **576**

——— **s. 41**—*Guardian discharged, liability of—Order direcitng discharged guardian to restore possession of minor's property—Consent order—Appeal, whether lies—Jurisdiction.*

A guardian is an officer of the Court and is responsible to the Court which appoints him guardian for due management of the property of the ward and for restoration of any property of the ward that remains in his possession. Orders made against him by the Court can be executed in proceedings under the Guardians and Wards Act.

Appellant was appointed the guardian of a female minor and under the sanction of the Court he exchanged certain property of his own with that of the minor. He was subsequently discharged and the minor's husband was appointed her guardian. The husband applied to the Court for re-opening the exchange on the ground that it was highly disadvantageous to the minor and the Court after enquiry set aside the deed of exchange and ordered the appellant to return the property which belonged to the minor before the exchange. The order expressly mentioned that the appellant was agreeable to the cancellation of the exchange. The appellant applied in revision against this order but the revision was dismissed on the ground that the order being a consent order was not open to be challenged. The husband of the minor subsequently put that order in execution and obtained delivery of possession of the property belonging to the minor. Appellant thereupon applied to the Court to restore possession of the property to him on the ground that the order was without jurisdiction. His application was refused and he came up in appeal to the High Court:

Held, (1) that the order which had been executed having been passed on the basis of consent it was no longer open to the appellant to contend that that order was passed without jurisdiction;

(2) that although the appellant had been discharged from the guardianship on the date when the order was passed against him, the liabilities of even a discharged guardian continue after his discharge as regards any fraud which may subsequently be discovered and it must, therefore, be deemed that the order was passed against the appellant directing him to restore possession of the property to the minor as a guardian still under the control of the District Judge;

(3) that the order so made was executable against the guardian in proceedings under the Guardians and Wards Act. **A** MOHAMMAD ABDUL RAB *v.* KHODAIJA, 23 A. L. J. 428; L. R. 6 A. 455 Civ.; (1925) A. I. R. (A.) 457 **165**

——— **ss. 41, 45**—*Order directing guardian to hand over property to minor—Property not admitted to belong to minor—Order, legality of—Disobedience—Offence—Irregularity, effect of.*

A Court cannot in proceedings under the Guardians and Wards Act compel a former guardian to hand over to the minor possession of property which the guardian does not admit to belong to the minor and over which he never obtained possession as guardian of the minor.

So long as an order passed by a competent Court with jurisdiction under the Guardians and Wards Act stands, any disobedience of it by the guardian would be an offence under s. 45 of the Act. The mere fact that there was some irregularity in passing the order would not be a good defence. **A** FAQIR MOHAMMAD *v.* BRIJ NARAIN MAHROTRA, L. R. 6 A. 377 Civ; 23 A. L. J. 736 **444**

Guardianship—*Mother, whether lawful guardian of minor sons.*

Under the Hindu Law the mother is the lawful guardian of her infant sons where the sons are the sole owners of their property. **N** SHAMPURI *v.* RAM CHANDRA **268**

Hackney Carriages Act (XIV of 1879), s. 6 (g)—*Bye-laws framed by Lucknow Municipal Board, bye-law 18—Carriage re-painted and awaiting for number—Number painted on lamps—Breach of bye-law.*

Where a hackney carriage, whose lamps bear the number, has been re-painted and is awaiting for the number to be painted on it, the absence of the number from a conspicuous part of the carriage does not involve a breach of bye-law 18 framed by the Lucknow Municipal Board under s. 6 (*g*) of the Hackney Carriages Act. **O** JOHN CASSEL *v.* EMPEROR, 2 O. W. N. 413; (1925) A. I. R. (O.) 447; 26 Cr. L. J. 1170 **594**

Hindu Law—Adoption—*Burden of proof—Presumption—Natural father, presence of, whether necessary—Handing over, whether must be done by natural father—Adoption by widow—Motive for adoption, whether can be enquired into.*

It is for the person who asserts that an adoption has taken place to prove it. But if it is proved that an adoption was apparently valid as performed, then in so much as there is a presumption that all things are done as they should be done, it is necessary for the person contesting the adoption to demonstrate in what particular respects there has been a failure of ceremonial or ritual.

The natural father of the adopted child must be present at the time of the adoption and the handing over of the child to the adoptive parent must be done under his direction, inasmuch as there must be an intention in the mind of the father at the moment of adoption to give up his natural rights, but if that requirement is complied with it is not necessary that the actual physical handing over should be done by the hands of the natural father.

Where a Hindu widow has power to make an adoption it is not for the Court to ascertain the motives of the widow in making an adoption. All that the Court has to see is whether the adoption is a legal adoption or whether it is invalid. **S** CHATIBAI *v.* KUNDIBAI, (1925) A. I. R. (S.) 223 **573**

——— ———, *proof of*—Gharbari Gosavis *of Berar.*

Plaintiff claimed to succeed to one *J* as his adopted son on the allegation that he had been adopted by *J's* widow after *J's* death under an authority from *J*. *J* belonged to a family of *Gharbari Gosavis* and it was found that the plaintiff had been shaved as a preliminary ceremony for being appointed the disciple of *J*, tha

after the date of the ceremony he lived in the family of *J* and bore a name showing that he belonged to it and had nothing to do with his natural family and also that on several occasions he had been described as the son of *J* by *J's* brother and after his death by the latter's widow :

Held, that under the circumstances plaintiff must be deemed to have been validly adopted by *J's* widow as a son to *J*. **P C** HARIGIR KISANGIR GOSAVI *v.* ANAND BHARTHI VISHNU BHARTHI GOSAVI, (1925) A. I. R. (P. C.) 127; (1925) M. W. N. 414; 21 N. L. R. 127; 22 L. W. 355 (P. C.) **343**

——— **Alienation** —*Widow—Attestation by reversioner, effect of—Consent, proof of—Presumption.*

The signature of a party as a witness to a deed, or as the scribe who wrote it is not in itself evidence of his consent to the transaction and the same principle applies to the case of a person who signs the name of another on a deed at that other's request. It may or may not be that he was fully aware of the contents of the document and it may or may not be that he approved of it, but the fact that he merely acted as the amanuensis of another affords in itself no evidence of his own knowledge of the contents of the document still less can it be said to express his concurrence in the matters expressed therein. His part is merely mechanical and expresses no separate intention of his own but merely the intention of the party on whose behalf he acts.

A transfer effected by a limited owner, such as a Hindu widow, with the consent of the next reversioner is a valid and a binding transaction. The consent of the next reversioner, however, cannot be held to be established by the mere fact that the deed of transfer was signed by the reversioner on behalf of the widow. **Pat** RAMBHUJAWAN SINGH *v.* SURAJ PRASHAD SINGH, (1925) Pat. 137; (1925) A. I. R. (Pat.) 467 **502**

——— *Widow—Necessity, absence of—Alienation, whether void or voidable.*

An alienation by a Hindu widow without legal necessity is voidable and not void and until the reversioners (including in that term the Crown, if there are no reversioners) decide to avoid it or to treat it as a nullity, it stands good. **C** UPENDRA NATH JANA *v.* SHIBADASI DEBI, (1925) A. I. R. (C.) 1053 **898**

——— **Bombay School**—*Berar, law applicable in*—Gharbari Gosavis, *law applicable to.*

Gharbari Gosavis are a fraternity within the *Sudra* caste. They are married ascetics having certain of the customs and practices of ascetics necessarily modified by the fact of marriage and its consequences. Except so far as their particular customs apply they are governed by the usual law as to Hindus which in the Province of Berar is the same as the Hindu Law in the Presidency of Bombay. **P C** HARIGIR KISANGIR GOSAVI *v.* ANAND BHARTHI VISHNU BHARTHI GOSAVI, (1925) A. I. R. (P. C.) 127; (1925) M. W. N. 414; 21 N. L. R. 127; 22 L. W. 355: (P. C.) **343**

——— **Charitable endowment**—*Property purchased to establish* "devalaya"—*Erection of temples—Installation of deity—Rents appropriated towards* deb sheba—*Dedication, proof of*—Shebait, *position of.*

The position of a *shebait* is not the same as that of a trustee in English Law in whom the property is vested. The *shebait* is only a manager, the property being vested in the deity. The possession and management remain with the *shebait* and the right of suit is vested in the *shebait* though the property is vested in the *thakur*.

When the question to be determined is whether a certain property is trust property, or, whether it belongs to the alleged trustee in his own right, instances of appropriation of such property by the alleged trustee to his own use, if they are numerous and extend far back into the past in a continuous series, will be a good evidence of his right; but if the instances are only recent or are few and far between they are not likely to be of much value and may be treated merely as instances of abuse of trust.

The question whether instances of personal appropriation by a trustee are merely evidence of breaches of trust or are evidence of there being no endowment is sometimes a difficult one, but it cannot be affirmed that an endowment cannot be proved from treatment of the properties, merely because there was personal appropriation by the *shebaits* in some instances.

A deed of dedication is not essential for the purpose of a valid dedication which may be inferred from application of the proceeds and family conduct.

One test of a *bona fide* or nominal endowment is to see how did the founder treat the property, or, how have his descendants treated it, and whether the income of the endowed lands has been continually applied to the object of the dedication.

In the case of private *debutter* properties it is not unusual to describe them as "ancestral" or as "our *debutter* properties" and the heirs of the founder describe their interest as *shebaits* according to the shares which they have in secular properties.

The mere fact that the rents of a particular property are applied for the worship of a deity for a long period may not be sufficient to establish that the property is *debutter*, because the worship of family deities may be and sometimes is carried on with the income of a specified property belonging to the family. That by itself may not be sufficient to establish the absolute *debutter* character of the property, but it may in certain circumstances have an important bearing in determining whether the property is *debutter*.

A certain plot of land was purchased expressly by the vendees for building "*devalaya*." The deed was not taken in the name of the deity and the vendees were to have the right of gift and sale. A temple was built upon the property so purchased and a deity was subsequently installed. Later on some other property was purchased by the same vendees and it was stated in the deed that the property was being purchased for the *sheba* of a particular deity. The deed also contained a passage as follows:—"your sons and grandsons and other heirs in succession will as *shebaits* of the said *thakur* continue to perform the *sheba* with the income of the lands, etc." In addition to the temple the necessary out houses and offices for the *debutter* staff were built and the rents of the *debutter* properties were separately collected, while the rents of the secular properties belonging to the family were collected by the agents of each co-sharer separately. The rents of the *debutter* estate were applied for the worship of the deities and none of the co-sharers ever took any portion of the rents for his own use. There were admissions of the successors of the original founders in some of the documents with respect to certain properties that they were dedicated to the deity. On the other hand there was evidence that some of the properties had been treated as secular properties by the descendants of the founders;

Held, (1) that the statement in the first deed of sale that the vendees would have the power of gift or sale was the statement of the vendor who was selling the property and that it was merely used to show that an absolute right in the property was being transferred to the vendees;

(2) that the words in the second sale-deed "your sons and grandsons and other heirs" were used in the conveyance to show that the vendees were to have an absolute right and that the words "as *shebaits* of the said *thakur* continue to perform the *sheba*" must have been inserted in the conveyance at the instance of the vendees and were evidence of their intention to purchase the property for purposes of the *deb sheba*;

(3) that instances of the treatment of some of the properties as secular properties by the descendants of the founders must be treated as abuse of trust on the part of the *shebaits* and did not affect the character of the remaining properties which had all along been treated as *debutter*;

(4) that such of the properties as had been treated all along as *debutter* properties and the income of which had been applied to the *deb sheba* must be declared to be *debutter* properties. **C** GOPAL JEW THAKUR *v.* RADHA BINONDE MONDAL, 41 C. L. J. 396 (1925) A. I. R. (C.) 996 **616**

——— **Custom**—*Inheritance—Property inherited by daughter—Death of daughter without issue—Property, whether reverts to father's family or passes to husband*—Kadwa kunbi *caste—Proof of custom—Burden of proof—Instances, value of.*

The onus of proving a custom which is a departure from the ordinary law which would otherwise govern the parties, rests on the person who alleges it. In order to prove such a custom it must be shown to be ancient and invariable, and also to be such that there is nothing unreasonable or contrary to public policy in the Court giving effect to it. A mere general statement by members of the caste, unaccompanied by positive instances in which the alleged custom was actually observed, is by itself insufficient to prove the custom.

If the evidence shows that for a certain number of years there have been a number of instances in which the alleged custom has been recognised the presumption arises that the parties concerned have acted in that manner but not from a desire to set up a new custom, because they are acting in accordance with the traditions of immemorial usage.

Among the *kadwa kunbi* caste when a married woman, who had succeeded to the property of her father in default of male issue, herself dies without issue, the property reverts to her father's family and does not pass to her husband. **B** RATILAL NATHALAL *v.* MOTILAL SANKALCHAND, 27 Bom. L. R. 880; (1925) A. I. R. (B.) 380 **891**

——— **Damdupat,** *rule of, applicability of—Bond—Debtor agreeing to re-pay principal and* sawai *with interest—Amount, maximum, recoverable.*

Defendant executed a bond in favour of the plaintiff stating as follows :—"I have borrowed from you a debt of Rs. 136 principal, Rs. 34 is *sawai* thereon, the total amounts to Rs. 170." The bond then went on to specify the mode of payment. In a suit to recover the principal and interest:

Held, that the principal amount borrowed under the bond was only Rs. 136 and that the sum of Rs. 34 was prospective interest and that the plaintiff was, therefore, entitled under the rule of *damdupat* to recover only double the amount of Rs. 136 and not double the amount of Rs. 170. **N** SADASHEORAO *v.* KALUSINGH, (1925) A. I. R. (N.) 272; 21 N. L. R. 45 **561**

——— **Gift**—*By husband to wife—Mithila School.*

There is nothing in the Hindu Law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, effect must be given to them irrespective of the sex of the grantee. **Pat** HITENDRA SINGH *v.* RAMESHWAR SINGH, 4 Pat. 510; (1925) A. I. R. (Pat.) 625 at p. 667; 6 P. L. T. 634 at p 698 **141**

——— **Guardianship**—Step-mother, right of, to be guardian of step-son. *See* MINOR **643**

——— **Joint family**—*Alienation by father—Antecedent debt—Terms, whether binding on sons.*

It may be that in certain cases where the bulk of the consideration for an alienation made by a father in respect of joint family property consists of antecedent debt or is justified by legal necessity the alienation may be held binding upon the sons; but where there is much more in an alienation than the simple question as to the amount of the consideration that might be of a valid character the Court must consider it in its entirety and come to the conclusion in the particular circumstances of each case as to whether it should be upheld or set aside. **O** GAURI SHANKAR *v.* BADRI NATH **474**

——— *Alienation by father—Antecedent debts, payment of—Debt paid off not mentioned in deed, effect of—Sons, whether bound.*

In a case in which false recitals are dishonestly and fraudulently entered in a deed of transfer in order to deceive persons entitled to challenge the alienation, the Court may prevent the transferee from shifting his ground and setting up a case that although the consideration was not paid or appropriated in the manner stated in the deed it was appropriated in payment of obligations which were in the nature of antecedent debts and that, therefore, the transfer was justified although not on the grounds stated in the deed itself.

Per *Sulaiman, J.*—Under the Hindu Law antecedent debts of the father unless tainted with immorality or illegality are binding on the sons, and a transfer of family property by the father in lieu of such debts is perfectly valid. It makes no difference in principle if a portion of the sale consideration though originally intended to pay off one antecedent debt, is, as a matter of fact, when it is discovered that that debt does not exist, honestly utilized to pay off another antecedent debt. Where both the debts are binding on the sons they cannot complain if one is paid off rather than the other. The payment of debts due from the father is considered to be one of the recognised legal necessities. When, therefore, an antecedent debt has in fact been discharged, though the debt is not the one actually mentioned in the deed, the transfer should not be vitiated unless there are circumstances showing an attempted fraud. **A** PIARE LAL *v.* THAKURJI, 23 A. L. J. 909; L. R. 6 A. 537 Civ. **964**

——— *Alienation by manager—Consent of co-parceners, effect of—Debt incurred for purpose of prosecuting litigation—Necessity—Pious duty of sons to pay their father's debts, whether arises during the lifetime of father—Appeal—Point of law raised on earliest possible opportunity, whether can be entertained.*

A debt contracted by the managing member of a

joint Hindu family for the purpose of prosecuting a litigation cannot be regarded as having been incurred for a necessary purpose.

The assent of a member of a joint Hindu family to an alienation made by the managing member of the family is only evidence of justifiable family necessity and is of no avail except by way of estoppel when admittedly there was no family necessity.

It is the pious duty of Hindu sons to pay their father's debts, and the duty arises even during the lifetime of the father. **O** KALKA DEVI *v.* GANGA BAKHSH SINGH, 12 O. L. J. 306; (1925) A. I. R. (O.) 435 **127**

——— **Joint family**—*Alienation by managing co-parcener—Legal necessity—Consent of other co-parceners, whether necessary—Burden of proof.*

The *de facto* managing co-parcener in a joint Hindu family, whether he is the *karta* or not, is competent to alienate joint family property for legal necessity, and it is not obligatory for him to obtain the express consent of the other adult co-parceners and their consent may be implied from the existence of legal necessity. An alienation so made by him is binding on all the co-parceners including minor co-parceners.

The burden is on the alienee in such a case to prove legal necessity. He may prove as a fact that there was such necessity or prove that he honestly did all that was reasonable to satisfy himself that the required necessity existed. The quantum of proof which is required in any particular case is not capable of a general and inflexible definition and depends on the circumstances of each particular case. **S** NARAINDAS *v.* KHATANMALL **916**

——— *Ancestral trade—Manager, position of—Minor co-parcener, how far bound by acts of manager—Guardian, authority of—Contract entered into by guardian—Minor, whether can sue for specific performance—Natural guardian, power of.*

Where a minor is a member of a joint Hindu family and as such entitled to a share in an ancestral trade, the manager of the family can, so long as it be beneficial to the minor, continue the trade on the minor's behalf. Minor members of the family are bound by acts of the manager which are necessarily incident to, and flowing out of, the carrying out such trade.

Where the family trade is that of dealing in immoveable properties it would undoubtedly be an act necessarily incidental to the carrying on of such trade to sell property which had been purchased for the purpose of sale. Even if the general business of a family be not that of dealing in property but lending money on mortgages and if in the course of such business the family had to purchase properties in satisfaction of their debts in order to avoid loss, it would again be an act incidental to the carrying on of such trade to sell such property and convert it into cash when a favourable opportunity offers itself to the manager.

A party filling a fiduciary character like that of a guardian is authorised to perform any act which is manifestly for the infant's benefit.

A manager of a joint Hindu family is competent to alienate property belonging to the joint family for purposes which are not only *necessary* but are *beneficial* to the joint family estate, so as to bind the interest of all co-parceners including minors.

Where the Hindu property alienated belongs exclusively to the minor, such alienation should be strictly and manifestly for his benefit alone. Where again the property alienated is co-parcenary property in which the minor is interested, the manifest benefit of the co-parcenary as creating the necessity is the test.

It is competent to a minor surviving co-parcener to enforce specific performance of a contract entered into by the deceased manager of the joint family for the benefit of the family estate.

Although the appointment of a guardian by the Court supersedes the power of natural and testamentary guardians, the powers of a natural guardian in the absence of such appointment are unaffected by the restrictions which the Guardians and Wards Act places upon the powers of guardians appointed by the Court. The validity of his acts must be determined by the general principles which govern the relations of a minor to the manager of his estate or, in the words of the Guardians and Wards Act, he may do all acts which are reasonable and proper for the realization, protection, or benefit of the property.

It is not competent to the guardian of a minor surviving co-parcener to apply for Letters of Administration to the estate of the deceased co-parcener or to take out a succession certificate, as there would be no estate to administer and no estate to which the minor has succeeded by inheritance.

A minor cannot on attaining majority sue to enforce specific performance of a contract to sell land made on his behalf by his guardian, which is not binding on him.

When a suit has been instituted on the minor's behalf by his mother as his guardian to enforce specific performance of a contract which was binding on him and the minor on attaining majority elects under O. XXXII, r. 12, C. P. C., to continue the suit, it does not amount to instituting a fresh suit and his right to claim specific performance would be determined as on the date on which the suit was originally instituted. **S** LAKSHMICHAND ISHARDAS *v.* KHUSHALDAS MANGATRAM, 18 S. L. R. 230 **116**

——— **Joint family**—*Debt—Necessity—Onus of proof—Debt incurred by* karta—*Family property, liability of.*

In determining the validity of a debt incurred by the manager of a joint Hindu family, there is no general and inflexible rule as to whether the onus to prove necessity rests on the creditor or on the joint family to prove the want of necessity: the presumption proper to be made will vary with circumstances and must be regulated by and be dependent on them.

Where necessity has been proved the mere fact that the creditor made no enquiries as to the necessity for the loan, or the purposes for which it was required is immaterial. **L** FIRM CHALA RAM *v.* KISHEN CHAND, (1923) A. I. R. (L.) 462 **762**

——— *Debt—Pious obligation of sons to pay father's debts, whether can be enforced during father's life-time—Partition, effect of—Property of sons, whether liable for father's debts.*

A pious obligation of a Hindu son to pay off his father's debts is enforceable even during the father's lifetime.

Where, however, a partition has taken place between the father and the sons the property of the sons cannot be proceeded against in satisfaction of a simple money-debt of the father. After partition takes place there are no assets of the father in the hands of the sons and there is nothing for the creditor to proceed against so far as the sons are concerned. **Pat** RAM GHULAM SINGH *v.* NAND KISHORE PRASAD, 4 Pat. 469; 6 P. L. T. 619; (1925) A. I. R. (Pat.) 688 **813**

Hindu Law—contd.

——— **Joint family**—*Partition—Jointness of members constituting one branch of family—Presumption—Burden of proof—Debts incurred by father—Pious obligation of sons, whether can be enforced during lifetime of father—Decree passed against father personally—Immoral obligation.*

The sons of a Hindu are under a pious obligation to pay their father's debts even in his lifetime.

Where a partition takes place of joint family property there is no presumption that a father and his sons constituting one branch of the family continue to remain joint *inter se*. The question is one of fact and the burden of proof is on those who allege jointness.

Where in a suit for partition of joint family property and for accounts against the manager of the family a decree for money is passed against the defendant personally, the fact that the decree is personal is not sufficient to prove that the obligation in respect of which the decree was passed was an immoral obligation so as to absolve the sons of the judgment-debtor from liability in respect of the decretal amount under the decree. **Pat** RAGHUNATH PRASAD SINGH *v.* BASDEO PARSAD SINGH, 6 P. L. T. 764 **1012**

——— *Partition—Minor, suit by—Birth of son after institution of suit, effect of—Profits, whether can be claimed.*

An unequivocal unilateral declaration by a member of a joint Hindu family of his intention to be separated from the other members is sufficient to give him a divided status.

A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. But a minor cannot enter into a valid contract and cannot enforce a partition by his mere volition. In an action for partition by a minor through his guardian or next friend the Court has to see whether there are circumstances which would justify granting relief to the minor and whether it would be in the interest of the minor and to his advantage to separate him from the family. Till the Court determines the question whether a partition should be effected in favour of a minor the joint status of the minor with the other members of the family is not in any way severed. It is only by the decree of the Court that a minor becomes divided from the other members of the family. Therefore, the mere filing of a plaint in a partition suit cannot bring about a divided status so far as a minor plaintiff is concerned. Although, however, a minor plaintiff becomes divided in status from the other members of the family only by reason of the decree of the Court, yet his share in the family property is what it was on the date of the plaint. The Court merely determines on the evidence before it whether on the date of the plaint the minor plaintiff was entitled to partition or not.

Therefore, the share of a minor plaintiff who sues his father for partition is not liable to be diminished owing to the birth of another son to the father conceived after the date of the filing of the plaint but born before the date of the preliminary decree.

Ordinarily in a partition suit the managing member of the family is not liable to account for the income and profits. Where, however, it appears that the whole income from the property was enjoyed by the defendant and that the plaintiff was not supported by him the Court has a discretion to award to the plaintiff a portion of the income from the date of the institution of the suit to the date of delivery of possession of his share of the property to the plaintiff. **M** KRISHNASWAMI THEVAN *v.* PUNUKARUPPA THEVAN, 48 M. L. J. 354; 21 L. W. 675; (1925) A. I. R. (M.) 717; 48 M. 465 **424**

Hindu Law—contd.

——— **Joint family**—*Partition suit for, dismissal of—Separate collections—Property acquired by different members, whether joint or separate—Family consisting of uncle and nephews—Jointness—Presumption.*

In the case of a Hindu family consisting of an uncle and nephews the presumption is that the family is joint until the contrary is established.

A member of a joint Hindu family filed a suit for partition of the family properties, but the suit was dismissed on the ground that all the family properties had not been brought into hotch-pot. After the dismissal of the suit, however, the members of the family began to make separate collections although there was no actual division of the family property. In a subsequent suit for partition:

Held, (1) that unless it was established that any particular item of property was acquired with separate funds by any individual member of the family, all the property in the hands of the members of the family was liable to partition and to be divided among the members in equal shares;

(2) that in the case of property acquired by the managing member before the different members began to make separate collections, the presumption was that the property belonged to the joint family and was not the separate property of the manager. **A** HAZARI LAL *v.* RAM LAL, L R. 6 A. 279 Civ.; 23 A. L. J. 621; 47 A. 746 **422**

——— ——— *Sale by father—Suit by son to challenge sale—Plaint, allegations in—Necessity—Antecedent debt—Burden of proof.*

Where a Hindu son sues to set aside a sale of family property by the father on the ground of want of legal necessity or of the payment of an antecedent debt, it is not necessary for him to allege that the debt which has been paid off was contracted by the father for purposes of immorality or was illegal or was of an illusory character. It is for the purchaser to prove that the sale took place for legal necessity or for the payment of an antecedent debt. **O** JAGAT SINGH *v.* BIKRAM SINGH **900**

——— *Separation—Presumption—Burden of proof—Revenue papers, definition of shares in, effect of—Widow of joint member allowed to remain in possession in lieu of maintenance, effect of.*

Given a joint Hindu family the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father. A person who alleges that the members of a joint Hindu family have separated must prove, unless it is admitted, that there was a separation at some material time.

A definition of shares in revenue and village papers by itself affords a very slight indication of an actual separation in a Hindu family and is insufficient to prove, contrary to the presumption of law, that the family to which the entries refer had separated.

A widow of a sonless prominent member of a joint Hindu family is sometimes allowed by the family to occupy possession of some of the family's land for her life for her maintenance. **P C** BHAGWANI KUNWAR *v.* MOHAN SINGH, 23 A. L. J. 589; (1925) A. I. R. (P. C.) 132; 49 M. L. J. 55; (1925) M. W. N. 421, 41 C. L. J. 591; 22 L. W. 211; 29 C. W. N. 1037 (P. C.) **385**

Hindu Law—contd.

——— **Joint family**—*Will by father, validity of—Testamentary guardian, appointment of—Minor—Guardian—Permanent alienation of immoveable property to meet step-mother's maintenance claim, validity of—Mesne profits, right to—Repudiation, date of.*

A Hindu father has no power to dispose by Will of joint family property, nor can he appoint testamentary guardians of his minor son to manage properties to which the son is entitled by survivorship.

Prima facie it is a breach of trust on the part of the guardian of a minor to make a permanent alienation of immoveable property belonging to the minor for the purpose of providing for the maintenance of a person who is only entitled to be maintained for her lifetime.

The obligation of a Hindu son to maintain his father's widow is only co-extensive with the widow's lifetime.

A sale of a minor's property by his guardian in fraud of the minor's rights is not void but only voidable and is valid till avoided.

A quondam minor seeking to recover possession of properties improperly alienated by his guardian during his minority is entitled to mesne profits only from the date of the repudiation and where there has been no repudiation before the plaint, from the date of the plaint. **M** DEVICHILHI IYENGAR *v.* RAGHUPATHI VENKATACHARIAR, 22 L. W. 188; 49 M. L. J. 317 **967**

——— **Succession**—*Oudh Estates Act (I of 1869), ss. 8, 10, 23*—Taluqdari *and non*-taluqdari *estate—Owner buying property with income—Subsequently acquired property, character of.*

Where an absolute owner of certain *taluqdari* as well as non-*taluqdari* properties buys more property with his income from both sources, which incomes are completely commingled, the subsequently purchased property does not acquire the character and status of a *taluqdari* estate and the succession to this property is governed by the ordinary rules of inheritance.

Per *Kanhaiya Lal, J.*—It is a settled law that a subject cannot make his property descendible in a manner not recognised by the ordinary law; and it appears to follow that he cannot by express declaration, still less by mere volition, whether actual or presumed, subject the property acquired by him to a rule of succession applicable to the property which he had received by a grant to which certain conditions were attached.

Where a *taluqdar* holds an absolute estate in his own right and acquires property for his own use out of the income of that estate or otherwise, any custom relating to the devolution of the property in the family, unless it is limited in its application, would apply equally to the property inherited by him and that acquired by him in his own right.

Where according to the family custom the estate descends to a single heir, there is no necessary presumption that it descends by the rule of primogeniture, and if the heir according to the lineal primogeniture is more remote in degree from the ancestor than other persons, who may be collaterals coming within the line of heirship, then in the absence of any proof to the contrary, nearness of degree prevails over directness of line.

Per *Mukerji, J.*—Where property is acquired out of the income of an impartible estate governed by a custom as regards succession and the acquired property is allowed to merge in the main property with a view to its passing to the heir to the main estate, the accreted property is governed by the custom. But where by Statute a special rule of succession is enacted with respect to a particular property, unless there is an express statutory sanction for it, it is not open to the owner of the property to add to it other properties, so that the succession to the added property may also be governed by the Statute aforesaid. **A** HAR BAKSH SINGH *v.* DAL BAHADUR SINGH, 22 A. L. J. 1079; (1925) A. I. R. (A.) 155; 47 A. 186 **255**

——— **Widow,** *acquisition of occupancy rights by—Alienation, power of.*

Where the widow of a grantee of *abadkar* rights acquires occupancy rights in the holding, such acquisition enures to the benefit of the widow personally and cannot be treated as having been made by her in any representative capacity as the widow of her husband. In such a case the widow has an absolute power of disposal over the occupancy rights so acquired. **L** NARAIN SINGH *v.* SADA KAUR, (1925) A. I. R. (L.) 305; 6 L. 134 **64**

——— *Adverse possession—Property acquired, whether* stridhan.

A Hindu widow is not a tenant for life but has a widow's estate in her deceased husband's property and if while she is in possession of such property as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. **Pat** CHAKRADHAR JHA *v.* SHABKANT MISRA, (1925) Pat. 133; 6 P. L. T. 363; (1925) A. I. R. (Pat.) 460 **767**

——— *Alienation by widow, when justified—Arrears of rent in respect of lease taken up by widow for personal benefit—Arrears of rent in respect of ex-proprietary tenancy—Necessity—Gift for charitable purpose, when to be upheld.*

Where *zemindari* property in the hands of a Hindu widow is attached in execution of a simple money-decree the question whether the purchaser at auction takes the whole estate or only the right, title and interest of the widow depends on the nature of the suit in which the decree was passed. If the decree under execution was obtained upon a personal claim against the widow then only her interest passes by the sale; but if the suit was one in respect of the family estate then the whole inheritance passes by the execution sale. The same principles apply to family property alienated by the widow.

Where a Hindu widow takes up a lease for her personal benefit, the arrears of rent due on account of the lease form a personal debt of the widow and she cannot alienate the family estate in her hands in satisfaction of such a debt. The same principle applies to an alienation of the family estate made by the widow in order to pay off arrears of rent in respect of an ex-proprietary tenancy which has come into existence by operation of law on the sale by the widow of a portion of the *zemindari* property.

In every case in which an alienation by way of gift for a religious or charitable purpose is made by a Hindu widow holding an estate with the limited interest of such a widow the Court is bound to take into consideration the proportion borne by the property to the total estate in the hands of the widow on the date of such alienation. **A** B. ISHWARI PRASAD *v.* BABUNANDAN SHUKUR, L. R. 6 A. 291 Civ.; (1925) A. I. R. (A.) 495; 47 A. 563 **193**

Hindu Law—concld.

——— **Widow**—*Alienation—Representations made by reversioner—Suit to challenge alienation—Estoppel—Ratification by reversioner—Assignee from reversioner, whether bound.*

On the death of a Hindu widow, and during the lifetime of her daughter, a reversioner, by his representations induced a third person to purchase properties from an alienee from the widow and subsequently himself obtained from the daughter a sale-deed of all her rights in the properties so purchased. In a suit by the reversioner as assignee from the daughter to set aside the alienation:

Held, that he was estopped by his conduct from maintaining the suit.

An alienation by a Hindu widow is only voidable. Where on the death of a Hindu widow her daughter, who is the next reversioner, receives and enjoys the sale-proceeds of an alienation by the widow she is not thereafter entitled to question the same as not being binding on her. An assignee from her is equally estopped from challenging the alienation. **M** BHALLAMUDI KAMA SASTRI *v.* THIRUMAMIDI KANNAMMA, 48 M. L. J. 284; (1925) A. I. R. (M.) 638; (1925) M. W. N. 495 **765**

——— **Will** *by wife relating to property inherited by her from her paternal relations, validity of—Consent of husband—Wife living separately from husband, effect of.*

Where a Hindu wife has lived separately and independently of her husband for a long number of years he loses all rights of control over her including the right to control any disposition which she might make by Will of property inherited by her from her paternal relations. **B** BHAGVANLAL CHUNILAL *v.* BAI DIVALI, 27 Bom. L. R. 633; (1925) A. I. R. (B.) 445 **750**

Inam—*Construction of grant—Berar Inam Rules, applicability of—Grant to certain persons and his male descendants, extent of—Female descendants, whether entitled to share.*

The Berar Inam Rules lay down the conditions, which are usually to accompany an *Inam* grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant. Where the right of inheritance is by the *Inam* certificate confined to a particular class of descendants, which in its exclusion of another class of descendants from enjoyment is in terms unambiguous, there is no reason why the grant in these terms should not have effect.

Where an *Inam* is granted to a person and his male descendants, the grant cannot be construed as meaning that it shall be continued to the male and female descendants of that person so long as there is no failure of male descendants. The only grant in such a case is to the male descendants themselves and the word "to" can have no other than its ordinary meaning attributed to it. It cannot be treated as meaning "during the existence of" or "pending the failure," and even if the word were capable of being so extended a general grant could not in such a case be evolved from the words of the grant in terms sufficiently wide to include female descendants within its scope. **P C** SUBHAN ALI *v.* IMAMI BEGUM, 23 A. L. J. 667; (1925) A. I. R. (P. C.) 184; (1925) M. W. N. 545; 21 N. L. R. 117 (P. C.) **347**

——— Despandya inam—*Possession before Permanent Settlement with* despandya—*Abolition of office—Possession continued—Lands, whether included in assets of* zemindari—*Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against two sets of defendants—Appeal by one set—Decree, whether can be set aside as against defendants who have not appealed.*

Where certain *inam* lands in a *zemindari* were enjoyed by *despandyas* before the Permanent Settlement of 1802 and at the time of the Permanent Settlement, the Government abolished the *despandya* office and added the *russoom* payable to the *despandyas* to the *peishcush* of the *zemindari* and the lands continued in possesion of the *inamdars*:

Held, (1) that by the inclusion of the *russoom* in the *peishcush* or permanent *zummah* payable by the *zemindar*, the lands in the possession of the *despandyas* did not become part of the *zemindari*;

(2) that the lands having been held under the Government were in the nature of *raiyatwari* lands. **M** MALYALA SURAYYA *v.* VENKATA KUMARA MAHIPATHI SURYA ROW, 48 M. L. J. 577; (1925) A. I. R. (M.) 771; 22 L. W. 376; (1925) M. W. N. 730 **99**

Inam Register—*Presumption of inquiry by Commissioner.*

An *Inam* Register embodies the conclusions of the Inam Commissioner on such enquiry as he chooses to make upon the statements filed before him. The presumption is that Inam Registers embody the findings of the Inam Commissioner after such investigation. There is no rule prescribing the extent of the investigation to be made by him. **M** KANDALAM KRISHNAMACHARYULU *v.* SATHULURI VIJAYASARATHI, (1925) M. W. N. 117; 48 M. L. J. 467; 22 L. W. 73; (1925) A. I. R. (M.) 823 **646**

Income Tax Act (XI of 1922), ss. 2 (14), 55—*Registration of firm—Super-tax, liability to pay—Registered firm converted into Company—Company, whether liable to pay super-tax in respect of period before conversion.*

Under s. 2, sub-s. (14) of the Income Tax Act a firm may take advantage of the provision therein contained for registering itself, and where it does so, by operation of s. 55 of the Act, the firm, being from that moment a registered firm, is not liable for super-tax. In other words, where a registered firm exists, it is not liable for super-tax on the whole of its profits made as such firm but the individual partners are liable for super-tax if they would be liable for such super-tax as individuals. On the other hand if the firm is an unregistered firm then it is directly chargeable with super-tax if it makes profits at a rate sufficient to create a liability for super-tax and in that event the partners are not chargeable for super-tax if their firm has already paid it.

There is nothing in the Income Tax Act which would justify the Income Tax Authorities in imposing on a limited liability Company, which is the successor of a registered firm, during the first year of assessment after the conversion of the firm into the Company, a liability in respect of its predecessor firm which its predecessor would not have been liable to pay if it had continued in existence without any conversion. **A** *In the matter of* BEGG SUTHERLAND & Co., L. R. 6 A. 333 Civ.; 23 A. L. J. 685; (1925) A. I. R. (A.) 535; 47 A. 715 **239**

——— **ss. 22, 23**—*Return filed by assessee not accepted—Assessment—Notice to assessee to produce evidence in support of return, absence of, effect of—Waiver—Prejudice to assessee.*

Per *Greaves, J.*—If an Income Tax Officer is not

satisfied with the return submitted by an assessee he is bound to serve on the assessee the notice specified in sub-s. (2) of s. 23 of the Income Tax Act, but such notice may be taken to have been waived by the assessee where before the assessment takes place he produces all the evidence within his possession in support of the return and does not specifically demand that a further opportunity should be given to him to produce any further evidence.

It is a sufficient compliance with the provisions of sub-s. (2) of s. 23 of the Income Tax Act on the part of an Income Tax Officer either to give notice to the assessee to attend or notice to produce evidence in general terms. The sub-section does not impose upon him any obligation to specify the points upon which evidence should be given.

Per *Mukerji, J.*—The law intends that there should be two opportunities given to an assessee for the purpose of supporting the return which he has submitted. Under s. 22 of the Income Tax Act he is given an opportunity to submit such accounts or documents as the Income Tax Officer may require. When a return is submitted under that section the Income Tax Officer may proceed to deal with the matter on the basis of the return and may not require the assessee to produce any further material. He may, as required by sub-s. (4) of that section, call upon the assessee to produce or cause to be produced such accounts or documents as the Income Tax Officer may require. Under sub-s. (2) of s. 23 of the Act the law gives the assessee a further opportunity of producing any evidence on which the assessee may rely in support of the return. Under that section when the Income Tax Officer has reason to believe that the return made under s. 22 is incorrect or incomplete he is bound to serve upon the person who made the return a notice requiring him on a day therein specified either to attend at the Income Tax Officer's office or produce or cause to be produced any evidence on which he may rely in support of his return. The intention of the law clearly is that if the Income Tax Officer makes up his mind not to assess the income on the basis of the return upon the ground that the return is incorrect or incomplete, the assessee is entitled to know the position and to have an opportunity of producing evidence in order to support the return.

Ordinarily a notice issued under sub-s. (2) of s. 23 of the Income Tax Act should contain the points upon which the assessee has to produce evidence.

An assessee at the time of submitting his return produced along with it his evidence in support thereof, namely, his accounts. The accounts were examined for two days and then an assessment was made but not on the basis of the accounts. The assessee did not give the Income Tax Officer to understand that he had any further evidence in support of his return. No notice was, therefore, issued to the assessee under sub-s. (2) of s. 23 of the Income Tax Act before the assessment was made:

Held, per *Greaves, J.*—That under the circumstances of the case the notice under sub-s. (2) of s. 23 of the Income Tax Act must be taken to have been waived by the assessee;

Per *Mukerji, J.*—(1) that the failure of the assessee to produce any further evidence at the time of submitting his return could not be construed as a waiver on his part to have a notice issued on him under sub-s. (2) of s. 23 of the Income Tax Act;

(2) that the provisions of sub-s. (2) of s. 23 were mandatory and that non-compliance with them had prejudiced the assessee and he was entitled to an opportunity to produce any further evidence which he might desire to produce in support of his return. **C** NIRMAL KUMAR SINGH NOWLAKSHA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, 29 C. W. N. 591; (1925) A. I. R. (C.) 890 **404**

——— **ss. 33, 23 (2)** —*Additional assessment, levy of—Procedure—Reasonable opportunity to assessee to be heard, what amounts to.*

Where an order is passed by the Income Tax Commissioner under s. 33 of the Income Tax Act in circumstances where he is really exercising the duties of an Income Tax Officer under s. 23, sub-s. (2) of the Act and is in effect calling upon the assessee to give evidence to support the original return made by him, a week's notice to the assessee to show cause why additional assessment should not be imposed upon him without specifying any particular day on which the assessee could appear before the Commissioner and produce his evidence, does not amount to reasonable opportunity within the meaning of s. 33 of the Act. **Pat** SACHIDHITANANDAN SINHA *v.* EMPEROR, 2 Pat. L. R. 180 Cr.; 3 Pat. 664; 5 P. L. T. 608; (1924) A. I. R. (Pat.) 644 **1014**

——— **s. 64**—*Business with branches—Income Tax Officer having jurisdiction over principal place of business, powers of, with respect to branches—Concurrent jurisdiction—Jurisdiction, exercise of, mode of.*

The provisions of sub-s. (4) of s. 64 of the Income Tax Act do not oust the jurisdiction of the Income Tax Officer of an area in which the principal place of business of an assessee is situated so far as the assessment or the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned. The jurisdiction of such Income Tax Officer in respect of the branch business situated in another area is concurrent with the jurisdiction of the Income Tax Officer within whose jurisdiction that area is situated. Under sub-s. (1) of s. 64 the Income Tax Officer of the principal place of business has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. By sub-s. (4) every Income Tax Officer has also jurisdiction to exercise the powers of an Income Tax Officer with regard to the profits arising in the area within his jurisdiction. The Income Tax Officer of the principal place of business should not, however, exercise his powers oppressively, so that persons willing to submit to the requirements of the Income Tax Officer of the particular area in which the branch is situated should not be deprived of an opportunity of supplying him with all proper materials. **A** *In the matter of* MESSRS. LACHHMAN PRASAD-BABU RAM OF CAWNPORE, 23 A. L. J. 379; L. R. 6 A. 325 Civ.; (1925) A. I. R. (A.) 385; 47 A 631 **216**

——— **s. 66.** *See* LETTERS PATENT (LAH.), CL. 10 **570**

Indemnity, contract of—*Liability of the party indemnified to the other parties.*

In the cases of contracts of indemnity the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity but is the very moving cause of that contract, and in such cases costs reasonably incurred by the promisee in resisting or reducing or ascertaining the claim may be recovered.

Where there is a contract to indemnify, a decree passed against the promisee cannot be impeached by the promisor. **N** RAMDHAN *v.* PURUSHOTTAM **699**

Inherent powers of Court.
See ALSO C. P. C., 1908, s. 151.
See ALSO CR. P. C., 1898, s. 561-A.
——— Appeal—Award on reference to arbitration, pending appeal, outside Court—Inherent power of Court to refuse to allow appeal to be proceeded with. *See* C. P. C., 1908, O. XXIII, R. 3 **768**

Interest—*Maintenance, arrears of, suit to recover—Interest, whether can be claimed.*
A claim for interest depends on contract, express or implied, or some rule of law allowing it.
In a suit to recover arrears of maintenance decreed to the plaintiff by the Settlement Court, where the claim is not based on any contract, the plaintiff is not entitled to interest on the arrears. **O** ABID HUSSAIN KHAN *v.* SARJU PRASAD **163**
——— Pendente lite, *whether can be allowed.*
Although the award of interest pending suit is discretionary with the Court, it should not ordinarily be refused in the absence of proper reasons. **N** RAMDHAN *v.* PURUSHOTTAM **699**
——— Whether usurious. *See* USURIOUS LOANS ACT, 1919, s. 2 (3) (*b*) **78**

Interpretation of Statutes. *See* C. P. C., 1908, O III, R. (4) (3) **91**
——— *Marginal notes, whether can be referred to—Duty of Judges.*
The marginal notes to a section in a Statute are no sure guide to the real object of the Legislature, but they may sometimes be looked at if there be any doubt about the meaning of the words used in the section.
No Judge has a right to override the clear provisions of an enactment on the plea that probably the Legislature forgot something or had not something in their mind at the time of framing the enactment. **A** GAJENDRA SINGH *v.* DURGA KUMARI, 23 A. L. J. 561; (1925) A. I. R. (A.) 503; 47 A. 637 **768**
——— *Meaning of two similar words in two sections.*
The same meaning must in the absence of any strong reason to the contrary be given to similar words in two contiguous sections of the same Act. **A** KUTROO *v.* EMPEROR, 23 A. L. J. 364; L. R. 6 A. 124 Cr. (1925) A. I. R. (A.) 434; 47 A 575; 26 Cr. L. J. 1112 **280**

Judge—*Duty of a Judge.*
A Judge should not assume the role of a prosecutor, and where a witness has made a clear and definite statement as to a certain point, the Judge should not endeavour to make the witness change his statement. **O** SARJU SINGH *v.* EMPEROR, 26 Cr. L. J. 1236 **852**

Jurisdiction
See ALSO C. P. C., 1908, SS. 20, 21 AND 115.
See LETTERS PATENT (BOM.), CL. 12 **92**
See SUITS VALUATION ACT, 1887, s. 11 **72**
See U. P. LOCAL RATES ACT, 1914, s. 14 **212**
——— Application under s. 53, Provincial Insolvency Act (V of 1920), to avoid transfer, whether ousts jurisdiction of Civil Court to proceed with mortgage suit. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 53 **934**
——— *Decree, duly passed, whether can be treated as nullity—Award directed to be filed, effect of.*
Where there is a Tribunal having jurisdiction and there are parties over whom that jurisdiction is exercised and a decree is issued, it is not open to any body to treat that decree as a nullity; on the contrary it must be taken, until it is set aside in due course of law, to be valid, being in effect the command of the sovereign power which regulates the relations of the parties to the litigation and to others.

Jurisdiction—concld.
As soon as the Court decides to file an award it is to all intents and purposes a decree of the Court and has precisely the same binding effect on the parties affected by it as a decree of the Court.
Obiter.—This principle applies even to the case of a consent-decree which has been passed by a Court being deceived or defrauded, and so long as the decree stands it cannot be treated as a nullity. **S** PEVANDBAI *v.* THAOOMAL PANJOOMAL **744**

Jurisdiction of Civil and Revenue Courts.
See AGRA TENANCY ACT, 1901, SS. 4, 167 **504**
See AGRA TENANCY ACT, 1901, SS. 18, 20, 59 AND 79 **224**
See AGRA TENANCY ACT, 1901, s. 167 AND SCH. IV **234**
See C. P. TENANCY ACT, 1920, SS. 100, 105 **126**
——— Bengal Tenancy Act (VIII of 1885), s. 158—Landlord and tenant—Land-holder's right to recover fair and equitable rent—Suit to enforce rights, nature of—Jurisdiction. *See* BENGAL TENANCY ACT, 1885, s. 158 **959**

Jury trial—*Dying declaration, weight to be attached to—Province of Judge or Jury.*
It is a matter entirely within the province of the Jury as to what value they should attach to a dying declaration. **C** EMPEROR *v.* PREMANANDA DUTT, 29 C. W. N. 738; (1925) A. I. R. (C.) 876; 42 C. L. J. 247; 26 CR. L. J. 1256 **1000**
——— *Retracted confession—Ambiguous charge—Prejudice.*
The failure of a Judge to unambiguously warn the Jury against taking the retracted confession of an accused into consideration as against his co-accused amounts to misdirection, and is likely to cause miscarriage of justice, and necessitates a re-trial of the co-accused. **C** *In re* IBRAHIM, 26 Cr. L. J. 1146; 42 C. L. J. 496 **458**

Karachi Port Trust Act (VI of 1866), s. 84—*Criminal Procedure Code (Act V of 1898), s. 386—Levy of Port Trust dues—Order directing issue of warrant—Revision, whether competent.*
The order of a Magistrate directing a warrant to issue under s. 386 of the Cr. P. C. for recovery of an amount due to the Karachi Port Trust on application being made to him for the purpose under s. 84 of the Karachi Port Trust Act, is not a judicial order but an executive order which cannot be revised by the High Court. **S** YUSIFALLY LOOKMANJI *v.* EMPEROR, 26 Cr. L. J. 1263 **1007**

Land Acquisition Act (I of 1894), ss. 11, 30—*Landlord and tenant—Occupancy lands, acquisition of—Apportionment of compensation—Landlord, whether entitled to share in compensation.*
Where occupancy lands are compulsorily acquired the landlord is entitled to a share of the compensation, if there is no custom of transferability of the holding without the consent of the landlord, or if at the time of the acquisition the landlord had the right to enhance the rent of the holding within 20 years of the date of the acquisition, although it would be difficult to assess the money value of the compensation to which the landlord may be entitled. **Pat** AGHORI KOERI *v.* B. KISHUNDEO NARAYAN, 3 Pat. L. R 111; 6 P. L. T. 797 **397**

Land Registration Act (VII B. C. of 1876), s. 70.
See BENGAL LAND REVENUE SALES ACT, 1859, s. 10 **465**

Landlord and Tenant—*Agreement to plant grove —Covenant against sale to stranger, whether prohibits mortgage.*

By an agreement between a landlord and a tenant the latter was permitted to plant a grove of the one-quarter of which he was to become owner, one of the conditions of the agreement being that he should not sell his one-quarter share to any stranger, but only to the proprietor by whose permission, the grove was to be planted or to co-sharers of such proprietor:

Held, that the prohibition contained in the agreement was directed against a sale to an outsider and did not affect the power of the tenant to mortgage his share of the grove. A HAR PRASAD *v.* GULZARI LAL, L. R. 6 A. 347 Civ.; 47 A. 604; (1925) A. I. R. (A.) 651 **265**

——— Custom—*Abadi* land—Plot lying close to tenant's house, user of—Tenant, rights of. *See* CUSTOM **746**

——— *Ejectment, suit for—Record of Rights, entry in*—Kabuliyat *executed by tenant, statement in—Presumption—Burden of proof.*

Plaintiffs sued to eject the defendants from a certain plot of land on the allegation that the defendants were under-*raiyats* holding under the plaintiffs who were themselves *raiyats* under the proprietors. The defendants were shown in the Record of Rights as sub-tenants under the plaintiffs and certain *kabuliyats* executed by the defendants also described them as sub-tenants:

Held, that whatever onus might originally have been upon the plaintiffs to make out their case, it had been shifted to the defendants to show that the Record of Rights and the *kabuliyats* executed by them did not really disclose the true state of affairs. Pat PARMESHWAR SINGH *v.* SUREBA KUER, (1925) Pat. 185; (1925) A. I. R. (Pat.) 530 **495**

——— *Enhancement of rent—Bengal Tenancy Act (VIII of 1885), s. 30.*

The right to claim enhancement of rent from a tenant on the ground of a rise in the price of staple food crops was first given to the landlord by s.30 of the Bengal Tenancy Act. Therefore, a covenant in a *kabuliyat* executed before the passing of the said Act, providing for enhancement of rent on excess lands being discovered in any future survey, does not negative the right of the landlord to claim enhancement under s. 30 of the Act. C BASANTA KUMAR KAPALI *v.* SATINDRA MOHUN TAGORE **377**

——— *Joint tenancy—Death of one tenant—Survivorship.*

In a case of joint tenancy, if a joint tenant dies without any heir-at-law his interest survives to the surviving joint tenant. The death of a joint tenant without heirs does not in any way benefit the *zemindar* but the surviving tenant still remains the tenant of the whole holding. A RAJARAM DHAR DUBE *v.* JADUNANDAN DHAR DUBE, L. R. 6 A. 196 Rev. **539**

——— *Lease—Permanent rights of occupancy, whether can be created.*

It is open to a *zemindar* to confer by grant, permanent rights of occupancy upon a lessee. A DIP CHAND *v.* MUHAMMAD KHALIL, 23 A. L. J. 505; L. R. 6 A. 152 Rev.; (1925) A. I. R. (A.) 584; 47 A. 626 **162**

——— *Lease for period of years—Clause providing for forfeiture in case of insolvency of lessee—Assignment of lease—Insolvency of lessee after assignment, effect of—Practice*—Pro interesse suo *summons—Procedure.*

One of the conditions of a lease for a period of years

Landlord and tenant—contd

was that if the lessee or any of his heirs, executors, administratives or assigns became insolvent or bankrupt it would be lawful for the lessors to re-enter the demised premises at any time and to re-possess and enjoy the same. The lessee mortgaged his leasehold interest in the demised premises to the plaintiff who brought a suit on his mortgage and obtained a decree. In execution of the decree the property was purchased by the plaintiff mortgagee himself. Thereafter the lessee became insolvent and the lessors made an application for an order *pro interesse suo* to come into the suit on the allegation that on the insolvency of the original lessee the lease had been forfeited and that the applicants had become entitled to re-enter on the demised premises. They also prayed for an order that the Official Receiver who was in possession of the premises should make over the possession thereof to them:

Held, (1) that there being nothing in the lease to prevent the lessee from mortgaging the leasehold premises by way of sub-demise without obtaining the permission of the lessors, the mortgage was valid as between the lessors and the mortgagee, and the mortgagee having succeeded to the rights of the lessee and having stepped into his shoes, he must be regarded as the lessee and in possession of the leasehold interest;

(2) that as there had been no insolvency of the person who must now be regarded as the lessee, the clause in the lease providing for a forfeiture could not be invoked in favour of the applicants;

(3) that a declaration such as was sought for by the applicants could not be made in a summary manner on a summons in Chambers and that consequently for both these reasons the application must fail. C HAZARIMUL HIRALAL *v.* SADASUKH PARRUK & Co., 41 C. L. J. 371; (1925) A. I. R. (C.) 750 **808**

——— *Permanent tenancy—Tenant, position and duties of—Trespass, effect of—Suspension of rent, when can be claimed.*

Under a permanent and transferable lease held on a fixed rent which is common in Bengal, the tenant virtually becomes the proprietor of the surface of the land subject only to the payment of the stipulated rent, and the lessor and the succeeding landlords have no interest in the lands except in so far as they form a security for payment of the rent. When the rent falls into arrears the landlord's only remedy is to bring the tenure to sale by public auction on the execution of a decree for payment of rent. The purchaser of the tenure in such a case acquires title to the lands on the terms of the original lease unaffected by any encumbrance created by previous tenants. The duty of a tenant under such a lease is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If he fails to do so it cannot prejudice the landlord's claim for rent. In the case of such a lease the landlord cannot in the ordinary case know whether the possession of a particular area of land by a third person is adverse to the tenant or has taken place with his consent. He cannot, therefore, safely sue an action at his own hands for ejectment of a trespasser, as he might always be met with the objection that the apparent trespass was acquiesced in by the tenant who can do with the lands as he pleases under the terms of the lease.

The doctrine of suspension of payment of rent, where the tenant has not been put in possession of a

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part of the subject leased, is applicable only where the rent is a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or *bigha*. **P C** KATYAYANI DEBI *v.* UDOY KUMAR DAS, (1925) A. I. R. (P. C.) 97; 52 C. 417; 23 A. L. J. 751; L. R. 6 A. (P. C.) 140; 30 C W. N. 1 (P. C.) **110**

——— *Tenancy, nature of—Actual user.*

Where the *kabuliyat* does not indicate the nature of the tenancy, the Court can properly look to the actual user of the land for determining the matter. **C** SATINDRA MOHAN TAGORE *v.* JAYNABI BIBI **492**

——— *Under-proprietary title, acquisition of—Construction of decree of Settlement Court—Adverse possession—Derivative title, whether can be converted into hostile title.*

A person who has no under-proprietary title and who has been paying rent in respect of the property in dispute to the landlord, cannot convert his derivative possession into a hostile one and thereby acquire a proprietary title by prescription.

On the application of the predecessors-in-title of the defendants for the allotment of a certain area of land to them for maintenance, the Settlement Court passed a decree on the basis of a compromise in favour of the applicants for a certain area of land bearing a certain rental "for *dawam*":

Held, that the decree could not be construed to have conferred an under-proprietary tenure on the predecessors-in-title of the defendants and that entries to that effect made in the papers of the first and the subsequent Settlements as regards the nature of the tenure would not operate to confer such title upon them. **O** GAYA PERSHAD *v.* ALAM SINGH **53**

Lease and License—*Distinction between.*

It is essential to the creation of a tenancy of a corporeal heriditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license and not as a lease.

The ordinary case of a lease of immoveable property is one where a defined piece of land or a defined building or a part of a building is transferred to the lessee, and there can be no valid lease of an area the position of which varies from time to time. **B** THE INDIAN HOTELS COMPANY *v.* PHIROZ SORABJI, 25 Bom. L. R. 84; (1923) A. I. R. (B.) 228 **316**

Legal Practitioner—*Refusal of brief on ground of partisanship, propriety of.*

A lawyer has no right to reject a brief when offered to him on payment of a fee agreed upon between the parties, on the ground of partisanship for a party to the litigation. **O** LALTA *v.* ZAHOOR AHMAD, 2 O. W. N. 982; (1925) A. I. R. (O.) 672; 26 Cr. L. J. 1272 **1048**

Legal Practitioners Act (XVIII of 1879), s. 13—*Pleader standing surety for accused and taking charge of property—Unprofessional conduct—Acquittal by Criminal Court, effect of.*

A Pleader, who stands surety for a man arrested on a charge under s. 420 of the Penal Code and takes charge of certain property on his behalf which subsequently turns out to have been stolen property, is not guilty of unprofessional conduct inasmuch as he does not act as a Pleader in the matter.

Proceedings under the Legal Practitioners Act are *quasi*-criminal and where the facts have already formed the subject of criminal trial which has resulted in an acquittal, the principle of "*autrefois acquit*" must apply. **R** MAUNG PO TOK, *In the matter of*, 2 R. 491; (1925) A. I. R. (R.) 110; 26 Cr. L. J. 1111 **279**

——— **s. 13**—*Professional misconduct—Misappropriation of client's money—Punishment.*

A Vakil was retained by two persons one of whom was a *gosha* lady and the other an old man. They were the plaintiffs in a suit in which there stood a certain sum to their credit in Court. The Vakil drew the money out of Court, but failed to pay the amount to the clients on the ostensible ground that he could not interview the lady and that the old man could not give a valid discharge. The same Vakil was handed a certain sum of money by another client, a defendant with instructions to admit the plaintiff's claim to that extent and to deposit the amount in Court. The Vakil misappropriated the amount and without the client's knowledge obtained adjournment after adjournment of the case and ultimately confessed judgment for the whole amount of the plaintiff's claim:

Held, (1) that a man guilty of two such grossly dishonest and improper actions could not safely be allowed to be entrusted with the interests and monies of future clients;

(2) that the cases were of such gravity that in justice to the public and the profession, the High Court could do no less than order that the Vakil be struck off the rolls. **M** G. NARASIMHACHARIAR, *In the matter of*, (1925) M. W. N. 321; 22 L. W. 152; (1925) A. I. R. (M.) 797; 26 Cr. L. J. 1128 **360**

——— **s. 13**—*Unprofessional conduct—Duty of Counsel in drafting pleadings and in cross-examination.*

A client who consults a Counsel and who requires a plaint or written statement to be drafted instructs the Counsel as to the facts of the desired document. It does not always happen that those facts are true but from the Counsel's point of view that is not a material matter. He is entitled to accept the instructions of the client subject to this, that, as a matter of prudence and for his own reputation, it is not well for him to associate himself with reckless charges of fraud and criminality or to indulge in abuse. He should explain to the client that such charges if unproved gravely injure the case and prejudice the Judge. He is not, however, supposed to go on hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done, nor is it the practice to do it. Counsel have to depend upon the statement that the client makes, the penalty being that if the client is not telling the truth he may probably lose the case. In such circumstances the rule is that the client is entitled to have the particular document drafted according to the instructions given. Counsel must not, however, import personal ill-will into pleadings and must refrain from making charges against witnesses in examination or cross-examination for which there is no conceivable ground. It may become the positive duty of Counsel to tear a man's character into pieces if his character is in issue but only when the fullest material exists. No questions attacking a witness's honour should be put unless and until Counsel by enquiry has satisfied himself that the damaging fact is well-founded, and this he ought to do before he comes into Court. **A** *In the matter of* B. RAJ BAHADUR, VAKIL, 23 A. L. J. 469; L. R. 6 A. 403 Civ.; 26 Cr. L. J. 1091; (1925) A. I. R. (A.) 641; 47 A. 729 **179**

Legal Representative—Official Assignee, whether legal representative of insolvent. *See* C. P. C., 1908, s. 11 **85**

Letters Patent (Bombay), cl. 12—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage suit—Mortgaged land outside jurisdiction—Suit, whether can be entertained—Jurisdiction of Court.*

The High Court, as a Court of Equity, will assume jurisdiction in relation to land abroad only where as between the litigants, or their predecessors, some privity or relation is established on the ground of contract, trust or fraud. It will not entertain a suit the object of which is to obtain a declaration of title to foreign land in the absence of any such relationship between the parties.

An interest in land is land and a mortgage suit, which is a suit to realise an interest in land, must be regarded as a suit for land within the meaning of cl. 12 of the Letters Patent of the Bombay High Court.

Rule 1 of O. XXXIV of the C. P. C. enacts a rule of procedure and not a rule that can be invoked in order to extend jurisdiction. The object of the rule is that the rights of all parties interested in a mortgage should be determined in one suit and that multiplicity of suits should be avoided. That cannot, however, apply to a case where the Court has no jurisdiction to adjudicate on the rights of the parties sought to be impleaded. **B** PRANLAL TRIBHUWANDAS *v.* GOCULDAS DAMODAR, 27 Bom. L. R. 570; (1925) A. I. R. (B.) 333 **92**

Letters Patent (Calcutta), cl. 36—Appeal—Difference of opinion—Procedure. *See* APPEAL **637**

Letters Patent (Lahore), cl. 10—*Income Tax Act (XI of 1922), s. 66—Reference to High Court by Income Tax Commissioner—Decision, whether "judgment"—Appeal, whether lies.*

The decision of the High Court given under s. 66 of the Income Tax Act does not amount to a "judgment" within the meaning of cl. 10 of the Letters Patent of the Lahore High Court and is not, therefore, appealable under that clause. **L** BULAQI SHAH *v.* COLLECTOR OF LAHORE, (1925) A. I. R. (L.) 336; 6 L. 30 **570**

Letters Patent (Mad.), cl. 15 *See* C. P. C., 1908, O. XLI, RR. 10, 22 (1) **443**

Letters Patent (Ran.), cl. 13. *See* C. P. C., 1908, s. 47 **740**

Lien—Solicitor—Priority over attaching creditor. *See* PRACTICE **81**

Limitation.

See Also LIMITATION ACT, 1908.
See AGRA TENANCY ACT, 1901, s. 79 **540**
See C. P. TENANCY ACT, 1920 **126**
See PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT, 1900 **80**

———, *commencement of—Suit to recover possession after death of widow—Limitation Act (IX of 1908), Sch. I, Art. 141.*

Z had two sons *J* and *R*. *J* died during the lifetime of his father and subsequently *R* separated from the father. Plaintiff was adopted by the widow of *J* under an authority from *J*. After *R's* death his widow obtained possession of *R's* property and continued to be in possession of it for over 20 years. She made various alienations and after her death plaintiff brought a suit to recover *R's* estate as his nearest male heir from the alienees of *R's* widow :

Held, (1) that if *R* and the plaintiff had been joint in estate the plaintiff ought to have succeeded to the property as surviving co-parcener and that in that case

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R's widow ought not to have taken possession of the property and having taken possession of it she would have acquired for herself and for her alienees a title by adverse possession ;

(2) that as *R*. was not joint in estate with the plaintiff, *R's* widow took possession of his property for a widow's interest and it was not till her death that the plaintiff's title accrued and that, therefore, limitation began to run from the date of death of *R's* widow. **P C** HARIGIR KISANGIR GOSAVI *v.* ANAND BHARTHI VISHNU BHARTHI GOSAVI, (1925) A. I. R. (P. C.) 127; (1925) M. W. N. 414; 21 N. L. R. 127; 22 L. W. 355 (P. C.) **343**

———Company—Articles of Association—Failure of member to pay allotment money and amount of calls—Forfeiture of shares—Suit to recover amount due from members—Starting point of limitation. *See* LIMITATION ACT, 1908, SCH. I, ART. 112 **96**

———*Karnam* service *inam*—Agreement to sell—Contract void—Refund of consideration money—Limitation, commencement of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 6 **557**

Limitation Act (IX of 1908), s. 5—*Appeal, delay in filing—Review, period spent in applying for, whether can be excluded—Extension of time.*

The time spent in prosecuting a well-founded application for review should be excluded in computing the period of limitation provided for an appeal against the order of which review was sought. **L** SHAH MUHAMMAD *v.* MUHAMMAD ROSHAN KHAN, (1925) A. I. R. (L.) 534 **326**

——— **s. 5**—*Criminal Appeal filed out of time—Sufficient cause to excuse delay, absence of—Procedure—Appeal, wrong acceptance of—Acquittal—Revision—Interference by High Court.*

A criminal appeal filed after the expiry of the prescribed period of limitation may be admitted if the Court is satisfied that the appellant had sufficient reason for not preferring the appeal within the period of limitation. Where the Appellate Court is not satisfied that there was sufficient reason to excuse the delay, it has no power to extend the period and admit the appeal. The proper procedure in such a case would be to move the High Court to exercise its powers of revision.

Where, however, a criminal appeal was wrongly admitted out of time, an order of acquittal will not be interfered with in revision by the High Court, unless there has been any gross miscarriage of justice which ought to be remedied. **M** V. JANIKARAMAYYA *v.* NIMMAGADDA BRAHMAYYA, 48 M. L. J. 457; (1925) A. I. R. (M.) 709; 26 Cr. L. J. 1110 **278**

——— **s. 5**—Cross-objections in appeal—Delay—Limitation. *See* C. P. C., 1908, O. XLI, rr. 10, 22 **443**

——— **ss. 6, 7**—*Alienation by mother—Suit to challenge alienation—Limitation—One of several co-parceners attaining majority, whether entitled to give discharge—Limitation, extent of.*

Where there are several persons jointly entitled to institute a suit, and some of them are under a disability, the running of time against all depends upon proof of the fact whether there is at least one of them who can give a discharge without the concurrence of the persons under disability. If there is no such person time does not begin to run against any of them until one of them becomes capable of giving a discharge without the concurrence of the others or until cessation of the disability.

It cannot be predicated of every Hindu family that an adult brother as soon as he becomes a major becomes the manager of the family and, therefore, necessarily competent to give a discharge without the concurrence of the other members. Such competence depends upon several questions of fact and upon a variety of circumstances varying with different families, and unless the necessary facts are properly alleged and proved by the party who wants to deprive the persons under disability of the benefit of s. 6 of the Limitation Act, the claim cannot be thrown out as barred by limitation.

The right of avoidance or of challenging an alienation is a personal right which every co-oparcener enjoys in virtue of his position as such co-parcener in a joint family owning joint or ancestral property and its non-enforcement does not depend upon the sweet will of any particular individual. It is the birth-right of every member and cannot be taken away by anything done or omitted to be done by another member of the family, unless that other could bind the rest.

A minor co-parcener in a joint Hindu family is not bound by the mere failure of a major co-parcener to avoid an alienation made by their guardian within three years of his attainining majority, especially where the alienation is found not to be supported wholly by necessity and, therefore, not binding as against the minor.

Although every act done by a joint tenant for the benefit of himself and his companions binds the others, it does not follow that a joint tenant is similarly bound by acts done by the others which prejudice him. **N** SHAMPURI *v.* RAMCHANDRA, (1925) A. I. R. (N.) 385 **268**

——— **s. 18**—*Execution of decree—Sale, application to set aside, on ground of fraud—Fraud, proof of.*

Where a judgment-debtor applying to set aside an auction-sale alleges that owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of the sale was withheld from the judgment-debtor, then so long as he did not come to know of the sale, the effect of the fraud would continue and the Court would be entitled to come to the conclusion that the judgment-debtor was kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder. **A** SARVI BEGAM *v.* RAM CHUNDER SARUP, L. R. 6 A. 388 Civ.; 23 A. L. J. 760 **500**

——— **s. 18, Sch. I, Art. 182**—*Decree obtained by minor—Judgment-debtor appointed guardian—Failure to execute decree—Fraud—Limitation, extension of.*

A minor obtained a decree and the judgment-debtor subsequently got himself appointed the guardian of the minor and failed to take any steps to execute the decree against himself. Several years afterwards the guardian was removed and another guardian was appointed in his place. When the latter attempted to execute the decree against the former guardian, he was met by the plea that the execution was barred by time:

Held, (1) that the judgment-debtor was bound to satisfy the Court that at the time when he was appointed guardian of the minor he had made a full disclosure of his indebtedness to the estate of the minor to the Court and that in default of such proof it must be assumed that no such disclosure was made and that the judgment-debtor perpetrated a fraud both on the Court and on the minor by not making the disclosure;

(2) that in these circumstances the time during which the judgment-debtor had continued to be the guardian of the minor must be excluded in computing the period of limitation for the execution of the decree. **C** GOBINDA LAL GHOSE *v.* NALINI KANTA GHOSE, (1925) A. I. R. (C.) 584; 52 C. 63 **61**

——— **s. 19**—*Acknowledgment—Statement in pleading that property was purchased by certain person, whether admission of purchaser's title.*

An admission that a certain person has purchased certain property is not an admission that that person has acquired a good title in the property, for it is quite consistent with an assertion that the purchase was bad in law and did not operate to confer any title on the alleged purchaser.

A written statement contained a recital that a certain property had been purchased by certain persons who had not, however, been able to obtain possession of it:

Held, that the statement did not amount to an aknowledgment of the title of the purchasers within the meaning of s. 19 of the Limitation Act. **Pat** IMDAD ALI *v.* NAND KUMAR LAL, (1925) Pat. 111; (1925) A. I. R. (Pat.) 473 **478**

——— **s. 20**—*Part payment of principal—Limitation, extension of.*

A part payment of principal will not give a fresh start of limitation under s. 20 of the Limitation Act unless the fact of the payment appears in the handwriting of the person making the same. **Pat** DANSFORD *v.* SHAW **747**

——— **s. 22**—*Pre-emption suit—Vendees, several—Omission to implead one vendee till after expiry of period of limitation, effect of.*

In a suit for pre-emption in respect of property which had been sold to *A*, *B*, *C*, *D* and *E*, the defendants were described as *A* son of *B*, *C*, *D* and *E*. The omission to implead *B* as a defendant was not discovered till after the expiry of the period of limitation and *B* was then impleaded as a defendant:

Held, that this was not a case merely of a misdescription of a defendant but of an entire omission to implead a necessary defendant and that *B* having been impleaded after the expiry of the period of limitation, the suit was barred as against him and was consequently barred as against other defendants also. **L** JAWALA DAS *v.* GOPAL LAL, (1925) A. I. R. (L.) **343**

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——— **s. 54.** *See* C. P. C., 1908, s. 110 **579**

——— **Sch. I, Art. 5**—*Civil Procedure Code (Act V of 1908), O. XXXVII, r. 1—Suit on negotiable instrument—Summary procedure—Admission of plaint—Limitation.*

Article 5 of Sch. I to the Limitation Act of 1908 is not applicable to suits under O. XXXVII of the C. P C. **C** ROBINDRA NATH DUTT *v.* ABDUL AHAD & Co., 29 C. W. N. 589; 41 C. L. J. 368; (1925) A. I. R. (C.) 781; 52 C. 954 **400**

——— **Art. 14**—*Redemption of Mortgages (Punjab) Act (II of 1913), s. 12—Application to redeem mortgage—Collector, order of, whether conclusive—Suit to redeem mortgage brought more than one year after Collector's order, whether maintainable.*

A litigant merely by attaching a label to his suit cannot bring it under a different Article of the Limitation Act from that under which it would come on a true interpretation of the nature of the suit. What has to be regarded is the true effect of the suit, not its formal or verbal description.

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An individual who takes advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits.

A mortgagor who does not take advantage of the summary procedure provided for redemption of mortgages by the Punjab Redemption of Mortgages Act may bring a suit within the ordinary period of limitation; but if he does take advantage of the summary procedure provided by the Act he must, if unsuccessful, bring a suit to establish his rights within the comparatively short period of one year from the date of the order under Art. 14, Sch. I to the Limitation Act.

The suit referred to in s. 12 of the Punjab Redemption of Mortgages Act is a suit to satisfy an order of the Collector. The cause of action for such a suit is not the original contract between the parties but the order of the Collector which aggrieves the party suing. That order unless it be set aside is conclusive and if a suit is not brought within the period of limitation provided by Art. 14 of Sch. I to the Limitation Act to set aside the order, a suit to redeem the mortgage is out of time. **L** KAURA *v.* RAM CHAND, (1925) A. I. R. (L.) 385; 6 L. 206; 1 L. C. 547 **945**

——— **Sch. I, Arts. 31, 48**—*Suit for damages against Railway Company—Wrongful conversion—Non-delivery—Limitation, commencement of.*

A suit against a Railway Company to recover compensation for wrongful conversion of the plaintiff's goods where non-delivery is also alleged, is governed by Art. 31 and not by Art. 48 of Sch. I to the Limitation Act, and limitation begins to run from the date on which the goods ought to have been delivered. **L** SECRETARY OF STATE *v.* DUNLOP RUBBER CO. LTD., DELHI, 6 L. 301; (1925) A. I. R. (L.) 478 **979**

——— **Arts. 36, 120**—Misfeasance by Directors— Claim by Liquidator --- Article applicable—Limitation, commencement of. *See* COMPANIES ACT, 1913, ss. 235, 281 **785**

——— **Arts. 44, 144**—*Alienation by mother —Suit to challenge alienation—Limitation.*

Under the Hindu Law the mother is the lawful guardian of her infant sons where the sons are the sole owners of their property.

Although a person, who manages the estate whether of a minor, who is the sole owner of the property, or of a co-parcenary in which he has a joint interest with the minor, is entitled to be styled a manager, in matters of alienation the position of each is different. In one case the alienation is by a manager who has no joint interest with the minor while in the other case he has. It is to an alienation of the latter kind that the description "alienation by a *karta* or manager" would strictly apply, as the alienation is by a person having an interest in the joint property.

A Hindu mother is the guardian of her sons but not the manager or *karta* in the technical sense of the term. Consequently, a suit by a minor to challenge an alienation made by his mother as his guardian is governed by Art. 44 and not by Art. 144 of Sch. I to the Limitation Act. **N** SHAMPURI *v.* RAMCHANDRA, (1925) A. I. R. (N.) 385 **268**

——— **Art. 52**—*Goods supplied on credit—Suit to recover price of goods—Limitation, commencement of.*

A suit to recover the price of goods supplied by a tradesman on credit for which payment was to be made on presentation of bills is governed by Art. 52 of Sch .I to the Limitation Act and limitation begins to run from the date of the delivery of the goods. **Pat** DANSFORD *v.* SHAW **747**

——— **Sch. I, Art. 62.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 6 **557**

——— **Arts. 62, 116**—*Suit for refund of purchase-money—Article applicable.*

A suit for refund of purchase-money from a vendor on the ground that he had no title to the property conveyed, *i. e.*, an action for damages for breach of a covenant for title contained in a registered deed is governed by Art. 116 of Sch. I to the Limitation Act. **N** RAMDHAN *v.* PURUSHOTTAM **699**

——— **Art. 89**—*Tenants-in-common—Eldest brother collecting revenue for all—Principal and agent- Limitation*

Where the eldest representative of a family collects the whole revenue of which he and his brothers are tenants-in-common there is a relationship of principal and agent, the eldest representative being the agent of his brothers in respect of the recovery of the particular portion of that revenue in regard to which those brothers have a share.

In such a case a suit for recovery of the plaintiff's share is governed by Art. 89 of the Limitation Act and is within time if brought within three years of the death of the agent. **B** GIRJABAI SHIVDEVRAO *v.* NARAYANRAO GANPATRAO, 26 Bom. L. R 1165; (1925) A. I. R. (B.) 148 **975**

——— **Art. 112**—*Company—Articles of Association—Failure of member to pay allotment money and amount of calls—Forfeiture of shares—Suit to recover amounts due from members—Limitation.*

The shares of the defendant in the plaintiff company were forfeited on non-payment of the allotment money and the amount of calls after the necessary formalities were complied with in pursuance of the Articles of Association, one of the Articles of Association also ran as follows :—"Any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the Company all calls, instalments etc." In pursuance of this a suit was filed by the plaintiff company against the defendant to recover allotment money, amount of calls, expenses interest etc.

Held, Art. 112 did not apply, as the defendant ceased to be a member of the Company on forfeiture and that the said Article of Association created a new obligation, to enforce which, time began to run from the date on which the shares were forfeited. **B** HABIB ROWJI *v.* STANDARD ALUMINIUM AND BRASS WORKS, 27 Bom. L. R. 574; (1925) A. I. R. (B.) 321; 49 B. 715 **96**

——— **Art. 120**—*Common land—Encroachment—Injunction, suit for—Limitation—Burden of proof.*

In a suit for perpetual injunction directing the defendant to remove an encroachment made by him on common land it is for the plaintiffs to prove that the encroachment was made within six years before suit. A mere surmise by the Court that the encroachment is recent is insufficient for holding that it took place within six years. **L** CHANDU *v.* GAJJU, (1925) A. I. R. (L.) 455 **176**

——— **Arts. 123, 142**—*Succession Act (X of 1865), s. 190*—Karen *Christian dying intestate—Suit by heir to obtain possession of his share of estate—Limitation.*

A suit for a distributive share of the estate left by an intestate is governed by Art. 123 of Sch. I to the Limitation Act.

The heirs of a deceased person very often leave the estate undivided and either enjoy the profits jointly living in commensality or divide the profits among themselves. Where in such a case one of the heirs is excluded from the enjoyment of the profits and sues to recover his share of the estate, Art. 123 is inapplicable for the reason that the heirs have taken their shares, but that, instead of dividing the property and enjoying their shares they have agreed to enjoy the whole property jointly. There is, therefore, no property of the intestate left to be distributed and Art. 123 cannot apply. When, under such circumstances, one of the heirs is excluded from joint enjoyment, he sues to recover not a share in the estate of the deceased, but his share in the joint property. In such a case the suit is one for partition and is governed by Art. 142 of Sch. I to the Limitation Act.

Karen Christians, being Christians of Asiatic descent, are native Christians, and, therefore, s. 190 of the Succession Act is inapplicable to them.

There is nothing to prevent the heirs of a *Karen* Christian from taking possession of the estate and agreeing to enjoy it in common. Their title becomes complete when they take possession of the property, and, when thereafter any of them are excluded from enjoyment the cause of action arises on such exclusion, and the suit is governed by Art. 142 of Sch. I to the Limitation Act and limitation will start from the date when the plaintiff is excluded from the possession of the property. **R** MA NAN THU *v.* MA SHWE MI, 4 Bur. L. J. 76; (1925) A. I. R. (R.) 233 **609**

——— **Sch. I, Art. 125**—*Suit by reversioner to declare mortgage by widow and decree thereon void—Limitation, commencement of.*

A suit by a Hindu reversioner for a declaration that a mortgage by the widow of the last owner and a Court-sale in execution of the decree passed thereon are void and not operative after the death of the widow is governed by Art. 125 of Sch. I to the Limitation Act and limitation commences to run from the date of the mortgage and not from the date of the sale in execution of the decree. **M** KAMAKSHI AMMAL *v.* POOCHAMMAL, 21 L. W. 277; (1925) A. I. R (M.) 567 **578**

——— **Art. 139**—Mokarrari *lease for lifetime of grantee—Death of grantee—Suit to eject successor of grantee—Limitation*—Marfatdari *receipt, what is.*

A *marfatdari* receipt is a receipt made out in the name of the original tenant although it shows that the rent has been actually paid by a third person.

Plaintiff granted a *mokarrari istumrari* lease in favour of *M*. The lease was not a hereditary one and operated only for the lifetime of the grantee. *M* died in 1902 and defendant got into possession of the land. Defendant paid rent to the plaintiff during 1903 and 1904 obtaining *marfatdari* receipts. In 1905 defendant refused to pay rent unless a receipt was granted in his own name and the plaintiff refused to grant such a receipt. Thereafter the defendant continued in possession without payment of rent and in 1920 plaintiff brought a suit to eject the defendant:

Held, that inasmuch as the plaintiff had refused to treat the defendant as his tenant there was no creation of a fresh tenancy in favour of the defendant and that defendant's possession after 1905 being adverse to the plaintiff the plaintiff's suit was barred under Art. 139 of Sch. I to the Limitation Act. **Pat** KAMAKHYA NARAYAN SINGH *v.* BECHU SINGH, 6 P. L. T. 361; (1925) Pat. 209; (1925) A. I. R. (Pat.) 499 **483**

——— **Sch. I, Art. 141.** *See* LIMITATION **343**

——— ——— **Art. 142**—*Alluvion and diluvion—Suit for possession after dispossession—Plaintiff, what must prove—Submerged lands—Constructive possession.*

A suit for recovery of possession after dispossession is governed by Art. 142 of Sch. I to the Limitation Act, and the plaintiff must show that he was in possession within 12 years of the date of the suit. The rule is equally applicable to suits in respect of diluviated lands.

On dispossession of a trespasser by flood the constructive possession of the land reverts to the true owner. The true owner means a person who has a subsisting title to the land even though he may be out of possession.

Therefore the mere fact that diluviated lands have emerged within 12 years of the suit would not entitle a plaintiff, who merely proves his title to them at some remote period, to a decree for possession. The plaintiff must further prove that his title subsisted at the time of the diluvion. **C** PANCHANON SARKAR *v.* BASANTA KUMAR DASI **567**

——— **Art. 174, s. 18**—*Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2 (2)—Execution of decree—Adjustment out of Court — Certification, application for Limitation—Extension of time, whether can be obtained—Fraud, what amounts to.*

In the absence of any fraud, the mere omission on the part of the decree-holder to certify the fact of adjustment of the decree, notwithstanding his promise to do so, does not entitle the judgment-debtor to override the period of limitation provided in Art. 174 of Sch. I to the Limitation Act for an application under O. XXI, r. 2 (2) of the C. P. C., and to secure an investigation of the very same matter and an extension of time by invoking the terms of s. 47 of the C. P. C.

Section 18 of the Limitation Act has no application to such a case in the absence of an allegation that the right to apply for certifying an adjustment was concealed by the decree-holder from the judgment-debtor. **N** MAROTI *v.* NARAYAN, (1925) A. I. R. (N.) 374 **48**

——— **Art. 181.** *See* C. P C., 1908, O. XXXIV, R. 3 **901**

——— ——— **Arts. 181, 182** —*Decree, satisfaction of—Modification in appeal—Restitution—Subsequent application for execution of amended decree, which Article applies.*

Pending an appeal against a decree by the widow of a *zemindar* judgment-debtor, the *zemindari* property was attached in execution. The widow raised funds and satisfied the decree and the execution petition was dismissed. The appeal was then disposed of and the decree was modified by excluding the *zamindari* property from liability. The widow thereupon applied for restitution and obtained refund of the amount paid by her. More than three years from the date of the appellate decree but within three years from the order for refund, an application for execution was presented by the decree-holder against the assets of the deceased *zemindar* in the hands of the widow:

Held, that the right to apply for execution accrued only on the date when the judgment-creditor

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was ordered by the Court to refund the money by way of restitution and that Art. 181 and not 182 of Sch. I to the Limitation Act applied and the petition was in time.

The doctrine of continuation or revival of execution petitions discussed.

Per *Wallace, J.*—In order to make Art. 182 of Sch. I to the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances of being enforced.

In the above case the decree-holder could not, at least until the judgment-debtor demanded restitution, apply for execution of the amended decree. Until then it was not a decree capable of execution and Art. 182 would have no application. Article 181, therefore, applied, and the right to execute the amended decree would accrue from the date on which the decree-holder ought to have handed over the sum improperly obtained. **M** MANGAMMA NAYA KURLU *v.* B. M. RAMADASAPPA NAYANANVARU, 48 M. L. J. 563; (1925) A. I. R. (M.) 981 **204**

——— **Sch. I, Art. 182.** *See* C. P. C., 1908, s. 110 **552**

——— **Art. 182.** *See* C. P. C., 1908, s. 18 **61**

——— **Art. 182 (5)**—*Execution of decree—Application, defective—Step-in-aid of execution—Extension of time.*

A decree-holder applied for execution of the decree and was asked to explain within a certain time how the application could be treated as being within limitation. He explained that he relied upon two payments which had been made towards the decree by the judgment-debtor, and the explanation was furnished within the time limited by the Court. The application was nevertheless dismissed on the ground that there had been delay in furnishing the explanation:

Held, that nevertheless the application was a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to extend limitation for execution of the decree. **M** BASUVAN *v.* A. R. RANGASAMI, 21 L. W. 548; (1925) A. I. R. (M.) 714 **88**

——— **Art. 182 (5)**—*Execution of decree—Assignment of decree—Substitution of names, application for, whether step-in-aid of execution.*

An application by the transferee of a decree for substitution of his name for that of the decree-holder is an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operates to extend limitation for execution of the decree. **N** JAGANNATH *v.* SHRINIWAS, (1925) A. I. R. (N.) 362 **112**

——— **Art. 182 (5)**—*Execution of decree—Objection by judgment-debtor—Oral application by decree-holder to examine a witness, whether step-in-aid of execution.*

A decree-holder is entitled to regard any step taken by him to remove an obstacle thrown by the judgment-debtor in his way to the realization of his decree as a step-in-aid of execution, and an application to the Court, whether verbal or written, to take such a step falls within the purview of Art. 182 (5) of Sch. I to the Limitation Act and operates to extend limitation for execution of the decree.

An oral application by the decree-holder to the Court to examine a witness in order to enable the decree-holder to resist an objection filed by the judgment-debtor to the execution of the decree, is an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act. **Pat** SHEO SAHAY *v.* JAMUNA PRASAD SINGH, (1925) A. I. R. (Pat.) 459; 4 Pat. 202; 6 P. L. T. 777 **807**

——— **Sch. I, Art. 182 (5)**—*Execution of decree—Objections—Application to send or record, whether step-in-aid of execution.*

Where in execution of a final decree for partition the judgment-debtor raised certain objections and in order to repel those objections it was necessary for the decree-holder to bring before the Execution Court the record of the suit and the final decree passed therein, and he made an application that the record may be sent for:

Held, that the application of the decree-holder was an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to extend limitation.

The plaintiff's title was based on a permit granted to his predecessor-in-title by the village headman under r. 4 of the Rules framed under the Lower Burma Town and Village Lands Act:

Held, that the question of the legal effect of the permit was a question of law and could be gone into in second appeal. **A** RAGHUNATH PRASAD SINGH *v.* LACHHMI NARAIN SINGH, 23 A. L. J. 422; L. R. 6 A. 339 Civ.; (1925) A. I. R. (A.) 394, 47 A. 667 **271**

——— **Art. 182 (5)**—*Execution of decree—Oral application for arrest of judgment-debtor, whether step-in-aid of execution—Limitation, extension of.*

A decree-holder applied by a written application for execution of his decree by arrest of the judgment-debtor. A notice was issued to the judgment-debtor under r. 22 and also under r. 37 of O. XXI of the C. P. C. The judgment-debtor appeared and put in an objection which was dismissed. The Court, however, overlooked the fact that it had also to decide the question of the arrest of the judgment-debtor. The decree-holder thereupon made an oral application to the Court for the arrest of the judgment-debtor and the Court thereupon directed the issue of a warrant of arrest:

Held, that the oral application made by the decree-holder was an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to extend limitation. **O** PIRTHINATH *v.* RAM SARAN, 12 O. L. J. 302; (1925) A. I. R. (O.) 453 **232**

——— **Art. 182 (5)**—*Execution of decree—Step-in-aid of execution—Application, defective, whether operates to extend limitation.*

Appellant obtained a decree and applied for execution of it by attachment of immoveable property. A report was made on the application that the number of the suit given in the application was not correct. The Court thereupon passed an order that the application should be returned for amendment. The application, however, was not taken back by the decree-holder and remained on the record and nothing further was done in connection with it:

Held, that the application, although defective, was a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and was sufficient to keep the decree alive. **L** LEKH RAM *v.* GURDIAL, (1925) A. I. R. (L.) 535 **266**

Lower Burma Town and Village Lands Act (IV of 1898), s. 42, rules framed under, rr. 4, 43, 44—*Permit granted by village headman, effect of, whether question of law—Appeal, second.*

The question of the legal effect of a deed which can be treated as a document of title or embodies a contract or is the foundation of the suit is a question of law and can be considered in second appeal.

The plaintiff's title was based on a permit granted to his predecessor-in-title by the village headman under r. 4 of the Rules framed under the Lower Burma Town and Village Lands Act:

Held, that the question of the legal effect of the permit was a question of law and could be gone into in second appeal. **R** ABDUL RAHIM v. MAHOMED CASSIM, 4 Bur. L. J. 27; (1925) A. I. R. (R.) 255 **314**

Lunacy Act (IV of 1912), s. 82—*Application for declaration of unsoundness of mind—Procedure—Duty of Court.*

Where an application is made under s. 82 of the Lunacy Act to the District Judge for the purpose of declaring that a person who has been declared to be of unsound mind has ceased to be of unsound mind, and on the materials placed before the District Judge there is good reason to believe that the unsoundness of mind of the person to whom the application relates has ceased, it is the duty of the District Judge to proceed with the application without regard to the effect which the enquiry might have upon a matter in dispute in other proceedings pending in Court. **L** PARBATI v. EMPEROR, (1925) A. I. R. (L.) 533 **580**

Madras District Municipalities Act (V of 1920), ss. 93, 95—*"Residence," meaning of—Agent for collection from lands outside Municipality residing within Municipal limits—Liability to pay profession tax—"Inside Municipal limits," scope of.*

The expression "or any source other than houses or lands inside the Municipal limits" in s. 95 of the Madras District Municipalities Act is used in order to exempt a person from paying profession tax on rent from property inside the Municipality, since he is already taxed on that under s. 81; but a person residing within the Municipality and drawing income from rent of houses outside it is bound to pay profession tax and is not entitled to any exemption. The words "inside the Municipal limits" in s. 95 qualify the words "houses and lands" and not the word "source."

Section 93 of the Madras District Municipalities Act only lays down the qualification for liability to tax and has nothing to do with the conditions under which the tax becomes payable.

The word 'residence' in s. 95 of the Madras District Municipalities Act must be interpreted in the sense of personal residence, and a person who neither himself personally resides nor maintains a residence for himself or his family within a Municipality, but merely maintains an office for the collection of his rent cannot be said to "reside" within the Municipality.

A money-lender who exercised his profession in one *taluk* purchased in another *taluk* a *zemin* situated wholly outside the limits of a Municipality but maintained within the Municipal limits a resident collection agent who collected his *zemin's* rent for him. He did not, however, himself ever reside or maintain a house for the residence of himself or his family within the Municipal limits;

Madras District Municipalities Act—concld.

Held, that although the money-lender through his agent was in receipt of income within the Municipality he was not liable to pay profession tax inasmuch as he did not "reside" within the Municipality within the meaning of s. 95 of the Madras District Municipalities Act. **M** VEERAPPA CHETTIAR v. MUNICIPAL COUNCIL, PALNI, (1925) M. W. N. 210; 48 M. L. J. 428; 21 L. W. 457; (1925) A. I. R. (M.) 607; 48 M. 476 **662**

Madras Estates Land Act (I of 1908). *See* PRIVY COUNCIL APPEAL TO **196**

——— **s. 3 (11)**—*Landlord and tenant*—Kasavargam *tenant in Tanjore District, house-site occupied by*—"Pagudi," *whether rent—Suit to recover* "pagudi"—*Jurisdiction of Revenue Court.*

In the absence of a finding that a house-site occupied by a *kasavargam* tenant in the Tanjore District was originally *raiyati* land or was once used for agricultural purposes, a payment made by the tenant to the landlord in respect of the house which is known as "*pagudi*" is not "rent" within the meaning of s. 3 (11) of the Madras Estates Land Act, and a suit by the landlord for the recovery of such "*pagudi*" is not maintainable in the Revenue Courts.

The mere fact that the tenants have been paying illegal cesses or that the landlord was able to exact something from the tenants for a number of years would not give to the landlord the right to collect such cesses. **M** APPASWAMI MOITHAI RAO v. GOPALASWAMY CHETTY, (1925) A. I. R. (M.) 1087 **380**

Madras Hereditary Village Offices Act (III of 1895), s. 5. *See* TRANSFER OF PROPERTY ACT, 1882, s. 6 **557**

Madras High Court Original Side Rules, O. XX, r. 11 (1)—*Practice—Original Side—Under-chapter suit—Decree by Deputy Registrar—Stay of execution, unconditional, whether can be granted.*

Where under the Madras Original Side Rules, a decree is passed by the Deputy Registrar in an under-chapter suit, it is not right for a Judge to stay execution of the decree unconditionally, or by imposing simply a condition as to giving security for a small amount for the defendant's appearance.

The fact that the defendant's property is tied up may be a ground for a conditional stay but is not a ground for an unconditional stay. **M** P. SUNDARAM MUDALIAR v. C. MUTHUSWAMI PILLAI, 21 L. W. 635; (1925) A. I. R. (M.) 908 **439**

Madras Panchayat Courts Act (II of 1920), s. 76—*Penal Code (Act XLV of 1860), s. 426—Conviction by Panchayat—Mischief—Value of property damaged not mentioned in judgment.*

Under s. 76 of the Madras Panchayat Courts Act a Panchayat Court is empowered to try, among other offences, one under s. 426, Penal Code, when the loss or damage caused thereby does not exceed Rs. 10, and under the same section, the Court is bound to mention the amount of loss or damage caused by mischief.

Where the judgment of a Panchayat Court convicting a person of an offence under s. 426 of the Penal Code, does not mention the value of the amount of loss or damage by mischief alleged to have been caused by the accused, the judgment is liable to be set aside by the High Court in the exercise of its powers of superintendence under s. 107 of the Government of India Act. **M** MUNIGADU v. EMPEROR, (1925) M. W. N. 600; 26 Cr. L. J. 1161 **521**

Master and Servant—*Contract of service—Promise to pay money for passage—Passage not actually booked—Passage money, whether can be claimed—Construction of document.*

An agreement of service contained a promise by the defendant to pay the plaintiff money to pay his passage to some destination outside Burma to be determined by himself. Plaintiff demanded from the defendant a sum of money sufficient to pay his passage to the United Kingdom. Defendant contended that he was liable to pay the amount only for a passage actually taken by the plaintiff and that the plaintiff was not entitled to claim passage money without actually taking a passage:

Held, that under the agreement the plaintiff was entitled to claim the passage money irrespective of the fact whether he actually took a passage or not. **B** OPPENHEIMER & Co. *v.* H. LONG, 2 Bur. L. J. 291; (1924) A. I. R. (R.) 112 **198**

———*Discontinuance of service—Dismissal—Servant, whether entitled to wages.*

When a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last payment of wages.

The contract is that the servant should perform his part of the contract for the whole period for which wages are paid and if he fails to perform his part of the contract or is rightfully discharged at any intervening period between the dates when his wages are due, he can recover nothing for the broken period of service. **A** BHAKTHA SHIROMANI *v.* SEETAL NATH, 23 A L. J. 682; L. R. 6 A. 529 Civ.; (1925) A. I. R. (A.) 680 **1018**

———*Wrongful discontinuation of service—Damages, liability of servant to pay.*

Ordinarily if a servant leaves his employment without notice, he cannot draw wages for that portion of time which he has served since the last periodical payment of wages. There is no authority, however for the proposition that a servant is liable to be mulcted in damages for the loss caused to his master by his leaving his employ without notice. **R** MAUNG AUNG THA *v.* MAUNG BA THAN, 4 Bur. L. J. 72; (1925) A. I. R. (R.) 246 **612**

Minor—*Alienation of minor's property by unauthorised person—Suit by minor to recover property—Refund, whether can be directed—Discretion of Court—Hindu Law—Guardianship—Step-mother, position of.*

When an alienation which a minor seeks to avoid on coming of age has been made by some one who was *prima facie* entitled to bind the minor, he is bound to refund the purchase-money when his estate has benefited by it, or to hold the property charged with the amount of the debt from which it has been freed by the sale.

Under the Hindu Law the step-mother is not a person *prima facie* entitled to bind her minor step-son's estate. A transaction by her with respect to the minor's property is not voidable but void.

Where a minor seeks to recover property alienated by an unauthorised person, the Court has a discretion to direct that the minor should refund that portion of the consideration for the alienation by which his estate or himself had benefited. **B** LIMBAJI RAVJI HAJARE *v.* RAHI RAVJI HAJARE, 27 Bom L. R. 621; 49 B. 576; (1925) A. I. R. (B.) 499 **643**

———Compromise entered into by guardian, whether binding on minor—Sanction of Court—Concealment of material facts. *See* C. P. C., 1908, O. XXXII, R. 7 **804**

Mortgage.

See ALSO C. P. C., 1908 **866**

See ALSO TRANSFER OF PROPERTY ACT, 1882 **866**

———Equitable—Record of transaction—Registration, whether necessary. *See* REGISTRATION ACT, 1908, s. 17 **866**

———*Occupancy and fixed rate tenancies, mortgage of—Mortgagee in possession of occupancy holdings—Suit to recover possession of fixed rate holdings and in alternative for proportionate amount of mortgage money, whether maintainable.*

Defendants executed a mortgage of occupancy and fixed rate holdings in favour of the plaintiff. Plaintiff brought a suit in which he stated that he was in possession of the occupancy holdings but that he had been dispossessed from the fixed rate holdings and prayed for recovery of possession of the latter and in the alternative for recovery of a proportionate amount of the mortgage-money:

Held, (1) that the mortgage of the occupancy holdings was illegal;

(2) that inasmuch as the plaintiff was in possession of the occupancy holdings which were not transferable and wanted to recover possession of the remaining lands, his suit could not be decreed, as to do so would be to enforce the entire mortgage a part of which was illegal;

(3) that the plaintiff was not entitled to a decree for a proportionate amount of the mortgage-money inasmuch as the result of such decree would be to split up the mortgage-money which was one single consideration for the transfer, it being impossible for the Court to say how much of the entire consideration was intended to be for the occupancy lands and how much for the fixed rate tenancies. **A** SITAL RAI *v.* RAM KHELAWAN PANDEY, 23 A. L. J. 521; (1925) A. I. R. (A.) 543; L. R. 6 A. 183 Rev.; 47 A. 780 **431**

———*Prior and subsequent mortgagees—Decree obtained by subsequent mortgagee subject to prior mortgage—Subsequent decree obtained by prior mortgagee—Auction-purchasers—Priority—Prior mortgage paid off by subsequent mortgagee, effect of—Intention of parties.*

The question whether a mortgage which has been paid off is to be considered as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention; but every one is presumed to intend that which is manifestly for his benefit.

Certain property was mortgaged to *H* and the same property along with some other property was subsequently mortgaged to *P*. Later on the property comprised in the second mortgage-deed was mortgaged to *N* along with some other property and a portion of the consideration was left with *N* to enable him to pay off *H*. *H* was not paid by *N* and consequently instituted a suit to enforce his security against the mortgagors. In this suit *P* was also impleaded as a defendant. In the meantime *P* had also instituted a suit to enforce his mortgage and obtained a decree subject to the prior mortgage of *H*. In execution of this decree the property was sold and purchased by the plaintiffs. In the suit instituted by *H*, the heirs of *H* after his death assigned the security in favour of the defendant for valuable consideration. Defendant obtained a preliminary decree which gave *P* the right to redeem his mortgage. *P* did not choose to exercise his right of redemption and a final decree was passed in favour of the defendant who brought the property to sale and purchased it himself. Thereupon the plaintiffs brought a suit for a declaration that they were entitled to priority over the defendant;

Mortgage—contd.

Held, that the plaintiffs having purchased the property with complete notice of the prior mortgage in favour of *H*, they could not claim priority over the defendant who was the representative of *H*. **Pat** GAURI SHANKAR *v.* BAHADUR SINGH, 6 P. L. T. 385; (1925) A. I. R. (Pat.) 605 **340**

———, *proof of—Oral evidence, conflicting—Documentary evidence and circumstances, consideration of.*

In this case the question for determination before their Lordships was as to whether a mortgage had been effected by the defendents in favour of the plaintiffs. The oral evidence produced by the parties was conflicting and their Lordships intimated that it would be most unsafe to rely upon the statements of the witnesses on either side. From the documentary evidence and the circumstances of the case, however, their Lordships came to the conclusion that the mortgage had been established. **P C** ADAPPA *v.* GANDAPPA BHARMAGOUDA DESAI, (1925) A. I. R. (P. C.) 114 **158**

——— *Redemption — Improvements — Consent of mortgagor, absence of, effect of.*

A mortgagee cannot be permitted to improve a mortgagor out of his estate.

A mortgagee of a *kachcha* structure is not entitled to convert the structure into a *pucca* building without the consent of the mortgagor. Where a mortgagee makes such improvements without the consent of the mortgagor, he cannot claim the value of the improvements at the time of redemption. **O** GAURI SHANKAR *v.* BADRI NATH **474**

——— *Redemption suit—Mortgagee, whether can set up interest of third party—Estoppel.*

In a suit for redemption it is not open to the mortgagee to say that at the time when the mortgage was made any one, other than the mortgagor, had also an interest in the mortgaged property. He is estopped from setting up the interest of a third party in answer to a suit for redemption. So long as he has not handed over possession of the mortgaged property to the mortgagor or his representatives, it is not open to him to set up the interest of a third party. **A** RAJA RAM DHAR DUBE *v.* JADUNANDAN DHAR DUBE, L. R. 6 A. 196 Rev. **539**

——— *Redemption—Usufruct appropriated towards interest on portion of mortgage-money—Interest payable on balance—Period fixed for redemption—Clog on equity of redemption.*

One of the conditions of a mortgage was that the usufruct of the property would be appropriated towards the interest on two-thirds of the principal amount at the rate of 12 per cent. per annum. The remaining one-third of the mortgage-money was to carry interest at the same rate which was payable by the mortgagor to the mortgagee year after year. In the event of default in the payment of interest the mortgagee was entitled to compound interest at the same rate and the mortgage was made irredeemable for a period of 25 years:

Held, that having regard to all the provisions of the mortgage-deed the postponement of the right of redemption for a period of 25 years was a clog on the equity of redemption and that the mortgagor or his successor-in-interest was entitled to be relieved of it. **O** RAZA MOHAMMAD KHAN *v.* RAM LAL KALWAR, 12 O. L. J. 222; 2 O. W. N. 215; (1925) A. I. R. (O.) 406 **201**

——— *Redemption—Waste by mortgagee, question of, determination of—Restitution—Separate suit, whether lies—Civil Procedure Code (Act V of 1908), s. 144.*

Mortgage—concld.

The question of the liability of a mortgagee in a redemption suit for alleged waste committed by him while he was in possession of the mortgaged property must be settled at the time of the preparation of the decree for redemption. After the final decree in the suit has been passed, the question cannot be gone into in an application under s. 144 of the C. P. C. Nor does a separate suit lie for the recovery of the amount of the alleged waste from the mortgagee. **O** MOHAMMAD SHERKHAN *v.* BISHESHUR DAYAL, (1925) A. I. R. (O.) 654 **529**

Motor Vehicles Act (VIII of 1914), s. 5. *See* PENAL CODE, 1860, s. 279 **998**

——— **s. 16**—*Rules framed under Act, r. 19—Motor vehicle plying for hire—Rules for imposing tax not framed—Tax, whether can be imposed.*

Rule 19 of the rules framed under the Motor Vehicles Act was passed for the protection of the roads and it was not intended that a prohibition under this rule should distinguish between private vehicles and vehicles plying for hire. Where no rules have been framed under the Act to enable a Municipality to impose a tax on motor vehicles plying for hire, the Municipality cannot take advantage of r. 19 to impose the tax. **C** SUDHAMOY DAS *v.* CHAIRMAN KRISHNANAGAR MUNICIPALITY, 41 C. L. J. 566; (1925) A. I. R. (C.) 1026; 26 Cr. L. J. 1269 **1045**

Muhammadan Law—Custom—*Mughals Barlas of Qadian, District Gurdaspur, whether follow custom.*

The fact that in matters of succession a party follows custom does not necessarily show that it follows the same rule as regards alienations as well.

In matters of alienation the Mughals Barlas of Qadian in the Gurdaspur District are governed by Muhammadan Law. **L** HUSSAIN SHAH *v.* GUL MOHAMMAD, 6 L. 140; (1925) A. I. R. (L.) 420 **816**

——— **Divorce**—*Deed of divorce not signed in presence of wife, validity of—Single pronouncement, whether irrevocable—Acknowledgment of divorce obtained by compulsion, whether binding.*

Under the Muhammadan Law a deed of divorce is not defective merely because it is not signed in the presence of the wife.

When the language of a deed of divorce clearly indicates that the intention is to make an irrevocable divorce, it is not necessary that the deed should contain three pronouncements of divorce.

A deed containing an acknowledgment of a divorce having taken place, as distinct from a pronouncement of the divorce itself, obtained under compulsion is not binding on the husband. Such an acknowledgment is wholly ineffective if it is proved that it was in fact untrue. **A** NUR BIBI *v.* ALI AHMAD, L. R. 6 A. 329 Civ.; (1925) A. I. R. (A.) 550 **408**

——— **Hanafi School**—*Imam Abu Yusuf and Imam Muhammad, priority between.*

Where Hanafi Law is applicable, decisions in India are primarily given according to the tenets of Imam Abu Yusuf and not according to those of Imam Muhammad. **R** MA E KHIN *v.* MAUNG SEIN, 2 R. 495; (1925) A. I. R. (R.) 71 **167**

——— **Marriage**—*Acknowledgment of legitimacy—Presumption of marriage, when available.*

Under the Muhammadan Law it is only where direct proof of marriage is not available that indirect

Muhammadan Law—contd.

proof of marriage by way of acknowledgment of a son is allowed to take the place of direct proof. Where direct proof is available to establish that a marriage between the parents was impossible or would have been invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. **A** MOHAMMAD SHAFIQ ULLAH KHAN *v.* NUHULLAH KHAN, L. R. 6 A. 505 Civ.; 23 A. L. J 917 **954**

——— **Marriage**—*Minor parties—Contract, nature of.*

In a case of marriage between Muhammadans the real contracting parties are the husband and the wife and under their personal law they are entitled to enter into a contract of marriage even before they have become majors under that law; and the contracts of such minors are entered into through their guardians specified by their personal law. Those contracts are as good as those entered into by the minor himself or herself for the purpose of creating rights and obligations. **C** FAZARA KHATUN BIBI *v.* MATIOR RAHAMAN **748**

——— **Shia Law**—*Pre-emption, right of, when arises—Properties never held jointly, effect of—Right of way, joint—Co-sharers, more than two, effect of.*

The right of pre-emption under the Shia Law is of a much more restricted character than that allowed under the Hanafi Law. According to the Shia Law *shufa* is the legal title of one partner (*sharik*) in the joint property to the share of another partner (*sharik*) therein in the event of its transfer by sale, and a right of pre-emption can only be claimed under that law by a person who is a partner of a share in the joint and undivided property.

Under that law there can be no right of pre-emption except in relation to property which is held jointly or which was at one time held jointly and has been divided off while the roads and rivulets passing through them continue to be held in joint proprietary right and the proprietary right in such roads and rivulets is included in the sale.

Where the properties have not been held jointly at any time, there can be no right of pre-emption because there never was any original partnership in respect of the properties to permit of a right of way being treated as a residuum of that joint right. If any right of way is enjoyed jointly by the owners of the properties, it is only a subsidiary or beneficial right appertaining to each property but not a right flowing out of the joint nature of the properties held by each.

Upon a sale of property by a Shia Muhammadan no right of pre-emption arises, where there are more than two co-sharers in such property. **A** HUSAIN BAKSH *v.* M. MAHFUZUL HAQ, 23 A. L. J. 617, (1925) A. I. R. (A.) 559; L. R. 6 A. 513 Civ. **972**

——— **Wakf**—Mutwalli—Wakf, *whether can be created orally*—Mutwalli, *appointment of—Object, declaration of—Presumption—Reservation of power to alter rules, validity of—Life-interest, reservation of—Invalid clause, effect of—Breach of trust.*

Under the Muhammadan Law a verbal *wakf* is permissible. The mere declaration of the owner that *he dedicates* the property, or *has already dedicated* it, is enough to divest his proprietary right therein. Thenceforth it is absolutely inalienable and uninheritable.

The *wakif* need appoint no *mutwalli*. In the absence of any appointment he is presumed himself to be the *mutwalli*. Nor is it necessary for the *wakif* to declare his object. This will be assumed to be for religion and charity.

The reservation of the *wakif's* life-interest in the property does not clash with the conception of a valid *wakf*, provided the *corpus* of the property is, there and then, definitely and finally appropriated to the intended purpose, *i.e.*, to the service of God.

It is open to the *wakif* to reserve to himself, as *mutwalli*, the power to make such alterations in the rules etc. of the grant as may be necessary to meet any new, or changed circumstances, or conditions.

The presence of invalid clauses in a *wakfnamah* does not vitiate the *wakf*. The only result is that the offending clauses are invalid.

Where a *wakf* has been validly constituted and perfected by a *wakfnamah*, the mere fact that the *wakif*, as *mutwalli*, has committed breaches of trust in regard to the income of the property would not invalidate the *wakf*. **R** MA E KHIN *v.* MAUNG SEIN, 2 R. 495; (1925) A. I. R. (R.) 71 **167**

——— **Wakf**—Takia, *whether valid object of* wakf.

The fact that in matters of succession a party follows custom does not necessarily show that it follows the same rule as regards alienations as well.

In matters of alienation the Mughals Barlas of Qadian in the Gurdaspur District are governed by Muhammadan Law and not by custom.

The literal meaning of the word *takia* "is resting place." In common parlance a *takia* means the resting place of a *fakir*. The word "*fakir*" does not mean a "beggar" as is commonly understood, but it means a "holy person" who has relinquished the world and devotes his time to imparting religious instructions to his disciples and others. The *takia* is the place where he usually resides and imparts such instructions.

A *takia* is an institution recognised by law and a grant of endowment to a *takia* is as valid a *wakf* as one made to a *khankah*, a *dargah* or a mosque.

Takia Kamaldinwala in Qadian in the Gurdaspur District is a religious or *quasi*-religious institution and is a valid object of *wakf* according to Muhammadan Law. **L** HUSAIN SHAH *v.* GUL MUHAMMAD, 6 L. 140; (1925) A. I. R. (L.) 420 **816**

——— **Will**—*Legacy in favour of one of several heirs, validity of—Consent of heirs.*

Under the Muhammadan Law a testator can dispose of one-third of his property by Will in favour of strangers. He can dispose of more only if the heirs consent. As against the heirs themselves he is prohibited from leaving a legacy to one particular heir and thus enlarging the share of that heir, unless the other heirs consent. In each case the consent of the other heirs must be given after the death of the testator, and all the heirs must consent in order to make the bequest or legacy valid. **R** MANNA ABU BUCKER *v.* BEE BEE, 4 Bur. L. J. 73; (1925) A. I. R. (R.) 236 **614**

Negotiable Instruments Act (XXVI of 1881), ss. 26, 27, 28—*Promissory note, suit on—Person whose name does not appear on note, whether liable—Debt borrowed by manager of joint Hindu family—Members of family, liability of—Hindu Law—Joint family—Partition—Guardian of minor co-parcener, appointment of, effect of.*

The appointment of a guardian of the property of a minor member of a joint Hindu family does not operate automatically as a disruption of the family.

Negotiable Instruments Act—concld.

It is of the utmost importance that the name of a person or a firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document. It is contrary to all established rules that in an action on a Bill of Exchange or a promissory note against a person whose name properly appears as party to the instrument it should be open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. Therefore, where a person is to be bound by a negotiable instrument made by his agent on his behalf his name must appear upon the instrument as a person to be bound thereby.

The members of a joint Hindu family whose names do not appear upon a promissory note cannot be made liable on it merely because the note is signed by a person who is the *karta* of the joint family.

The *karta* of a joint Hindu family has the same authority to acknowledge a debt on behalf of the family as he has to incur it and the acknowledgment need not be expressed as having been made in his capacity of *karta*.

In a suit to recover the amount of a promissory note signed by the *karta* of a joint Hindu family it is open to the plaintiff to claim on an alternative cause of action that the money was borrowed by the *karta* for the benefit of the family and that the other members of the family are liable for re-payment of the money.

In such a case an oral agreement by the *karta* to support the alternative cause of action may be proved inasmuch as the agreement being not reduced to writing s. 91 of the Evidence Act has no application to such a case. **C** HARI MOHAN GHOSE *v.* SOURENDRA NATH MITTER, 41 C. L. J. 535 **1025**

——— **s. 76 (d)**—Hundi, *suit on—Non-presentment—Damage to drawer, absence of—Burden of proof.*

The burden lies heavily on a person suing on the basis of a *hundi* to prove that the drawer could not have suffered any damage owing to non-presentment of the *hundi* for payment. It will only be held in very exceptional circumstances that the drawer could not have suffered any damage owing to non-presentment. **A** BHIKKI MAL *v.* RAGHUBIR SINGH, L. R. 6 A. 500 Civ.; 23 A. L. J. 861 **915**

Notice—*Registration, whether amounts to notice—Mortgage—Sub-mortgage, registration of—Notice to mortgagor.*

A registration of a subsequent transaction affecting immoveable property is no notice to persons who were parties to earlier transactions affecting such property. **A** PRABHULAL *v.* CHATTER, L. R. 6 A. 344 Civ.; (1925) A. I. R. (A.) 557 **398**

Opium Act (I of 1878), s. 9 (c)—*Illegal possession of opium—Shop owned by two brothers jointly—Presumption.*

Two brothers were joint owners of a shop in which opium was sold, the license being in the name of the elder brother. After the expiry of the license a quantity of opium was found in the shop:

Held, that the presumption may safely be made that the possession of opium was that of the elder brother and that the younger brother was not, therefore, guilty of an offence under s. 9 (c) of the Opium Act. **L** NAND LAL *v.* EMPEROR, 6 L. 311; (1925) A. I. R. (L.) 477; 26 Cr. L. J. 1268 **1044**

Oudh Civil Courts Act (XIII of 1879), s. 18—*Forum of appeal—Execution of decree—Re-sale.*

Where an order directing a defaulting auction-purchaser to make good the loss occurring on the re-sale of property is made in the course of the execution of a decree passed in a suit of the value of more than Rs. 5,000, an appeal against the order lies under s. 18 of the Oudh Civil Courts Act to the Judicial Commissioner and not to the District Judge, irrespective of the amount which the auction-purchaser is directed to pay. **O** ANGNU *v.* MOHAMMAD SAJJAD ALI KHAN, 12 O. L. J. 261; 2 O. W. N. 212; (1925) A. I. R. (O.) 397; 28 O. C. 327 **131**

Oudh Civil Digest, Para. 272 (V)—*Fee, whether covers execution proceedings.*

The intention of the rule contained in para. 272 (*v*) of the Oudh Civil Digest is that the fee fixed for the case should cover execution proceedings also, whether an objection is filed by the judgment-debtor or not. **O** SWAMI DAYAL *v.* MAQSOOD HUSEN **141**

Oudh Estates Act (I of 1869), ss. 8, 10, 23—Taluqdari *and non*-taluqdari *estate—Owner buying property with income—Subsequently acquired property, character of.*

Where an absolute owner of certain *taluqdari* as well as non-*taluqdari* properties buys more property with his income from both sources, which incomes are completely commingled, the subsequently purchased property does not acquire the character and status of a *taluqdari* estate and the succession to this property is governed by the ordinary rules of inheritance. **A** HAR BAKSH SINGH *v.* DAL BAHADUR SINGH, 22 A. L. J. 1079; (1925) A. I. R. (A.) 155; 47 A. 186 **255**

Oudh Laws Act (XVIII of 1876), ss. 9, 10—*Pre-emption—Co-sharer, meaning of—Notice—"Person concerned," meaning of—Foreclosure of property belonging to joint Hindu family—Member of family not party to suit, whether can pre-empt.*

Per *Daniels, J. C.*, and *Ashworth, A. J. C.* (*Dalal, A. J. C.* dissenting):—A member of a Hindu joint family does not acquire a right of pre-emption by reason of a decree for foreclosure of joint family property in which he himself is a co-parcener.

Per *Daniels, J. C.*—No one can pre-empt a sale or foreclosure of his own property. Whatever other property a man may hold he cannot thereby obtain a right to pre-empt a sale or foreclosure by which his own interest in the property is transferred. A person cannot successively occupy the position of vendor and pre-emptor in respect of the same transaction.

The word "co-sharer" in s. 9 of the Oudh Laws Act is used with reference to the ordinary constitution of a village proprietary community where there has been no partition. In such a community the co-proprietors are owners of fractional shares out of the entire proprietary right and are entitled to a proportion of the total assets according to the shares recorded in the *khewat*. But a co-sharer must be some one distinct from the person whose share is foreclosed. A man cannot be a co-sharer with himself.

A co-sharer cannot pre-empt if he denies the title of the person who has sold the property.

By s. 10 of the Oudh Laws Act notice is to be given to the "persons concerned," that is, to the persons who are entitled to a right of pre-emption by reason of the sale. Therefore, the question whether a person is entitled to notice depends on whether he has a right of pre-emption or not.

Per *Ashworth, A. J. C.*—An undivided member of a joint Hindu family cannot, apart from the other

Oudh Laws Act—concld.

members of the family, unless he represents the whole family as *karta*, claim to be a co-sharer within the meaning of s. 9 of the Oudh Laws Act. Such an individual member cannot be permitted to claim in the case of a sale of joint family property that he is other than a vendor or co-vendor of the property.

The expression "co-sharer" in s. 9 of the Oudh Laws Act means a juristic person and not merely an individual who collectively with other individuals constitutes a single juristic person.

No individual member of a joint Hindu family can claim to be a co-sharer on the basis of joint family property. If, however, he possesses separate property, he can claim to be a co-sharer by virtue of that separate property and in the latter capacity he would be entitled to pre-empt a sale by the family of which he is a member of joint family property.

Where one or more of the members of a joint Hindu family are recorded in the village papers as co-sharers, the other members not so recorded should be held, by reason of their omission to get their names also recorded to receive notices on behalf of the whole family under s. 10 of the Oudh Laws Act.

Per *Dalal, A. J. C.*—Where a foreclosure decree is passed against joint family property behind the back of some of the members of the family, without their being made parties to the suit and without notice to them, any one of such members would have a right to pre-empt the foreclosure.

In s. 10 of the Oudh Laws Act there is no mention of a constructive notice. Every co-sharer is entitled separately to a notice or the procedure should be adopted of sticking it up on the *chaupal* or other public places of the village in which the property is situated.

The right of pre-emption is given even to a member of the village community and it does not stand to reason that the law desired to deprive of the right of pre-emption co-sharers who were owners of property other than the property sold or foreclosed simply on the ground that they happened to have a share in the vended or foreclosed property. **O** GAJADHAR *v.* LAL BEHARI, 12 O. L. J. 202; 2 O. W. N. 264; (1925) A. I. R. (O.) 352; 28 O. C. 139 **879**

Oudh Rent Act (I of 1923), s. 17 (3)—*Landlord and tenant—Payment in addition to rent, whether can be claimed through Court.*

All that cl. (3) of s. 17 of the Oudh Rent Act of 1923 lays down is that if a landlord recovers a sum from a tenant in addition to the rent, the sum recovered would be considered as a payment illegally enforced and can be claimed back by the tenant. This does not mean that prior to the addition of cl. (3) to s. 17, a landlord was entitled to recover through Court any sum in excess of the rent due. A demand for such a payment was illegal before the addition of cl. (3) to s. 17 and is illegal even after such addition and cannot be enforced in a Court of Law. **O** MANOHAR LAL *v.* RAM RATTAN PATHAK, 2 O. W. N. 439; L. R. 6 A. (O.) 91; (1925) A. I. R. (O.) 434; 12 O. L. J. 561 **538**

——— **s. 119**—*Civil Procedure Code (Act V of 1908), ss. 100, 101—Appeal, second, whether lies on question of fact.*

Under s. 119 of the Oudh Rent Act a second appeal will not lie to the District Judge on grounds other than those mentioned in s. 100, C. P. C. **O** TIRBHAWAN DATT PANDE *v.* RAM PIARE **65**

Oudh Rent Act—concld.

——— **s. 127**—*Ejectment suit—Trespasser—Arrears of rent, whether can be claimed.*

A person entitled to eject another person who is a trespasser in a holding can claim under s. 127 of the Oudh Rent Act arrears of rent from such person, as if he were his tenant, and such a claim is not inconsistent with the position that the defendant is otherwise merely a trespasser. **O** LACHMI NARAIN *v.* RAMANUJA SINGH **536**

Pardanashin Lady, *transactions with—Ratification of transaction—Agency, proof of.*

Where a deed is executed by a *pardanashin* lady there must be evidence of clear understanding by her of what liabilities she is taking and what is being given her.

Similarly, in the case of the ratification of a transaction entered into by the agent of a *pardanashin* lady, it must be proved that she had full knowledge of the facts.

Any person seeking to bind a *pardanashin* lady by the act of her agent must give strict proof of such agency. **C** TARU BALA DASI *v.* SURENDRA NATH MITRA, 41 C. L. J. 213; 29 C. W. N. 597; (1925) A. I. R. (C.) 866 **369**

Parties—*Easement — Declaratory suit — Necessary parties.*

In a suit for declaration of an easement, servient owners who are not in possession and who have done nothing in the way of giving a cause of action to the plaintiff are not necessary parties. **C** UPENDRA NATH GHOSH *v.* BHUSHAN SAHANA **970**

——— *Easement, suit on—Servient owner, who is.*

In a suit for the removal of an obstruction to an easement, the servient owners against whom no relief is sought are not necessary parties.

'Servient owner' for the purpose of a suit on an easement is the owner who has raised objection to plaintiff's claim, against whom there is a cause of action, and does not refer to the owners of all the tenements subject to the easement. **C** BHOLA NATH MONDAL *v.* MOHESH CHANDRA BERA **664**

Partition—*Improvements made by co-sharer—Contribution, right of—Consent of co-sharers, whether necessary.*

To entitle a tenant-in-common to an allowance on a partition in equity for the improvements made by him on the premises it is not necessary for him to show the assent of his co-tenants to such improvements or a promise on their part to contribute their share of the expense; nor is it necessary for him to show a previous request to them to join in the improvements and their refusal. The only good faith required in such a case is that the improvements should have been made honestly for the purpose of improving the property and not for the purpose of embarrassing the co-tenants or encumbering their estate or hindering partition.

Where, however, one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenants to obtain their shares of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor notwithstanding that he may have added greatly to the value of the land, inasmuch as it would be the improver's own folly to extend his own improvements over the whole estate. It would

Partition—concld.

be unjust to permit a co-tenant at his pleasure to charge another tenant with the cost of improvements he may not have desired. In such a case the improver stands as a mere volunteer and cannot, without the consent of his co-tenants, lay the foundation for charging him with improvements.

Where a co-tenant is charged with the cost of improvements made by another co-tenant, the charge will not be for the price of the improvements but only with his proportion of the amount which at the time of the partition the improvements add to the value of the premises. From this amount he will also be entitled to deduct any sum in respect of which he may have a just claim for use and occupation of his share of the property enjoyed by the co-tenant making the improvements. **A** SHIAM LAL *v.* RADHA BALLABH, L. R. 6 A. 547 Civ.; 23 A. L. J. 950 **822**

Partition Suit—*Preliminary and final decrees—Mesne profits, omission to award—Appeal—Review—Inherent power of Court, exercise of—Civil Procedure Code (Act V of 1908), s. 151.*

Where in a preliminary decree for partition, no relief was given in respect of mesne profits, the mere omission to refer to the relief cannot make the decree a preliminary decree in respect of that relief. The omission must be deemed to be a refusal of the relief, whether it was done intentionally or accidentally, and it is open to the plaintiff to apply for a review of this decree, or to appeal against it.

Where there is no appeal against such a decree and a petition for review is dismissed it is not competent, to the plaintiff to invoke the inherent jurisdiction of the Court under s. 151, C. P. C.

An order on an application to pass a further decree for mesne profits in respect of properties awarded in a preliminary decree for partition must be treated as a decree and an appeal will lie therefrom. **M** VEERAPPA KOUNDAN *v.* VEERAPPA KOUNDAN, 48 M. L. J. 512; (1925) A. I. R. (M.) 886 **94**

Partnership—*Death of one partner—Suit by surviving partner against legal representatives of deceased partner—Claim for specific items, maintainability of—Accounts, final, whether must be taken—Procedure.*

In a suit by certain partners against the legal representatives of a deceased partner for recovery of certain specific items due from the deceased to the partnership:

Held, that the defendants, who had no personal knowledge of the transactions were entitled to have all the questions at issue determined by a taking of accounts inasmuch as it was impossible to do justice to all the parties without taking a final account of the partnership, and that a suit for the recovery of specific items alone was not maintainable.

Per *Phillips, J.*—It was an established rule in English Law that Courts would not interfere between one partner and another, unless it was for the purpose of dissolving the partnership or if it was dissolved, of finally winding up its affairs. The principle has, however, been relaxed and Courts have interfered in order to prevent a partner deriving advantage from his own misconduct.

Where justice requires that all the dealings of the partnership should be finally determined, the Courts will not allow a partial account to be taken but when the basis of the claim is unconnected with the partnership business or is only very remotely connected

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therewith, an action is maintainable, provided no injustice is caused by dealing with the claim separately. **M** RAMASWAMY PILLAI *v.* V. R. M. K. MUTHU KARUPPAN CHETTI, 48 M. L. J. 444; (1925) A. I. R. (M.) 737; (1925) M. W. N. 497 **153**

Part performance, *doctrine of, applicability of—Unregistered agreement for consideration transferring property—Transferee put in possession—Suit by transferor to recover possession of property, whether maintainable.*

In consideration of defendant giving up her claim to certain properties in the possession of the plaintiff, the latter executed an unregistered agreement in favour of the former giving her the land in dispute and put her in possession of it. Some years afterwards plaintiff filed a suit to recover possession of the property from the defendant:

Held, that the doctrine of part performance applied and that the plaintiff was not entitled to recover the property. **M** AVUGADDI JOGAMMA *v.* LALIAN POTHANNA, 48 M. L. J. 287; (1925) M. W. N. 159; (1925) A. I. R. (M.) 763 **903**

Penal Code (Act XLV of 1860), ss. 24, 120-B, 409—*"Dishonestly", meaning of.*

The word "dishonestly" as defined in s. 24 of the Penal Code does not necessarily imply wrongful gain to the accused himself. **O** F. S. HAY *v.* EMPEROR, 2 O. W. N. 469; (1925) A. I. R. (O.) 469; 28 O. C. 230; 26 Cr. L. J. 1217 **833**

——— **ss. 34, 325**—*Attempt to abduct by persons armed with dangerous weapons—Grievous hurt caused to persons resisting attempt—Common liability of accused.*

Accused, four in number, joined together to forcibly carry off a girl while she was sleeping in her own house and proceeded to do so armed with *dangs* and *chhavis*, and in the course of the attempt to carry off the girl grievous hurt was caused to the friends and relatives of the girl:

Held, that it must be assumed that all the accused had the knowledge that in the attempt to carry off the girl it might be necessary to use the *dangs* and *chhavis* that they were armed with, and that, the use of such weapons would in all probability result in grievous hurt being caused to persons attempting to prevent the girl being carried off, and that, consequently, by virtue of s. 34 of the Penal Code, all the accused were guilty of the offence of voluntarily causing grievous hurt. **L** ALLAH RAKHA *v.* EMPEROR, 2 L. C. 34; 26 Cr. L. J. 1105; (1925) A. I. R. (L.) 565 **273**

——— **ss. 71, 380, 457**—*Criminal Procedure Code (Act V of 1898), s. 35—House breaking with intent to commit theft—Theft—Separate sentences, whether can be awarded.*

Where a person is convicted at one trial of the offence of house breaking with intent to commit theft and of the commission of theft after such house breaking, he can be sentenced to separate sentences in respect of each of those offences. **C** KANCHAN MOLA *v.* EMPEROR, 41 C. L. J. 563; (1925) A. I. R. (C.) 1015; 26 Cr. L. J. 1253 **997**

——— **ss. 75, 511**—*Conviction for attempt to commit offence—Enhanced punishment, whether can be inflicted.*

Under s. 75 of the Penal Code it is only when an accused person is convicted of an offence under Ch. XII or Ch. XVII of the Penal Code that he is liable to enhanced punishment. An accused person convicted of an attempt to commit an offence cannot be

Penal Code—contd.

made liable to enhanced punishment under that section. **A** BRIJ BEHARI LAL *v.* EMPEROR, 26 Cr. L. J. 1204; L. R. 6 A. 156 Cr; 23 A. L. J. 926 **724**

——— **s. 97**—*Right of private defence, when can be availed of.*

The right of private defence cannot be availed of where there is time to have recourse to the public authorities to prevent the commission of an offence against the person or property of the person concerned. **N** RAJMAL *v.* EMPEROR, 26 Cr. L. J. 1069; (1925) A. I. R. (N.) 372 **13**

——— **ss. 100, 302, 304**—*Right of private defence, exceeding of—Intention to cause death—Murder—Culpable homicide.*

If a person in defending himself exceeds the right of private defence and intends to cause the death of his assailant he is not necessarily guilty of murder. A person in order to defend himself may kill his adversary provided he has a reasonable apprehension that otherwise he himself would be killed. But where there is no reasonable apprehension of his being killed but only reasonable apprehension of grievous hurt, and in defending himself he exceeds his right of private defence and kills the other, he is not guilty of murder but only guilty of an offence less than murder. His act may amount to an offence under s. 304 of the Penal Code. **M** *In re* KATIRI, 26 Cr. L. J. 1143; (1925) A. I. R. (M.) 1069 **455**

——— **ss. 109, 114**—*Abetment, what amounts to.*

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent but it is absolutely necessary to connect him in some way or other with those steps of the transaction which are criminal. **N** RAJMAL *v.* EMPEROR, 26 Cr. L. J. 1069; (1925) A. I. R. (N.) 372 **13**

——— **s. 124-A**—*Evidence Act (I of 1872), s. 114, Ill. (f)—Exciting disaffection towards Government—Publication of pamphlet—Authorship, proof of—Name appearing on title page, whether sufficient.*

In the absence of any other evidence the mere fact that the title page of a pamphlet bears a certain name does not justify the conclusion that a person bearing that name, and nobody else, could be the author and publisher of the pamphlet. The prosecution must prove by evidence that the accused is the author or publisher of the pamphlet. **L** RANJIT SINGH *v.* EMPEROR, 2 L. C. 27; 26 Cr. L. J. 1124; (1925) A. I. R. (L.) 569 **356**

——— **ss. 141, 143**—*Meeting of association—Members compelled to take oath by violence—Unlawful assembly—Members not taking part in violence, whether guilty.*

The actions of a few members of an assembly which has gathered together for a perfectly lawful purpose cannot, by themselves, make the whole assembly an unlawful assembly. The circumstances must be such as at least to justify the presumption that the other persons present associated themselves with the offending members. The mere fact that they are with the offending members at the time does not make them members of the unlawful assembly formed by those members, they must be shown to have joined or continued in that portion of the assembly which has become an unlawful assembly.

Accused was the Secretary of a Wanthanu Society. He convened a meeting of the society the object of which was to discuss whether certain resolutions should be adopted. It was proposed at the meeting that the members present should take a certain oath.

Penal Code—contd.

Some of the members objected to the form of the oath, whereupon certain other members who were more than five in number, got up in an angry and threatening manner and in consequence of their attitude the objecting members took the oath. There was no evidence that the accused in any way associated himself with the show of violence or that he made any speech after violence had been used:

Held, (1) that the action of those members who used violence fell within the fifth clause of s. 141 of the Penal Code and that they, therefore, constituted an unlawful assembly;

(2) that there was nothing, however, to show that the accused had become or had continued to be a member of that unlawful assembly and that consequently the accused could not be convicted under s. 143, of the Penal Code. **R** MAUNG CH. KYAN *v.* EMPEROR, 4 Bur. L. J. 80; (1925) A. I. R. (R.) 243; 26 Cr. L. J. 1186 **706**

——— **ss. 169, 403.** *See* CR. P. C., 1898, s. 197 **517**

——— **s. 201.** *See* CR. P. C., 1898, s. 233 **3**

——— **s. 211**—*False charge, what amounts to—Just or lawful grounds, absence of—Suspicion, whether amounts to charge.*

In order to bring home a charge under s. 211 of the Penal Code the prosecution must establish that there were no just and lawful ground for the action taken and that the accused was aware of this.

The mere communication of a suspicion to the Police does not amount to making a charge of a criminal offence within the meaning of s. 211 of the Penal Code. **L** ABDUL GHAFUR *v.* EMPEROR, (1925) A. I. R. (L.) 325; 6 L. 28; 26 Cr. L. J. 1165 **525**

——— **ss. 211, 182**—*False information to Police—False charge in Court—Prosecution for false charge—Conviction for false information, legality of.*

An offence under s. 211 of the Penal Code must always include an offence under s. 182 of the Code and where a person is prosecuted in respect of an offence under the former section but it appears that the prosecution is illegal owing to the absence of a complaint in writing by the Court before whom the false charge was made, it is open to the Court to convict the accused under s. 182 of the Penal Code.

Every false charge made to the Police is not necessarily an offence under s. 211 of the Penal Code. If the intention to injure is absent then the offence falls under s. 182 of the Code and there is no reason why if the prosecutor is unable or unwilling to prove intention, that is to say, malice, he should not be permitted to take a conviction under s. 182. **Pat** DAROGA GOPE *v.* EMPEROR, 6 P. L. T. 515; (1925) A. I. R. (Pat.) 717; 26 Cr. L. J. 1269 **1045**

——— **s. 215**—*Receiving gratification to help owner to recover stolen property—Gratification received by thief himself—Offence.*

Section 215 of the Penal Code is not intended to apply to the actual thief but to a person who takes gratification on account of helping the owner to recover stolen property without at the same time using all the means in his favour to cause the offender to be apprehended and convicted of the offence. **L** KEHR SINGH *v.* EMPEROR, 2 L. C. 25; 26 Cr. L. J. 1121; (1925) A. I. R. (L.) 563 **353**

——— **s. 235.** *See* CR. P. C., 1898, s. 503 **848**

——— **s. 279.** *See* CR. P. C., 1898, s. 227 **1**

——— **s. 279**—*Motor Vehicles Act (VIII of 1914), s. 5—Rash or negligent driving—Attempt to pass*

Penal Code—contd.

car in front while car is approaching from opposite direction—Offence—Charge under s. 279, Penal Code—Conviction under s. 5, Motor Vehicles Act, legality of.

The facts which have to be proved for a conviction under s. 279 of the Penal Code and for a conviction under s. 5 of the Motor Vehicles Act are substantially the same and a person who is charged under one of these sections may be convicted under the other inasmuch as there is no question of prejudice to him in such a case.

A driver of a car who attempts to force his way past a car in front of him on his side of the road at a time when there is a car approaching on the opposite side of the road in the opposite direction almost immediately in front of his car, is guilty of conduct which comes within the purview of s. 5 of the Motor Vehicles Act. **A** CHARAN SINGH *v.* EMPRROR, 23 A. L. J. 790; L. R 6 A. 150 Cr.; 26 Cr. L. J. 1254 **998**

——— **ss. 300, Excep. I, 302, 304**—*Wife leading immoral life—Remonstrance—Provocation—Death caused by stabbing—Murder—Culpable homicide.*

Accused's wife led a grossly immoral life. After a recent act of unchastity the accused remonstrated with her and instead of showing repentence she replied that she would continue in the course to which he objected. The accused became enraged and struck her with a stick. She struggled with him and got hold of his fingers and bit them. Accused then lost control of himself, took out a knife and stabbed her repeatedly with it with the result that she died from the injuries:

Held, that the immediate provocation offered to the accused at the time of his remonstrance coming on the top of all that had gone before was sufficient to bring the case within Exception 1 to s. 300 of the Penal Code and to reduce the offence of the accused from murder to one of culpable homicide. **A** SUKHAI *v.* EMPEROR, L. R. 6 A. 157 Cr; (1925) A. I. R. (A.) 676; 26 Cr. L. J. 1228 **844**

——— **ss. 300, 302, 325**—*Death caused by single blow delivered suddenly—Murder—Grievous hurt.*

Deceased and his friend gave a beating to the accused. All three were young men of about 18 years of age. The following day the accused saw the deceased unexpectedly and forthwith formed the design of hitting him in return for the beating which he had received on the previous day. He thereupon struck the deceased a violent blow on the back of the head with a hockey stick which he had in his hand at the time. After striking this blow the accused ran away and the deceased walked on for some 30 paces and then sat down on the ground. He was taken home and became unconscious after about half an hour and died on the following morning as the result of internal bleeding and a clot of blood on the surface of the brain:

Held, that under the circumstances of the case and having regard to the conduct of the accused, it could not be safely inferred that the bodily injury which he intended to inflict was sufficient in the ordinary course of nature to cause death and that the accused was guilty not of the offence of murder but of an offence under s. 325 of the Penal Code. **L** GHULAM JILANI *v.* EMPEROR, 2 L. C. 37; 26 Cr. L. J. 1118; (1925) A. I. R. (L.) 559 **286**

——— **s. 302**—*Death caused by hatchet blow by one accused—Second accused present but not taking part in assault—Murder—Sentence.*

Penal Code—contd.

G and *C* two brothers proceeded to the house of the deceased, the former being armed with a hatchet and the latter with a stick. On arriving at the house of the deceased *G* gave a blow on the neck of the deceased with the hatchet as the result of which the latter died. *C* did not use his stick but stood near while *G* attacked the deceased:

Held, that both *G* and *C* were guilty of the offence of murder and that while *G* fully deserved the punishment of death, *C* who appeared to be acting under the influence of his brother and had inflicted no injury upon the deceased, should be sentenced only to transportation for life. **L** GULAB *v.* EMPEROR, 2 L. C. 14; 26 Cr. L. J. 1133; (1925) A. I. R. (L.) 584 **365**

——— **s. 302.** *See* CR. P. C., 1898, s. 417 **453**

——— **s. 302**—Death caused by gun-shot—Accident or design, determination of—Benefit of doubt. *See* CR. P. C., 1898, s. 162 **711**

——— **s. 302**—*Death caused by violent blow from takwa—Murder.*

A *takwa* is a deadly weapon and a person who strikes a blow on the head of another with such a weapon and with such a violence as to cut through the skull does so with the intention of causing death or such bodily injury as is likely to cause death, and if death is caused as the result of such a blow, he is guilty of the offence of murder. **L** TEK SINGH *v.* EMPRROR, (1925) A. I. R. (L., 373; 26 Cr. L. J. 1251 **995**

——— **s. 302**—*Murder—Youth of accused—Sentence.*

Accused who was a raw youth of 17 or 18 years of age with no experience of the world stabbed the deceased with a knife under unknown circumstances and caused his death:

Held, that the accused was guilty of murder but that under the circumstances the sentence of transportation for life would meet the ends of justice and that it was not necessary to pass the sentence of death upon him. **N** CHUNILAL *v.* EMPEROR, 7 N. L. J. 144; (1924) A. I. R. (N.) 115; 26 Cr. L. J. 1121 **353**

——— **ss. 302, 304**—Exceeding right of private defence and killing another—Murder or culpable homicide. *See* PENAL CODE, 1860, s. 100 **455**

——— **ss. 302, 395, 396**—*Dacoity—Number of persons, finding as to, whether necessary—Dacoity with murder—Charge, form of—Acquittal of some accused, effect of, upon others.*

An offence under s. 395 of the Penal Code can be committed only if the number of persons concerned in the robbery is not less than five.

Where murder is committed during the course of a dacoity it is proper to charge the accused persons with an offence under s. 396 of the Code rather than with two offences of murder and dacoity separately.

Where several persons are charged with the commission of an offence and some of them are acquitted not on the ground that their innocence is proved but on the ground that the case against them is not free from doubt, it cannot be argued that the remaining accused have been falsely implicated. **L** LABH SINGH *v.* EMPEROR, (1925) A. I. R. (L.) 337; 6 L. 24; 26 Cr. L. J. 1153 **513**

——— **ss. 304, 323**—*Cattle trespass—Beating given to owners of cattle—Intention to cause death or grievous hurt, absence of—Chance blow by one accused resulting in death of person assaulted—Liability of other accused—Culpable homicide—Hurt.*

The party of the accused, into whose field cattle belonging to the party of the complainants had trespassed, beat some of the owners of the cattle with the intention of chastising them. There was no intention to cause death or grievous hurt but one of the owners of the cattle was hit by one of the accused on the temple and died as a result of the injury:

Held, (1) that the particular accused who hit the deceased on the temple with a *lathi* must be taken to have intended to cause such hurt as would in the ordinary course of nature cause death and that he was consequently guilty of an offence under s. 304 of the Penal Code;

(2) that the other accused could not be held liable for the blow which had caused the death of the deceased and that they were, therefore, only guilty of an offence under s. 323 of the Penal Code. O HAR PRASAD SINGH *v.* EMPEROR, 2 O. W. N. 465; (1925) A. I. R. (O.) 482; 26 Cr. L. J. 1160 **520**

——— **ss. 366, 376.** *See* CR. P. C., 1898, s. 423 **287**

——— **ss. 366, 366-A**—*Abduction of girl under 18 years of age—Force or deceit, absence of—Procuration—Offence.*

Accused took a girl of less than 18 years of age from place to place with the intention of compelling her to marry against her will or in order that she may be forced or seduced to illicit intercourse. There was no evidence that the girl was compelled to accompany the accused by force or by deceitful means:

Held, that the accused could not be convicted of an offence under s. 366 of the Penal Code but that he was guilty of an offence under s. 366A of the Code. O SAADAT KHAN *v.* EMPEROR, 2 O. W. N. 445; (1925) A. I. R. (O.) 454; 26 Cr. L. J. 1151 **463**

——— **s. 376**—*Rape — Penetration, partial—Offence.*

Under s. 376 of the Penal Code vulval penetration only is sufficient to constitute rape. L NATHA *v.* EMPEROR, (1923) A. I. R. (L.) 536; 26 Cr. L. J. 1185 **705**

——— **s. 395**—*Dispute between two communities—Looting of shops—Separate offences.*

In consequence of a dispute between the members of two communities, the members of one community raided and looted a large number of shops in the Bazar belonging to the other community:

Held, that the looting of each shop was a separate offence and that in respect of each such offence the Court must come to a finding what the offence amounted to. C DARGAHI *v.* EMPEROR, 52 C. 499; (1925) A. I. R. (C.) 831; 26 Cr. L. J. 1213 **733**

——— **s. 397,** *applicability of—Dacoity with use of deadly weapon.*

Section 397 of the Penal Code applies only to the persons who actually cause grievous hurt or are themselves armed with deadly weapons. L MOHAR SINGH *v.* EMPEROR, 2 L. C. 5; 26 Cr. L. J. 1144 **456**

——— **ss. 401, 413.** *See* CR. P. C., 1898, s. 403 **185**

——— **s. 408**—*Criminal breach of trust, what constitutes—Intention to deprive owner of property.*

In order to constitute the offence of criminal breach of trust it is not necessary that the accused should have disposed of the property to a third person. His first possession of the property being lawful, the offence consists in a mental act or intent to deprive the owner of his property, without any outward or visible trespass.

Accused was engaged by the complainant as a tonga driver to drive the latter's tonga on hire within the limits of a Municipality. Under the terms of the agreement the accused had to bring the tonga back each evening and was to pay over his earnings to the complainant while he was to receive a certain fixed salary per month. On the very first day of his employment the accused did not return with the tonga in the evening and on the following day was pursued and arrested at a distance of 36 miles from the town while driving the tonga away from the town:

Held, that the conduct of the accused showed that he intended to keep the tonga for himself or to dispose of it to some third person and that this intent or mental act of his was the gist of the offence of criminal breach of trust and the accused was consequently guilty of an offence under s. 408 of the Penal Code. L EMPEROR *v.* DINA, 2 L. C. 12; 6 L. 257; (1925) A. I. R. (L.) 411; 26 Cr. L. J. 1149 **461**

——— **ss. 409, 120-B**—*Criminal breach of trust by public servant—Ingredients of offence—Conspiracy.*

Without the slightest evidence of any money having been received by a public servant he can be convicted of criminal breach of trust by a public servant under s. 409 and of conspiracy under s. 120-B of the Penal Code when property under his control disappears and his connection with the conspiracy is brought home to him. O HAY *v.* EMPEROR, 2 O. W. N. 469; (1925) A. I. R. (O.) 469; 28 O. C. 230; 26 Cr. L. J. 1217 **833**

——— **s. 420**—*Railways Act (IX of 1890), ss. 68, 112 (a)—Railway employee obtaining pass for relative—Pass handed over to stranger—Cheating—Travelling without ticket.*

Accused who was a Railway employee obtained a free pass for his wife and mother and handed it over to a woman who was neither his wife nor his mother and the latter used the pass:

Held, that the accused was guilty of an offence under s. 420 of the Penal Code and not of an offence under s. 112 (*a*) of the Railways Act. O RAM DAYAL *v.* EMPEROR, 2 O. W. N. 510; (1925) A. I. R. (O.) 479; 12 O. L. J. 508; 26 Cr. L. J. 1164 **524**

——— **s. 426.** *See* MADRAS PANCHAYAT COURTS ACT, 1920, s. 76 **521**

——— **s. 430**—*Easements Act (V of 1882), s. 13 (b)—Mischief, what amounts to—Partition—Right to carry water through channel existing on joint lands, whether transferred—Channel filled up—Wrongful loss—Offence.*

To constitute the offence of mischief it is not sufficient to show that loss has been caused to the complainant, it is necessary further to show that the loss was wrongful loss and that the accused had the intention to cause or a knowledge that his act was likely to cause loss to the complainant.

On a partition between the complainants and the accused, who were members of a joint family, certain fields fell to the share of the former and other fields fell to the share of the latter. On the lands allotted to the accused there had existed a channel for a long number of years which was used for carrying water to the fields which had been allotted to the complainants. Some years after the partition the accused filled up the channel with the result that water could not be carried to the lands of the complainants for purposes of irrigation:

Held (1) that under s. 13, cl. (*b*) of the Easements

Penal Code—contd.

Act the right of carrying water through the channel to their fields passed to the complainants on partition;

(2) that the loss caused to the complainants by the channel being filled up was wrongful loss and the accused must be presumed to have had the knowledge that their act in filling up the channel was likely to cause such wrongful loss to the complainants and that consequently they were guilty of an offence under s. 430 of the Penal Code. **M** KRISHNA AIER *v.* AYYAPPA NAICK, (1925) M. W. N. 45; 21 L. W. 641; (1925) A. I. R. (M.) 577; 26 Cr. L. J. 1100 **188**

——— **ss. 441, 448**—*Criminal trespass, what amounts to—Intention—Possession taken of empty house with intent to assert title—Offence.*

Intimidation, insult or annoyance within the meaning of s. 441 of the Penal Code can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as for instance, the actual owner, his wife, agent, licensee or other person. These results much more naturally follow when premises are occupied than when they are vacant. A person who takes possession of a house which is absolutely empty at the time and is not in the actual physical possession of anybody cannot be held to be guilty of an offence under s. 448 of the Penal Code.

A conviction under s. 448 of the Penal Code cannot follow merely because the Court can pronounce with certainty that the accused must have been known that his act would as one of its inevitable incidents cause annoyance. There must, in order to sustain a conviction under that section, be found an intent to cause intimidation, insult, or annoyance.

A person who takes possession of a house with the intention of asserting his title to the house and of gaining and holding possession of it as against a rival claimant, cannot be convicted of an offence under s. 448 of the Penal Code inasmuch as it cannot be said that his intention was to cause intimidation, insult or annoyance to the person in possession. **A** MOTILAL *v.* EMPEROR, 23 A. L. J. 679; L. R. 6 A. 132 Cr.; (1925) A. I. R. (A.) 540; 26 Cr. L. J. 1273 **1049**

——— **s. 448**—*Criminal trespass—Formal possession delivered in execution of decree—Actual possession remaining with accused—Offence.*

Where formal possession of a house is delivered to a decree-holder under a *dakhalnama*, the judgment-debtor remaining in actual physical possession of the house, the latter cannot be said to be guilty of an offence under s. 448 of the Penal Code. **A** KEWAL *v.* TUFAIL AHMAD, L. R. 6 A. 104 Cr.; (1925) A. I. R. (A.) 592; 26 Cr. L. J. 1125 **357**

——— **s. 448**—*U. P. Excise Act (IV of 1910), s. 53—Search carried out by Sub-Inspector without warrant—Reasons not recorded—Criminal trespass—Intention, proof of.*

An offence under s. 448 of the Penal Code requires an intention either to commit an offence or to intimidate or annoy the person in possession.

The mere fact that an Excise Sub-Inspector omits to record his reasons as required by s. 53 of the U. P. Excise Act for not first obtaining a search warrant from a Magistrate, does not render him guilty of an offence under s. 448 of the Penal Code if he proceeds to carry out the search. **O** SYED ALI ABBAS *v.* SUBBA SINGH, 2 O. W. N. 463; (1925) A. I. R. (O.) 505; 26 Cr. L J. 1205 **725**

——— **s. 463.** *See* CR. P. C., 1898, s. 195 **283**

Penal Code—contd.

——— **ss. 465, 471**—*Producing forged copies of entries in Revenue Records in support of complaint in pursuance of order of Court—Offence.*

Accused filed a complaint of trespass and was told to produce copies of the Revenue Records in support of his claim and knowingly he produced forged copies as genuine:

Held, that the accused had not been forced to produce the copies and that he was guilty of an offence under s. 471 of the Penal Code. **L** ISHAR DAS *v.* EMPEROR, (1925) A. I. R. (L.) 333; 6 L. 50; 26 Cr. L. J. 1171 **595**

——— **s. 466**—*Forgery—Railway clerk making entry in register at instance of superior officer acting bona fide—Offence.*

Certain goods were consigned to the complainant and on arrival of the goods at their destination the complainant was required by the Station Master to unload the goods within a certain period. After the complainant had unloaded the goods, accused, a goods clerk, entered the time of the unloading in the register. The Station Master subsequently discovered that in unloading the goods the complainant had blocked the line on which the wagon was standing and called upon the complainant to clear the line. After the line had been cleared the Station Master directed the accused to alter the time of the unloading of the goods from that previously entered in the register to that at which the line had been cleared:

Held, that under the circumstances, even if the Station Master's view as to the correct time when the goods had been unloaded was erroneous, the accused was not guilty of an offence under s. 466 of the Penal Code. **A** GULAB SINGH *v.* EMPEROR, L. R. 6 A. 148 Cr. 26 Cr. L. J. 1233 **849**

——— **s. 467**—Kabuliyat, *whether valuable security.*

A *kabuliyat* is a valuable security within the meaning of s. 467 of the Penal Code, because it creates a legal right, namely, the right of a tenant to hold the land, and it is also an acknowledgment by the tenant that he is legally bound to pay the rent and to hold the land in accordance with the conditions of the *kabuliyat.*

Semble.—A *kabuliyat* retains the character of a valuable security, within the meaning of s. 467 of the Penal Code, even after the expiry of the period for which it has been executed. **N** ISMAIL PANJU *v.* EMPRROR, 26 Cr. L. J. 1115; (1925) A. I. R. (N.) 337 **283**

——— **ss. 467, 471** — *Forgery — Use of forged document as genuine—Conviction of forger for use of document, legality of.*

A person, who, being the forger of a document, has used it as genuine, cannot be punished under s. 471 of the Penal Code for the use of the forged document as well as for the forgery. **N** DIGAMBAR *v.* EMPEROR, 26 Cr. L. J. 1275 **1051**

——— **s. 471.** *See* CR. P. C., 1898, s. 195 (1)(*c*) **283**

——— **s. 477 A**—*Partner falsifying accounts.*

When a partner of a firm has been appointed to manage its business and write its accounts and he falsifies its accounts, he is liable under s. 477-A of the Penal Code. **S** MAHOMED *v.* MAHAMED IDRIS, 26 Cr. L. J. 1101 **189**

Pensions Act (XXIII of 1871), s. 4—Kulkarni *commutation—Suit by co-sharer for his share of income—Certificate of Collector, whether necessary.*

Pensions Act—concld.

A suit for accounts of the income of *kulkarni* commutation of certain villages and of the revenue received from the *taluka* treasury is not maintainable without a certificate of the Collector inasmuch as it relates to a grant of money conferred by the British Government within the meaning of s 4 of the Pensions Act. **B** GIRJABAI SHIVDEORAO VINCHURKAR *v.* NARAYANARAO GANPATRAO VINCHURKAR, 26 Bom. L. R. 1165; (1925) A. I. R. (B.) 148 **975**

Pleadings and proof—*Suit to recover damages for breach of contract—Agent, authority of, denial of—Burden of proof—Appeal—Question of fact—Trial Court, conclusions of, value of.*

Plaintiff brought a suit to recover a certain sum by way of damages resulting from the re-sale of certain goods alleged to have been sold by the plaintiff to the defendant through a certain broker, delivery of which had been improperly refused by the defendant. Defendant denied that the broker had any authority from him to enter into the contract. The only evidence produced by the plaintiff in respect of his case was his own allegation that the broker had entered into the contract on behalf of the defendant, and had signed his Broker's Book on behalf of the defendant and that the transaction had been entered in the day book and Ledger of the plaintiff to the defendant's debit. The broker was examined as a defence witness and stated that he had no authority from the defendant to enter into the contract and that the defendant did not ratify the purchase of the goods. The defendant in his evidence also denied that he had ever given authority to the broker for entering into the contract. The suit was dismissed by the Trial Court but was decreed on appeal. On appeal to His Majesty in Council:

Held, that it was the duty of the plaintiff to prove the contract on the basis of which he sought to recover damages and that the proof of the contract necessitated proof of authority given to the broker, and that even if the evidence upon this point of the defendant and the broker were eliminated, there was still an utter absence of evidence of any authority on the part of the broker to enter into the contract on behalf of the defendant and that consequently plaintiff's suit was liable to be dismissed. **P. C.** PALANIAPPA CHETTIAR *v.* KATHIRESAN CHETTIAR (1925) A. I. R. (P. C.) 172; 22 L. W. 309 (P. C.) **351**

Police Act (V of 1861), s. 34—*Penal Code Act (XLV of 1860), s. 279—Charge under s. 34, Police Act—Conviction under s. 279, Penal Code, legality of.*

The accused was summoned and tried for a charge under s. 34, Police Act but the Magistrate held that the facts proved did not constitute an offence under s. 34 of the Police Act. The accused was, however, convicted of an offence under s. 279 of the Penal Code:

Held, that the finding that the accused was not guilty of an offence under s. 34 of the Police Act necessarily and logically meant that the accused could not be convicted of an offence under s. 279 of the Penal Code. **A** DHUM SINGH *v.* EMPEROR, 23 A. L. J. 436 Cr.; (1925) A. I. R. (A.) 448; L. R. 6 A. 143 Cr.; 26 Cr. L. J. 1057 **1**

Practice—*Criminal trial, whether accused bound to give explanation.*

If no *prima facie* case is made out against the accused, it is open to the accused to rely safely on the presumption of innocence or of the infirmity of the evidence for the prosecution. But when a *prima facie* case has been made out and the presumption of innocence is displaced, the force of suspicious circumstances is augmented if the accused attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain. **S** BAHADUR *v.* EMPEROR, 26 Cr. L. J. 1063; (1925) A. I. R. (S) 289 **7**

——— *Postponement of case—Party missing train, whether ground for postponement—Plea, rejection of—Evidence, failure to produce, effect of.*

The fact that a party to a suit has missed the train is no sufficient ground for postponement of a case. Parties must leave a safe margin in order to enable them to arrive in Court in time before their cases are called.

A Court is justified in rejecting a plea where the party putting forward the plea fails to produce evidence in support of it. **O** AMNA KHATUN *v.* MOHAMMAD WALI **481**

——— *Record, printing of—Registration endorsements, whether must be printed.*

It is always desirable to get registration endorsements translated and printed where they are necessary by way of evidence. **O** BIBI BATUL *v.* KEDAR NATH, 12 O. L. J. 372; (1925) A. I. R. (O.) 462 **810**

——— *Solicitor's lien in respect of costs—Charging order in favour of Solicitor—Money lying in Court—Attachment by creditor before charging order—Priority.*

A Solicitor who has obtained a charging order in respect of his costs as against certain money of his client which is lying in Court and which has been realised in execution of a decree by a creditor of his client, has a right to receive his costs out of the money so charged in priority to the attaching creditor, so long as the money has not actually been paid out to the creditor. It is immaterial that the attachment by the creditor was prior to the date of the charging order obtained by the Solicitor. **B** VED AND SOPHER *v.* R. P. WAGLE & Co., 27 Bom L. R. 556; (1925) A. I. R. (B.) 351; 49 B. 505 **81**

——— *Suit on promissory note—Original cause of action, whether can be relied on.*

In a suit based on a promissory note the plaintiff can be allowed to raise an issue proceeding upon the original cause of action in the alternative provided no prejudice would be caused to the defendant. **C** HARI MOHAN GHOSE *v.* SOURENDRA NATH MITTER, 41 C. L. J. 531 **1023**

——— *Trust property—Permanent lease—Non-payment of rent—Suit for recovery on ground of forfeiture—Appeal—Plea of invalidity of lease, whether can be raised.*

Where in a suit by a trustee to recover possession of trust property from a lessee on the ground of forfeiture owing to non-payment of rent the Trial Court finds against the forfeiture, it is not open to the plaintiff in appeal to rely upon the invalidity of the lease on account of its permanent character. Such a plea ought to be specifically put in issue, so as to enable the defendant to raise the appropriate pleas in defence. **M** LAKSHMINARAYANA IYER *v.* PACKIRI CHETTIAR **392**

Pre-emption—*Benami purchase by father in name of son—Relinquishment by son in favour of father, whether sale.*

Certain property was purchased by a father at an auction in the name of his son. Subsequently the son

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mortgaged the property to the father and finally executed a deed of relinquishment in favour of the father. Plaintiff brought a suit for pre-emption in respect of the last transaction on the allegation that the deed of relinquishment was executed in reality to mask a sale-deed:

Held, that the transaction was only a device to put the parties in the position which they really held towards the property and that the property having been purchased originally by the father, no right of pre-emption arose. **O** MAHARAJAH BAKSH *v.* RAZA HUSSAIN **33**

——— *Custom*—Wajib-ul-arz, *entries in, construction of—Custom, proof of.*

The *wajib-ul-arz* of a village prepared in 1820 allowed a right of pre-emption in the first instance to the co-sharers of the village. The *wajib-ul-arz* prepared in 1862 gave a right of pre-emption to near co-sharers and in case of their refusal to the other co-sharers of the village. The *wajib-ul-arz* prepared in 1890 laid down that the right of pre-emption shall belong in the first instance to a co-sharer who was a near relation, after him to a co-sharer who was a more distant relation, and after the latter to a co-sharer in the *patti* and in case of his refusal to the co-sharers of other *pattis*:

Held, (1) that the entries afforded evidence of the existence of a custom of pre-emption in the village;

(2) that a co-sharer in the *patti* in which the land sold was situate was entitled to preference over a vendee who though a blood relation to the vendor was a co-sharer in another *patti*. **A** JAGAT NARAIN DUBE *v.* NAGESHAR PRASAD TIWARI, L. R. 6 A. 296 Civ.; (1925) A. I. R. (A.) 663 **133**

——— *Custom*—Wajib-ul-arz, *entry in, construction of—Partition of village into* mahals, *effect of—Sir rights, relinquishment of, whether liable to pre-emption.*

A *wajib-ul-arz* of a village conferred the right of pre-emption first on own brothers, next on near brothers and finally on co-sharers in the *patti* or the village. At the time when the *wajib-ul-arz* was prepared the village was undivided but it was subsequently divided into several *mahals*. Certain property in *mahal* S was sold to the defendant who was a co-sharer in *mahal* Q. Plaintiff who was a co-sharer in *mahal* S brought a suit to pre-empt the sale:

Held, (1) that for the purposes of pre-emption the *wajib-ul-arz* placed co-sharers in the *patti* and co-sharers in the village upon the same footing, inasmuch as such co-sharers were united by bonds of common interest and common liability;

(2) that the provisions of the *wajib-ul-arz* must be interpreted in the light of the existing circumstances and that the bonds of common interest and common liability having been severed by the partition of the village into *mahals*, the defendant whose property was situated in *mahal* Q had no community of interest or liability with any of the co-sharers in *mahal*;

(3) that under the circumstances the defendant must for purposes of pre-emption be treated as a stranger to the co-sharers in *mahal* S in which the property sold was situated and that consequently the plaintiff's suit must be decreed.

The relinquishment of *sir* rights cannot form the subject of pre-emption. **A** SAGAR SINGH *v.* SIRI RAM, 23 A. L. J. 447; L. R. 6 A. 336 Civ.; (1925) A. I. R. (A.) 491 **136**

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——— *Suit by minor—Consent of next friend to sale before institution of suit, effect of.*

The consent given to a sale by the paternal uncle of a Muhammadan minor who is entitled to pre-empt the sale, does not deprive the minor of his right to enforce pre-emption. It is immaterial that the suit to enforce the right on behalf of the minor is brought by the uncle who had consented to the sale. **A** AMIR HAIDER *v.* ALI AHMAD, 23 A. L. J. 404; L. R. 6 A. 357 Civ.; (1925) A. I. R. (A.) 424; 47 A. 635 **234**

Presidency Towns Insolvency Act (III of 1909), s. 36 (4), (5)—*Examination for discovery of insolvent's property, when to be directed—Dispute as to title—Procedure.*

Clauses (4) and (5) of s. 36 of the Presidency Towns Insolvency Act are intended to provide a summary procedure for ordering payment of debts due to the insolvent and delivery of property where there is no dispute. The procedure provided under these clauses, however, is inappropriate in a case where the person against whom the order is sought to be made claims to hold the property under a conveyance from the insolvent and sets up the validity of the conveyance in his own favour. **B** *In re* MOHAMED ESMAIL FAZLA, 27 Bom. L. R. 551; (1925) A. I. R. (B.) 329 **77**

Principal and agent—*Agent acting as principal towards third parties and seeking to make undisclosed profit—Indemnity, right to—Principal, liability of.*

Plaintiffs were a firm of merchants carrying on business at Madras as exporters of groundnuts and other country produce. Defendants were merchants in London who were intermediaries for the placing of the plaintiffs' merchandize at European Continental ports especially Marseilles. In answer to a telegram from the defendants in October 1916 plaintiffs agreed to despatch three hundred tons of groundnut kernels of a particular brand at a particular price on the usual terms. The letter of acceptance stated that commission would be paid as arranged. Defendants sold the goods on their own account to one *G* of Marseilles through a firm *S*. Plaintiffs took up space on a certain vessel for the despatch of the goods but the Government requisitioned the vessel for war purposes and the plaintiffs did not succeed in procuring any other tonnage and failed eventually to despatch the goods. *G* took proceedings before the Tribunal of Commerce at Marseilles to recover damages from *S* for non-delivery of the goods. Plaintiffs were informed of these proceedings by the defendants in general terms only and supposed that the proceedings were either against themselves or against the defendants as their agents and believing that they had a good defence under French Law, namely, that they had been prevented from fulfilling their contract by *force majeure* gave instructions for this defence to be raised; and when it failed before the tribunal of first instance they furnished papers and documents for the appeal which the defendants had already started. The defence failed in the Appellate Court also and the plaintiffs were required by the defendants to pay the amount which *G* had recovered from *S* and for which the defendants were liable. When the plaintiffs discovered that in effecting the sale of the groundnuts to *G* through *S* the defendants had acted as principals and had sought to make a profit for themselves over and above the commission which they were entitled to get from the plaintiffs,

the plaintiffs repudiated all liability in respect of the transaction:

Held, (1) that the relationship between the plaintiffs and defendants and the terms of the particular contract between them justified the conclusion that the defendants were the agents of the plaintiffs;

(2) that, therefore, when the defendants sought to make an undisclosed profit on the transaction, they became disentitled to claim any indemnity as agents from the plaintiffs, nor could they claim as a link in the chain of buyers and sellers in respect of damages recovered by the ultimate buyer, because there was no contract of sale between the plaintiffs and themselves;

(3) that the conduct of the plaintiffs in helping the defendants to put forward the defence of *force majeure* in the French Courts did not amount to ratification of the defendants' action and the plaintiffs were not consequently liable for the amount which *G* had recovered from *S* and for the payment of which defendants had become liable to *S*. **P C** HOPE PRUDHOMME AND COMPANY *v.* HAMEL AND HORLEY, (1925) A. I. R. (P. C.) 161; L. R. 6 A. (P. C.) 129 (P. C.) **307**

——— *Agreement, construction of—Agent allowed share of profits, effect of—Sea Customs Act (VIII of 1878), s. 20—Goods belonging to Government—Duty, whether payable.*

Under an agreement between the parties the defendant agreed to work the plaintiff's Railway, the ultimate control and supervision of the Railway being vested in the plaintiff. Capital money required for purposes of the undertaking was at his option to be provided by the plaintiff and all moneys received by the defendant in working the undertaking were to be paid to the plaintiff. The plaintiff's sanction was required for all the expenditure and all money required by the defendant for the purposes of the undertaking was to be supplied by the plaintiff. Out of the surplus profits arising from excess of receipts over payments 19/20ths were to belong to the plaintiff and the remaining 1/20th to the defendant. Out of moneys supplied by the plaintiff certain stores were purchased by the defendant Company and imported into India for the use of the undertaking:

Held, that the defendant Company acted merely as the agents of the plaintiff and that the stores at the time of their importation belonged to the plaintiff and not to the defendant Company. **P C** SECRETARY OF STATE FOR INDIA *v.* GREAT INDIAN PENINSULA RAILWAY, (1925) A. I. R. (P. C.) 103; 48 M. L. J. 539; (1925) M. W. N. 358; 2 O. W. N. 379; 27 Bom. L. R. 810; 49 B. 320 (P. C.); 30 C. W. N. 76 **107**

——— *Forward contracts—Purchase made by agent contrary to instructions of principal—Principal, liability of—Liability of principal to deposit margin—Amount of margin to be determined by agent—Discretion, exercise of—Wrongful closing of contracts by agent—Loss on one contract, whether can be set-off against profit on other contracts—Appeal—Consent, whether can be withdrawn—Interest pendente lite—Discretion of Court.*

Plaintiffs, who were general merchants, used to make forward contracts for the sale and purchase of cotton through the defendants, who were cotton brokers and merchants at Liverpool with a branch office at Bombay. In respect of each contract the plaintiffs' used to sign an agreement whereby they bound themselves to deposit a certain sum of money as a margin with the defendants in respect of the contract and further agreed to maintain such deposit and to deposit such further sum of money as the defendants may from time to time require as further margin to meet any difference in price, the amount of such further margin being in the absolute discretion of the defendants. If such further deposit was not made the defendants were authorized to close out all the contracts of the plaintiffs without any notice to the plaintiffs and notwithstanding any objections or instructions from the plaintiffs to the contrary. On 27th November 1916 defendants had open on the plaintiffs' account two contracts in future one for the sale of one hundred bales of cotton on the New York exchange and the other for the purchase of two hundred bales of cotton in Liverpool. On 27th November plaintiffs instructed defendants by wire to purchase four hundred bales of cotton. On receipt of defendants' reply, however, the plaintiffs on 29th November countermanded their wire of the 27th November and instructed the defendants to wait to execute the order and to wire opinion. Notwithstanding the receipt of these instructions the defendants made the purchase directed by the plaintiffs' wire of the 27th and notified the plaintiffs of the fact. The plaintiffs at once repudiated liability in respect of the contracts. Shortly afterwards defendants demanded from the plaintiffs a further margin of five thousand rupees on the basis of the New York and Liverpool contracts and also of the four hundred bales subsequently purchased. The plaintiffs refused to comply with this demand stating that they were not responsible for the last mentioned contract and that there was a sufficient margin for the previous contracts. The defendants thereupon closed out all the contracts of the plaintiffs. The plaintiffs brought this suit to recover a certain sum of money made up of the balance in favour of the plaintiffs in the hands of the defendants on the date on which the contracts were closed out, and damages calculated on the basis of the difference between the contract price and the market price of the one hundred bales to be sold on New York exchange which was alleged by the plaintiffs to have been wrongly closed by the defendants and interest:

Held, (1) that the defendants having purchased the four hundred bales of cotton notwithstanding the instructions of the plaintiffs to the contrary, the plaintiffs were not responsible for the purchase and that no margin could, therefore, be demanded by the defendants, in respect of that contract;

(2) that admittedly the sum in the hands of the defendants being sufficient margin in respect of the New York and Liverpool contracts, the defendants were not justified in demanding further cover from the plaintiffs on the basis that the latter were liable in respect of the purchase of four hundred bales of cotton;

(3) that although it was within the absolute discretion of the defendants to demand any further margin the discretion was nonetheless to be exercised with reference to the true position and with even a greater sense of responsibility in that it was within limits final;

(4) that there being no exercise of discretion at all by the defendants, the demand for further cover was not properly made and the subsequent closing by the defendants of the two open contracts on New York and Liverpool could not be justified;

(5) that the New York and Liverpool contracts which were effected in different markets for different quantities of cotton with different delivery dates on

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separate instructions and evidenced by separate memoranda were in law for all purposes distinct one from the other and that the liabilities of the defendants to the plaintiffs in respect of each were separate; (6) that the closing of the New York contract having resulted in loss to the plaintiffs the latter were entitled to recover the amount of that loss from the defendants and that the defendants could not claim any credit in respect of any benefit which might as the result of the defendant's wrongful act have accrued to the plaintiffs in connection with the Liverpool contract.

Interest *pendente lite* is in the discretion of the trial Court and an Appellate Court will not interfere with the exercise of that discretion merely on the basis of conjecture.

It is only in special circumstances that a consent which has formed the foundation of the judgment appealed from can be treated as open to withdrawal in the Appellate Court. **P C** DIWAN CHAND KIRPA RAM AND COMPANY *v.* WELD AND COMPANY, (1925) A. I. R (P. C.) 150; (1925) M. W. N. 459 (P. C.) **54**

——— *Money paid to agent—Proof that money reached principal, whether necessary.*

Where a debt is contracted on behalf of a *pardanashin* lady by her general agent authorized to do so, the creditor is not required to prove that the consideration reached the lady, unless there is a reservation to that effect in the power-of-attorney executed by the lady in favour of the general agent. **O** BIBI BATUL *v.* KEDAR NATH, 12 O. L. J. 372; (1925) A. I. R. (O.) 462 **810**

Private defence. *See* PENAL CODE, 1860, ss. 96 TO 106.

Privy Council, *Appeal to—Practice — Concurrent findings of fact—Madras Estates Land Act (I of 1908)—Private land of* zemindar, *whether question of fact.*

It is the practice of the Privy Council not to interfere with concurrent findings of fact of the Courts in India.

The question whether certain land is "private land" of the *zemindar* within the meaning of the Madras Estates Land Act, is one of fact and the Privy Council will not disturb the concurrent findings of fact arrived at by the lower Courts with regard to such a question. **P C** YARLAGADDA MALLIKARJUNA PRASADA NAIDU BAHADUR *v.* RENDU CHINTALA SUBBAYYA, (1925) A. I. R. (P. C.) 174 (P. C.) **196**

———, *Powers of—Competency to examine findings of fact, concurrent—Practice.*

If in an appeal to His Majesty in Council it appears that underlying findings of fact there are questions of law on which the findings proceeded or that there is a case that the Judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal to the Privy Council does not apply to the examination of such grounds of law. **P C** TILAKDHARI SINGH *v.* KESHO PRASAD SINGH, 48 M. L. J. 611; 6 P. L. T. 349; (1925) A. I. R. (P. C.) 122; 2 O. W. N. 403; 41 C. L. J. 386; 3 Pat. L. R. 114 Civ.; L. R. 6 A. (P. C.) 109; 27 Bom. L. R. 819; (1925) M. W. N. 403 (P. C.) **103**

———, *Powers of, whether a Court of criminal appeal—Interference in criminal matters.*

The Privy Council is not a Court of Criminal Appeal. Where there has been evidence before the Court of Appeal and the Court of Appeal has come to a conclusion upon that evidence, their Lordships

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will not disturb that conclusion. They will only interfere in cases where there has been a gross miscarriage of justice and gross abuse of the forms of legal process. **P C** BEGU *v.* EMPEROR, 48 M. L. J. 643; 2 O. W. N. 447; 41 C. L. J. 437; 27 Bom. L. R. 707; 3 Pat. L. R. 95 Cr.; (1925) A. I. R. (P. C.) 130; 6 L. 226; 23 A. L. J. 636; (1925) M. W. N. 418; 26 Cr. L. J. 1059 (P. C.) **3**

——— *Practice—Interpretation of Orders in Council—Procedure.*

Generally speaking it is no part of the functions of their Lordships of the Privy Council to interpret Orders in Council which have been already made unless they are brought before them in the ordinary way upon appeal. **P C** *In re* PRAGDAS BUDSHEN, (1925) A. I. R. (P. C.) 111 **174**

Probate and Administration Act (V of 1881), s. 50—*Letters of Administration, revocation of—Misrepresentation of date of death of deceased in application for grant, effect of—Discretion of Court.*

The power given to the Court by s. 50 of the Probate and Administration Act to revoke a grant of the Letters of Administration is a discretionary one.

The fact that an application for grant of Letters of Administration misrepresented the date of the death of the deceased is not sufficient to entitle the Court to revoke Letters of Administration which have already been granted. **R** MANNA ABU BUCKER *v.* BEE BEE, 4 Bur. L. J. 73; (1925) A. I. R. (R.) 236 **614**

——— **s. 50**—*Letters of Administration—Revocation, application for—Applicant not qualified—Appeal—Objection, whether can be taken.*

Where a grant of Letters of Administration is revoked by the Court on the application of a person who is not qualified to make an application for revocation, the respondent having taken no objection to the maintainability of the application, the order revoking the grant cannot be disturbed in appeal unless and until it is shown that on the merits it is wrong. The objection that the applicant was not qualified to make an application for revocation cannot be urged for the first time in appeal. **L** BULAKI MAL *v.* SHAMBU NATH, 6 L. 180; (1925) A. I. R. (L.) 428 **896**

——— **s. 61.** *See* SUCCESSION CERTIFICATE ACT, 1889, s. 25 **612**

Procedure—*Decree set aside—Original proceedings, whether can be revived.*

Where a final order in a litigation is set aside the proper procedure is to restore the original proceedings.

Plaintiff obtained a decree for sale of certain properties on the basis of a mortgage against the defendants. The defendants subsequently instituted a suit for a declaration, that the decree was not binding on them for the reason that they were minors at the time when the original suit was brought and were not properly represented in that suit. The declaration was granted and the plaintiff subsequently made an application to the Court which had passed the decree in the mortgage suit that the mortgage suit be restored to its original number and re-tried as against the defendants. This application was granted and the defendants went up in revision:

Held, that the order complained of was a proper order under the circumstances of the case and should not be set aside. **O** ZUHARA BEGAM *v.* MASHUQ FATIMA **175**

Promissory note, *suit on—Oral agreement that amount shall not be payable till certain accounts have been gone into—Evidence, whether admissible—Evidence Act (I of 1872), s. 92.*

Plaintiff sued defendants on a promissory note. Defendants admitted execution of the note but pleaded that under an oral agreement which was subsequently embodied in a written instrument, the amount of the pro-note was not payable until the accounts of a certain partnership, for the business of which plaintiff had provided the money, had been settled. The Trial Court held that the written instrument which was signed some days after the promissory note had been executed, could not have retrospective effect and that defendants could not be allowed to prove that the amount was given for a partnership account as laid down in the written instrument:

Held, that the finding was not sufficient to exclude evidence to prove the oral agreement alleged by the defendants which had been entered into prior to the written instrument, subject, however, to the admissibility of such evidence having regard to the provisions of s. 92 of the Evidence Act. **R** L. B. LALHIA *v.* B. M. BHARADWAJA, 4 Bur. L. J. 38; (1925) A. I. R. (R.) 256 **336**

Proof of documents—Mortgage. *See* MORTGAGE **158**

——— *Newspaper, contents of, admissibility of.*

A mere production of a newspaper is no proof of the truth of its contents. A statement contained in a newspaper unless specifically proved as having been made by a particular person can only be treated as an anonymous statement and merely hearsay and consequently inadmissible in evidence. **L** SARUP SINGH *v.* EMPEROR, (1925) A. I. R. (L.) 299; 1 L. C. 538; 26 Cr. L. J. 1078 **22**

Provincial Insolvency Act (III of 1907), s. 36—*Transfer by transferee of insolvent, whether can be cancelled.*

Section 36 of the Provincial Insolvency Act of 1907 gives no power to the Court to cancel a transfer made by a transfer of the insolvent. **L** SUDHA *v.* FIRM NANAK-CHAND DAULATRAM, (1925) A. I. R. (L.) 295; 2 L. C. 162 **89**

Provincial Insolvency Act (V of 1920), s. 6—*Act of insolvency—Purchasing goods from one creditor and paying off others—Ceasing to prosecute business with vigour, whether act of insolvency.*

The facts that a retail seller of goods has been purchasing goods from one creditor and has been selling them in retail and using the sale-proceeds to pay off the other creditors and that he has not been keeping up his accounts for some time past and has ceased to carry on his business with vigour do not constitute an act of insolvency within the meaning of s. 6 of the Provincial Insolvency Act. **A** DURGA RAM *v.* HAR KISHEN DASS, 23 A. L. J. 536; L. R. 6 A. 415 Civ.; (1925) A. I. R. (A.) 564 **440**

——— **s. 17**—*Death of insolvent, effect of—Vesting of property in Receiver, whether affected—Heirs of insolvent, rights of.*

Under s. 17 of the Provincial Insolvency Act the death of a debtor does not interrupt the insolvency proceedings so far as may be necessary for the realisation and distribution of the property of the debtor. Consequently the vesting of the property of the insolvent in the Receiver on the making of an order of adjudication holds good even after the death of the insolvent and the latter's heirs have no remedy against the Receiver other than they would have had against the insolvent himself. In other words they

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are, if so advised, at liberty to bring a suit to show that the insolvent's debts were tainted with immorality or were otherwise not binding upon them. But in other respects the death of the insolvent does not affect the insolvency proceedings. **L** GOKAL SINGH *v.* SHIV RAM, (1925) A. I. R. (L.) 366; 1 L. C. 550 **558**

——— **ss. 28, 78**—*Insolvency—Secured creditor—Leave to sue and execute—Leave not availed of—Annulment of adjudication—Execution of decree—Limitation—Period between adjudication and annulment, whether can be deducted.*

Where permission is given to a secured creditor under s. 28 (2) of the Provincial Insolvency Act to sue and execute but the permission is subject to conditions which make it impossible for the creditor to execute the decree obtained by him, the permission is ineffectual to exclude the unfettered operation of s. 48 of the Act and the creditor is entitled under the provisions of that section to deduct from the period of limitation allowed for the execution of the decree the period between the adjudication and the annulment. **A** MULCHAND *v.* RAJADHAR, (1925) A. I. R. (A.) 735; 23 A. L. J 975; L. R. 6 A. 585 Civ. **544**

——— **s. 28 (2), (6)**—"Creditor", meaning of—"Realise", meaning of. *See* PROVINCIAL INSOLVANCY ACT, s. 53 **934**

——— **s. 28 (3)**—*Insolvency—Bond executed in favour of insolvent's son—Son, whether can sue on bond—Insolvent, whether can be guardian* ad litem *of minor—Suit on bond—Consideration, admission of—Re-payment—Burden of proof—Muhammadan Law—Jointness, presumption.*

There is no presumption of jointness in estate between a Muhammadan son and his father.

There is no law that an insolvent cannot be the guardian *ad litem* of an infant.

Where a bond is executed in favour of a minor and there is no evidence to show from whom the consideration of the bond proceeded, nor as to whether the minor had any money of his own or not, it cannot be said that the minor is not the owner of the bond and is not entitled to sue on it.

Where there is no evidence to show that a bond executed in favour of the minor son of an insolvent was in existence on the date of the order of adjudication passed against the father, there can be no presumption as to the father being the reputed owner of the bond under s. 28 (3) of the Provincial Insolvency Act, so as to disentitle the son from suing on the bond. Even where the property in such a bond is held to have vested in the insolvent the son would be entitled to maintain a suit on the bond so long as the Official Assignee or Receiver did not interfere.

Where in answer to a suit on a bond the consideration of the bond is admitted and re-payments are alleged the burden lies on the defendant to prove the re-payments. **N** MANIK RAO *v.* NURHASSAN, (1925) A. I. R. (N.) 376 **254**

——— **s. 29**—Insolvency Court, power of, to stay proceedings pending against insolvent. *See* PROVINCIAL INSOLVANCY ACT, s. 53 **934**

——— **ss. 41, 43**—*Discharge, application for, when to be made—Period originally fixed by Court, whether can be enlarged.*

The provisions of s. 43 of the Provincial Insolvency Act are mandatory and there is no discretion in the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge.

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Under s. 41 of the Provincial Insolvency Act a debtor has a complete discretion to apply when he likes for his discharge provided that he applies within the period specified by the Court. The word "shall" in this section imposes a duty upon the insolvent the breach of which involves the consequences pointed out in s. 43 of the Act. **Pat** *In re* RAMA KRISHNA MISRA, (1925) A. I. R. (Pat.) 355; 4 Pat. 51; 9 P. L. T. 776 **70**

——— **s. 53**—*Voluntary transfer—Application to avoid transfer—Period of two years, computation of, from date of adjudication or date of petition.*

A person is adjudged insolvent within the meaning of s. 53 of the Provincial Insolvency Act on the day on which the order of adjudication is made, though the effect of the order on the insolvent's property relates back under s. 28 (7) of the Act to an earlier date. Therefore, the point of time from which the two years mentioned in s. 53 are to be calculated, is the date when the transferor is adjudged insolvent and not the date of the presentation of the petition for insolvency. **B** NAGINDAS DAHYABHAI *v.* GORDHANDAS DAHYABHAI, 27 Bom. L. R. 967; (1925) A. I. R. (B.) 480; 49 B. 730 **941**

——— **ss. 53, 2 (a), 4, 21, 28**—*"Creditor" in s. 28 (a), meaning of—"Realise" in s. 28 (6), meaning of—Insolvency Court, power of, to stay proceedings pending against insolvent—Mortgage suit, whether affected by order of adjudication—Application under s. 53 to avoid transfer, whether ousts jurisdiction of Civil Court to proceed with mortgage suit—Jurisdiction.*

There is no provision in the Provincial Insolvency Act empowering an insolvency Court to stay proceedings pending against an insolvent before that Court or in another Court subject to the superintendence of that Court. Section 29 of the Act, however, gives power to the Court before which a suit or other proceeding is pending against a debtor to stay the proceeding or to continue it on such terms as the Court may impose on proof that an order of adjudication has been made against the debtor.

The word "creditor" in cl. (2) of s. 28 of the Provincial Insolvency Act means only a creditor as defined in s. 2 *(a)* of the Act and does not include a secured creditor.

The word "realise" in cl. (6) of s. 28 of the Provincial Insolvency Act must be understood in the ordinary sense of a secured creditor realising his security by suit.

The right of a secured creditor either to commence a suit on his mortgage or to proceed with such suit and after he has obtained a decree to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency petition, or by the adjudication of the mortgagor as an insolvent.

An Insolvency Court is the proper Court for considering whether a transaction is bad under s. 53 of the Provincial Insolvency Act. An ordinary Civil Court would have power to declare a mortgage void under s. 53 of the Transfer of Property Act, but it cannot make such a declaration under s. 53 of the Provincial Insolvency Act.

It does not follow that because a transaction is void under s. 53 of the Provincial Insolvency Act, therefore, the mortgagee has no remedy against the mortgagor. The transaction under s. 53 is only voidable and not void, and until it is set aside it is good against the mortgagor. It is only in the interests of the general body of creditors that a transaction which is good against the mortgagor is

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set aside under s. 53 of the Provincial Insolvency Act. The jurisdiction to set aside a transaction which is good against the mortgagor but not good against the general body of creditors is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of a Civil Court to proceed with the mortgagee's suit to decree.

A mortgage which is voidable under s. 53 of the Provincial Insolvency Act is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent.

No Court has power to sell the property of an insolvent if it is vested in the Official Receiver except the Official Receiver himself.

The Official Receiver's right to proceed under s. 53 is not taken away either by the institution of a suit by the mortgagee or the passing of a decree in his favour or even by his realising the amount due to him by the sale of the property, for the Official Receiver could apply to the Insolvency Court for a declaration that the transaction is void and if he succeeds, the property of the insolvent would vest in him before sale in execution of the mortgage-decree. If the property is sold to a *bona fide* purchaser for value, before the Insolvency Court passes an order under s. 53, the Official Receiver would be entitled to proceed against the amount realised by the mortgagee in execution of his mortgage-decree.

Under s. 4 of the Provincial Insolvency Act, the Court is given wide powers to try all questions which it may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. Though the Insolvency Court has such wide powers, neither s. 4 nor any other section of the Insolvency Act takes away the jurisdiction of the ordinary Civil Court to try a suit instituted by a mortgagee against the insolvent. The scheme of the Act is to exempt the secured creditors from its operation unless they choose to come in under s. 47. This does not mean that a mortgage cannot be set aside as being void under s. 53. Similarly, the jurisdiction given to an Insolvency Court under ss. 53 and 54 cannot take away the jurisdiction of the ordinary Civil Court to entertain a suit at the instance of a mortgagee, or proceed with such a suit already instituted by reason of the pendency of the insolvency proceedings.

Per *Wallace, J.*—Where the secured creditor of an insolvent brings a suit against the insolvent to realise his security and the Official Receiver is made a party to that suit as representing the insolvent he does not carry into that representation his character as representative of the creditors. The decree in the mortgage suit, if in favour of the mortgagee, will still be enforceable except so far as the proceedings under s. 53 have debarred him from recovering the whole of the proceeds for himself, and if, for example, in the proceedings under s. 53 the Court finds the alienation good to any extent, and upholds it to that extent, or rather does not challenge the mortgage right to that extent, then the mortgagee will become a creditor of the insolvent estate on the foot of his mortgagee to that extent. If the mortgagee's suit is dismissed, then the property vests in the Official Receiver who is on record in his suit as representative of the mortgagor. Similarly, if the proceedings under s. 53 are dismissed, the mortgage suit is unaffected; if they are upheld, the mortgagee's rights against his mortgagor are subject to the result of the order

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against him under s. 53. The two Courts are in fact deciding different questions in relation to different parties and there is, therefore, no question of concurrent or conflicting jurisdiction on the same point. **M** OFFICIAL RECEIVER COIMBATORE *v.* PALNISWAMI CHETTY, 49 M. L. J. 203; (1925) M. W. N. 672; (1925) A. I. R. (M.) 1051; 48 M. 750 **934**

——— **s. 75 (2)**—*Attachment of crops at instance of creditor—Order releasing crops—Appeal—Creditor, whether person aggrieved by order.*

Certain crops were attached by a Receiver in insolvency at the instance of a creditor of the estate of the insolvent. The crops were claimed by the respondent and the District Judge decided on evidence that they were sown by the respondent and belonged to him and he directed that the crops should be released. On appeal by the creditor:

Held, that the creditor was a person aggrieved by the decision of the District Judge within the meaning of s. 75 of the Provincial Insolvency Act and was entitled to maintain the appeal. **A** NIADAR *v.* RAMJI LAL, 23 A. L. J. 503; (1925) A. I. R. (A.) 549; L. R. 6 A. 463 Civ. **944**

Provincial Small Cause Courts Act (IX of 1887),

s. 17—Ex parte *decree, application to set aside—Full security given—Amount of decree stated incorrectly, effect of—Cash security, deposit of, effect of.*

An *ex parte* decree was passed by a Small Cause Court against the defendant, the total amount of which was Rs. 540. Defendant applied under s. 17 of the Small Cause Courts Act to set aside the *ex parte* decree and at the time of presenting his application filed a bond by which he hypothecated a house which he asserted was worth Rs. 4,000 as security for the performance of the decree, but in his application he mentioned the decretal amount as Rs. 530 instead of Rs. 540. The Court made an order that the security should be verified but before steps were taken by the Court to verify it, the defendant paid in cash into Court the full decretal amount as security:

Held, that the defendant had complied with the provisions of s. 17 of the Provincial Small Cause Courts Act inasmuch as he gave full security for the decretal amount and the mere fact that he made a mistake in stating in his application that the amount of the decree was Rs. 530 instead Rs. 540 did not affect the fact that he had given security for more than what was due, and that by subsequently depositing the amount in Court, he merely saved the Court the trouble of further verification. **A** AZMATULLAH KHAN *v.* AHMAD ALI, 23 A. L. J. 435; L. R. 6 A. 343 Civ.; (1925) A. I. R. (A.) 379; 47 A. 728 **581**

——— **s. 35**—*Civil Procedure Code (Act V of 1908), s. 24—Transfer of Small Cause Court Judge—Successor not empowered to try suits of certain value—Suit transferred to Court of Subordinate Judge—Procedure—Subordinate Judge, whether empowered to try suit as Small Cause Court.*

A suit instituted in a Small Cause Court was dismissed after trial but the dismissal was set aside in revision and the suit was remanded to the Small Cause Court for fresh trial. In the meantime the Judge of the Small Cause Court who had tried the suit originally had been transferred and his successor was not empowered to try suits of the value of this particular suit. The District Judge thereupon transferred this suit to the Court of a Subordinate Judge who tried it as a Small Cause Court and eventually dismissed it. On revision:

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Held, that after remand from the High Court the suit was a suit in a Small Cause Court and had been withdrawn from that Court by the District Judge under s. 24 (1) (*b*) of the C. P. C., and, consequently, the Court to which it was transferred was by virtue of cl. (4) of s. 24 invested with Small Cause Court powers with regard to that suit.

Under the Provincial Small Cause Courts Act a Small Cause Court is established first and the Judge of that Court is appointed afterwards. The Court, therefore, does not cease to exist if, at any time, there is no Judge to preside over it, and suits can be instituted in the Court even if there be no Judge appointed for the time being and suits so instituted would remain in the Small Cause Court until they are withdrawn from it. **L** JOGI PERSHAD *v.* AMIR BAKSH, (1925) A. I. R. (L.) 561 **139**

——— **s. 35**—*Civil Procedure Code (Act V of 1908), s. 99—Suit instituted in and evidence recorded by Small Cause Court—Decision by Court not having powers of Small Cause Court—Appeal, whether lies—Evidence, failure to record in full—Irregularity.*

A suit was originally instituted in a Small Cause Court and the evidence was recorded by that Court. The Presiding Officer of the Court ceased to have jurisdiction over the case and it was taken up by his successor who had no Small Cause Court powers and was tried as an ordinary suit:

Held, (1) that the omission of the officer who decided the suit to record the evidence over again as in a regular suit was an irregularity to which s. 99 of the C. P. C. applied and which could not be made a ground for setting aside the decree unless it had affected the decision on the merits;

(2) that in view of the provisions of s. 35 of the Provincial Small Cause Courts Act the decision in the suit must be treated as one given in a regular suit and was open to appeal. **A** FAQIR ULLAH *v.* HIKMAT ULLAH, 23 A. L. J. 527; (1925) A. I. R. 569; L. R. 6 A. 478 Civ. **661**

——— **Sch. II, Art. 8**—*Contract to extract* lakh *from trees, money payable under, whether rent—Suit to recover money under such contract, whether cognizable by Small Cause Court.*

A contract for the extraction of *lakh* from trees is of the nature of a license and is not a lease. No interest whatever in the trees passes under such a contract, nor even the right to temporary possession of the trees. The contract is strictly limited to the particular purpose for which it is given. A suit to recover money payable under such a contract is not, therefore, a suit to recover rent within the meaning of Art. 8 of Sch. II to the Provincial Small Cause Courts Act and is not excluded from the cognizance of a Small Cause Court. **O** IDOO *v.* NEHAL KHAN, 2 O. W. N. 319; 12 O. L. J. 328; (1925) A. I. R. (O.) 456 **1010**

——— **Sch. II, Art. 13**—*Suit to recover share in allowance for* kulkarni watan, *nature of—Suit of Small Cause nature.*

A suit by the plaintiff to recover from the defendants his share of an allowance received by the latter from the Government in respect of the commutation of a *kulkarni watan* is a suit for the recovery of money had and received by the defendants for the plaintiff's use and does not fall within the purview of Art. 113 of Sch. II to the Provincial Small Cause Courts Act. Such a suit is, therefore, a suit of the nature of a

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Small Cause. **B** GOVIND VASUDEO KULKARNI *v.* NARAYAN BALWANT KULKARNI, 27 Bom. L. R. 627; (1925) A. I. R. (B.) 439 **668**

——— **Sch. II, Art. 31**—*Civil Procedure Code (Act V of 1908), s. 102—Suit to recover damages for wrongful act done in respect of immoveable property, nature of—Small Cause—Appeal, second, whether lies.*

A suit to recover the value of the loss caused to the plaintiff by the wrongful act of the defendant in respect of immoveable property is not a suit for the profits of immoveable property within the meaning of Art. 31 of Sch. II to the Provincial Small Cause Courts Act. The value claimed by the plaintiff may be more or less than the profits received by the defendant from the immoveable property and it need not necessarily have any relation at all to those profits. The fact that it happens to be the same does not make the suit one for profits. In such a case the defendant may produce his accounts as evidence of the amount of the profits he had received but that is entirely at his option. He may, if he chooses, withhold that evidence and allow the inference to be drawn that if it were put forward it would go against him. Such a suit cannot be called a suit for an account within the meaning of Art. 31 and is, therefore, a suit of a small cause nature and if the value of the suit is less than Rs. 500 no second appeal is competent.

In order to bring a suit within the purview of Art. 31 of Sch. II to the Provincial Small Cause Courts Act, the plaintiff must demand an account and the defendant must be bound to render it if the suit succeeds. **N** PAGA PATIL *v.* ISHWARDAS, 21 N. L. R 18; (1925) A. I. R. (N.) 327 **876**

——— **Sch. II, Arts. 35 (ii), 43 (a)**—*Suit to recover value of property made over to defendant, whether cognizable by Small Cause Court.*

A suit to recover the value of property made over to the defendant which the latter has failed to return is not excluded from the cognizance of a Small Cause Court, especially where there is no allegation in the plaint of a criminal offence having been committed by the defendant with regard to the property in dispute. **O** HIRA LAL *v.* MANGAL DEI **511**

Public Gambling Act (III of 1867), ss. 3, 4—*Extension of Act to certain area—Persons found gambling beyond that area, whether guilty.*

Where the Public Gambling Act has been extended by Government Notification to a certain area, one of the boundaries of which is the bank of a certain river, persons found gambling in a boat away from the bank which has been described as the boundary of the area notified cannot be held to have been guilty of any offence under the Act. **A** KASHI NATH *v.* EMPEROR, 23 A. L. J. 457; (1925) A. I. R. (A.) 518; L. R. 6 A. 144 Cr; 26 Cr. L. J. 1061 **5**

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Art. 1—*Suit to challenge alienation—Limitation, commencement of—Mutation effected not in name of vendee but in name of pre-emptor, effect of.*

The limitation for a suit which falls within the purview of Art. 1 of the Punjab Limitation (Ancestral Land Alienation) Act of 1900 begins to run from the date of the attestation of mutation, and it is immaterial that mutation was not effected in the name of the original vendees but was effected

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in the names of persons who had obtained a decree for pre-emption in respect of the sale and who had been substituted as vendees in the place of the original vendees. **L** KISHAN SINGH *v.* SUNDER, (1925) A. I. R. (L.) 309 **80**

Redemption of Mortgages (Punjab) Act (II of 1913), s. 12—Limitation Act (IX of 1908), Sch. I, Art. 14—Application to redeem mortgage—Collector, order of, whether conclusive—Suit to redeem mortgage brought more than one year after Collector's order, whether maintainable. *See* LIMITATION ACT, 1908, SCH I, ART. 14 **945**

Railway Company—*Carriage of goods—Risk Note Form "B"—Goods sent in waggon sealed with paper, string and wax—Loss of goods—Wilful neglect.*

Where a Railway Company is aware that over a certain section of their line it is a common incident for seals of waggons to be broken and goods to be stolen therefrom, it is guilty of wilful neglect in sending a waggon over a long section of the line, where the train would have to travel at night and stop at all sorts of sidings sealed only with paper, string and wax. Where in such a case the seals are broken and the goods are lost, the loss must be ascribed to the wilful neglect of the Company. **A** BALRAM DASS FAKIR CHAND *v.* G. I. P. RY., Co. L. R. 6 A. 340 Civ.; 23 A. L. J. 645; (1925) A. I. R. (A.) 562; 47 A. 724 **559**

——— *Carriage of goods—Risk Note, Form H—"Loss of complete package," meaning of—Bags delivered empty—Liability of Railway Company—Unreasonable delay in delivering consignment—Damages, whether can be claimed.*

The expression "loss of a complete package" in Risk Note, Form H, means the loss of both covering and contents and there can be no loss of a complete package if the Company delivers the bags in which the goods were packed even though they are empty.

Loss caused to a consignor owing to unreasonable delay on the part of the Railway Company in delivering the goods consigned to it for carriage and not by reason of any loss, destruction, or deterioration of the goods themselves, is not covered by the terms of Risk Note, Form H and the Company is not protected by the terms of the Risk Note from liability for such loss. **N** BENGAL NAGPUR RAILWAY *v.* DILLU, 21 N. L. R. 78; (1925) A. I. R. (N.) 350 **291**

Railways Act (IX of 1890), ss. 68, 112 (a). *See* PENAL CODE, 1860, s. 420 **524**

——— **s. 72**—*Rules framed under Act, r. 34-A—Goods consigned for carriage—Non-compliance with r. 34-A—Loss of goods—Negligence—Liability of Railway Company.*

Plaintiff consigned certain goods for carriage to the defendant Railway Company and instead of the goods consigned the defendant Company offered some other goods to the plaintiff of which the plaintiff declined to take delivery. The plaintiff thereupon sued the defendant Company for the value of the goods lost and it was found that the loss of goods was due to the negligence of the servants of the Railway Company. It was also found that r. 34-A of the rules framed under the Railways Act had not been complied with by the plaintiff:

Held, that the failure of the plaintiff to comply with r. 34-A did not absolve the defendant Company from liability in respect of the value of the goods which had

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been lost owing to the negligence of the Company. B HARI RAMACHANDRA NAVARE v. G. I. P. R. Co., (1925) A. I. R. (B.) 196 68

——— **s. 122**—*"Unlawful entry," what is—Intending passenger entering platform without ticket—Offence—Interpretation of Statutes—Penal provision in special Statute.*

Unless a person has made an "unlawful" entry upon Railway premises he cannot be brought within the provision of s. 122 (2) of the Railways Act.

The word "unlawful" in s. 122 of the Railways Act means contrary to the law laid down in the Act.

An intending passenger who enters upon a Railway platform in anticipation of purchasing a ticket, enters lawfully upon the platform. If the Railway staff, however, orders him to leave the platform, his refusal to do so would possibly make him a trespasser, and he could be expelled by force, but he cannot be held to have committed an offence under s. 122 of the Railways Act.

A penal provision in a Statute which is of a special nature and not a penal Statute in itself, should be interpreted with great caution. Pat MEWA LAL JHA v. EMPEROR, 6 P. L. T. 437; (1925) A. I. R. (Pat.) 535; 26 Cr. L. J. 1162 522

Rangoon Rent Act (II of 1920), s. 10—*Ejectment of tenant—Partnership business—Partner's separate business—Personal use.*

Where the premises in an ejectment suit under the Rangoon Rent Act, 1920, are required more for the landlord's partnership business and the separate business of the managing partner and his family, than for the personal use of the landlord or any member of his family, the premises cannot be regarded as being reasonably and *bona fide* required for the occupation of the landlord within the meaning and intention of s. 10 of the Act. R LIM CHWE HTAW v. LU TYAW TAT, 3 Bur. L. J. 67; (1924) A. I. R. (R.) 277 216

Registration Act (XVI of 1908) s. 2 (6), (9)—*Contract for sale of fruit crop not in existence, whether requires registration—Memorandum of notes of agreement, whether registrable.*

A contract for the sale of mango and other fruit crop not in existence at the time of the contract is a contract with regard to moveable property only and as such does not require registration.

A document containing a memorandum of notes of an agreement of sale of future crops does not require registration. A RAJA DEVI v. MUHAMMAD YACUB, 23 A. L. J. 430; L. R. 6 A. 382 Civ.; (1925) A. I. R. (A.) 411; 47 A. 738 109

——— **s. 17**—*Equitable mortgage—Record of transaction—Registration, whether necessary.*

A certain sum of money was advanced by a bank to a debtor for the purchase of certain property on the understanding that when the property was purchased it would be utilized as additional security for the bank's advances. In pursuance of this arrangement the title-deed of the property after it was purchased was handed over to the manager of the bank and the debtor also gave a letter to the manager containing a record of the agreement which had been made between the parties:

Held, that the letter did not constitute the bargain between the parties being merely the record of a transaction which had already been completed and that consequently, it did not require registration and

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was admissible in evidence to prove the transaction. C BHUBAN MOHAN GHOSE v. CO-OPERATIVE HINDUSTAN BANK, 29 C. W. N. 784; (1925) A. I. R. (C.) 973 866

——— **s. 17 (1) (b)**—*Custom—Right of reversioner to succeed after death of widow, nature of—Document relinquishing such right, whether requires registration.*

Such right is only a *spes successionis*; hence such a document is not compulsorily registrable. L GURBHAJ v. LACHHMAN, 1 L. C. 492; (1925) A. I. R. (L.) 341; 6. L. 87 550

——— **ss. 17 (1) (d), 49**—*Evidence Act (I of 1872), s. 116—Lease fixing yearly rent, whether requires registration—Possession, nature of, determination of—Lease, unregistered, whether may be referred to—Landlord and tenant—Estoppel.*

A lease which fixes a yearly rent payable every six months, requires registration under s. 17 (1) (*d*) of the Registration Act.

An unregistered lease which requires registration, although inadmissible in evidence under s. 49 of the Registration Act, may be referred to in order to determine the nature of the defendant's possession, and where the lease shows that the possession is that of a tenant under the plaintiff, neither the defendant nor persons claiming through him can be permitted to deny the title of the plaintiff under s. 116 of the Evidence Act. L ATA MUHAMMAD v. SHANKAR DAS, 6 L. 319; (1925) A. I. R. (L.) 491 872

——— **ss. 34, 35**—*Evidence Act (I of 1872), s. 90—Sale-deed executed by vendor through attorney—Admission of execution through another attorney—Registration, validity of—"Executant", meaning of—Document 30 years old—Presumption as to execution and attestation and authority of attorney.*

In order to provide for the costs of an administration suit the Court made an order in the suit for the sale of such portion of the properties comprised in the estate as might be necessary for the purpose of paying the costs payable under the decree and directed that the property should be conveyed to the purchaser by *U* and *B*, the trustees under the Will of the deceased. The sale-deed was executed by *U* personally and by *B* by his constituted attorney *J*, but the power-of-attorney authorizing *J* to execute the sale-deed on behalf of *B* was not produced. When the deed was presented for registration execution was admitted on behalf of *B* by another attorney of his who had been authorized to admit execution by a duly executed power-of-attorney which was produced. During the pendency of the administration suit one of the beneficiaries under the Will had executed a mortgage of his right, title and interest in the estate. More than 30 years after the execution of the sale-deed the plaintiffs, who were the sons of the vendee under the sale-deed, proposed to sell the property to the defendant. On a dispute arising as to the title of the plaintiffs to the property which their father had purchased from *U* and *B*:

Held, (1) that the Court was entitled to presume under s. 90 of the Evidence Act that every signature and every other particular of the sale-deed which purported to be in the handwriting of any particular person was in that person's handwriting and that the sale-deed was duly executed and attested by the persons by whom it purported to have been executed and attested;

(2) that under the circumstances of this particular case it was only reasonable to presume that *B* obeyed

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the orders of the Court and carried them out by authorizing his attorney *J* to execute the sale-deed on his behalf and that it should be presumed not only that the deed was executed by *B*'s attorney by whom it purported to have been executed but also that *J* was the duly authorized agent of *B* to execute the deed on his behalf;

(3) that if *B* had appeared personally before the Registrar when the document was presented for registration and had admitted the execution of the deed by his duly constituted attorney *J*, that would have been a sufficient compliance with the provisions of s. 35 of the Registration Act;

(4) that it was, therefore, competent to *B* to authorize some person to appear on his behalf before the Registrar and to admit the execution of the sale-deed, which having been done by a duly constituted attorney, the registration of the sale-deed was perfectly valid and conveyed a valid title to the purchaser;

(5) that the mortgage executed by one of the beneficiaries under the Will of the deceased having been executed during the pendency of the administration suit, the mortgagee took the mortgage subject to any disposition which might be made in due course of the administration proceedings and that consequently the sale in favour of the plaintiffs' father was free from the mortgage and was not affected by it.

Per *Rankin, J.*—The Registration Act deals with parties and executants of documents on an ordinary common sense footing without contemplating or making particular provisions for the case of a man whose name by his authority is written by some one else.

The ordinary meaning of executing a document is signing a document as a consenting party thereto.

In the case of a *bakalam* signature a person whose name is put with his authority in evidence of his assent to a document is the "executant" of the document within the meaning of s. 35 of the Registration Act.

In India the legal estate follows the beneficial interest and it is not necessary that an authority to sign should be in writing. **C** MONMOTHO NATH MUKERJI *v.* PURAN CHAND NAHATTA, 29 C. W. N. 539; (1925) A. I. R. (C.) 703 **33**

——— **ss. 34, 72, 73, 77**—*Registration, refusal of—Appeal, whether lies—Suit to compel registration—Failure to apply for extension of time for appearance of executant, effect of—Plea that document is not binding on executant, whether can be entertained.*

Where a refusal to register a document is based on any ground except denial of execution, s. 72 of the Registration Act applies and the remedy of the aggrieved party is by appeal to the Registrar. If the appeal also fails a suit may be instituted under s. 77 of the Registration Act.

Section 34 of the Registration Act does not make it compulsory on a party to apply for extension of time where the executant fails to appear. It would be useless to ask for extension where the executant is purposely keeping out of the way, because by the very terms of the section extension can only be given where the absence of the executant is due to urgent necessity or unavoidable accident.

The failure to make a useless application for extension of time under s. 34 of the Registration Act does not affect the plaintiff's right to a decree in a suit brought under s. 77 of the Act.

In such a suit the plea of the defendant that the

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document is not binding on him cannot be gone into. **O** JWALA SAHOY *v.* BALABHADDAR SINGH, 2 O. W. N. 348; (1925) A. I. R. (O.) 445; 12 O. L. J. 506 **494**

——— **ss. 72, 73, 74, 77**—*Suit to compel registration, maintainability of—Procedure—Appeal under s. 72, whether can be treated as application under s. 73.*

A document which purports to be an appeal under s. 72 of the Registration Act and is not verified as required by sub-s. (2) of s. 73 of the Act cannot be treated as an application under s. 73 of the Act.

An enquiry by the Registrar under s. 74 of the Registration Act is a necessary preliminary to a suit under s. 77 of the Act. A suit under the latter section is not maintainable in the absence of such an enquiry having been made and in the absence of an application under s. 73 of the Act. **N** IBRAHIM *v.* SUGRABHAI, (1925) A. I. R. (N.) 235 **149**

Religious Endowments Act (XX of 1863), s. 14—*Civil Procedure Code (Act V of 1908), ss. 9, 92—Specific Relief Act (I of 1877), s. 42—Religious endowment—Suit for declaration that* mutwalli *is liable to dismissal and has been dismissed for neglect of duty, nature of—Procedure.*

Section 14 of the Religious Endowments Act applies to endowments created both before and after the Act came into force.

Reliefs which can be claimed under s. 14 of the Religious Endowments Act are slightly different from those which can be claimed under s. 92 of the C. P. C. The power of appointing a new trustee and of framing a scheme for the administration of the trust property is restricted to s. 92 only.

Section 92 of the C. P. C., is mandatory and the reliefs specified in the section can only be enforced by resort to the procedure laid down in the section. Neither the founder of a trust nor his heirs are entitled to sue for the removal of a trustee and the appointment of a new trustee, if a breach of trust is alleged or directions are required for the administration of the trust, unless the procedure specified in the section is followed.

Plaintiff brought a suit for a declaration that he being the heir of the founder of a trust was entitled to dismiss the defendant from the post of the *mutwalli* on the ground of misappropriation, slackness and negligence under the terms of the deed of endowment, that the defendant had committed acts of misappropriation, etc., and was liable to be dismissed from the post of *mutwalli* under the terms of the said deed and that he had been so dismissed by the plaintiff.

Held, (1) that the suit as it stood was not one which fell within the purview of s. 9 of the C. P. C., or of s. 42 of the Specific Relief Act;

(2) that in essence the suit was for the removal of the trustee and for the administration of the trust and to protect the endowment against misfeasance, breach of trust or neglect of duty by the trustee and that consequently the suit fell within the purview of s. 14 of the Religious Endowments Act or of s. 92 of the C. P. C., and that the procedure laid down in those sections must be followed. **Pat** DILJAN ALI *v.* AKHTARI BEGUM, (1925) Pat. 194; (1925) A. I. R. (Pat.) 544; 4 Pat. 741 **1035**

Res judicata. *See* C. P. C., 1908, s. 11 **985**

Revenue papers, Definition of shares of members of a joint Hindu family in, effect of. *See* HINDU LAW—JOINT FAMILY **385**

Revision—*Bengal Municipal Act (III of 1884), s. 202*—Order under section, whether can be based on report of Subordinate officer—Opportunity to parties of being heard, absence of—Order, legality of—Revision, whether lies. *See* BENGAL MUNICIPAL ACT, 1884, s. 202 **862**

See ALSO (*i*) C. P. C., 1908, s. 115.
(*ii*) CR. P. C., 1898, ss. 435 TO 439.

Sale of Goods—*Construction of document—Contract specifying place of delivery—Goods destroyed after shipment but before delivery—Property, whether passes to buyer—Liability of buyer for price of goods—Shipment of portion of goods contracted to be sold, whether performance of contract.*

Plaintiff contracted to sell one thousand bales of jute to the defendant, shipment to take place during certain months. The goods were to be delivered at "Buyer's Mill-ghat or Press-house by Rail or Steamer and/or Flat." The plaintiff shipped five hundred bales of jute on board a certain Flat and the Bill of Lading was made out in the name of the defendant as consignee. The Bill of Lading was presented to the defendant in accordance with the terms of the contract but payment was delayed by the defendant and in the meantime the Flat on which the goods had been shipped caught fire before arrival at the plaintiff's Mill-ghat or Press-house and the goods were destroyed. In a suit by the plaintiff to recover the price of the goods:

Held, (1) that under the contract the property in the goods was not to pass to the defendant until the goods were delivered at the defendant's Mill-ghat or Press-house and that consequently the defendant was not liable for the price of the goods inasmuch as the goods had been destroyed before delivery and property in the goods had not passed to the defendant;

(2) that the contract for the delivery of one thousand bales of jute was one indivisible contract and was not performed by shipment of five hundred bales and that for this reason also the plaintiff was not entitled to recover. C SADASOOK KOTHARI *v.* CHAITRAM RAMBILASH, 29 C. W. N. 808 **910**

——— Contract Act (IX of 1872), s. 107—Appropriation not communicated to buyer before repudiation—Re-sale—Liability of buyer. *See* CONTRACT ACT, 1872, s. 107 **230**

Sea Customs Act (VIII of 1878), s. 20. *See* PRINCIPAL AND AGENT **107**

Shebait, position of. *See* HINDU LAW—CHARITABLE ENDOWMENT **616**

South Kanara—Kumki *land*—Warg *land*—*Lease by* wargdor—Darkhast—*Grant by Government of* kumki *land to* wargdor—*Subsequent possession of lessee—Prescription—Landlord and tenant—Improvements—Making land fit for cultivation—Appeal, second—Finding of fact—Misconstruction of document.*

Where *kumki* land attached to *warg* land in South Kanara is granted on *darkhast* by the Government, any right previously created by the *wargdor* in favour of a tenant or a mortgagee as regards the *kumki* land comes to an end.

Where a lessee of such *kumki* land who is let into possession for a limited term continues in possession of the land for the statutory period after the date of his lease and subsequent to the grant of the land on *darkhast* to the *wargdor* himself, he acquires a title as lessee by prescription and is entitled to continue in possession as lessee under the terms of his lease,

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Where a tenant wastes money by doing useless things on the land, the landlord would not be bound to pay the amount spent on such fruitless labour; but where the tenant removes stones or levels the ground so as to make it ready for cultivation, it cannot be said that all his labour is wasted and the land is not improved. M RAMA RAO *v.* APPU **924**

Specific performance—*Damages for breach of contract—Readiness to perform contract—Repudiation of contract, effect of—Discretion of Court.*

In order to claim specific performance of a contract or damages for its breach, the plaintiff must prove his readiness and willingness to perform his own part of the contract.

Readiness and willingness to perform a contract imply not only the disposition but the capacity to perform the contract.

When the defendant has repudiated the contract before the filing of the suit, the plaintiff is absolved from proving his readiness and willingness to perform the contract.

The claim for a decree for specific performance of a contract is not a matter of right. The Court has to consider the whole of the surrounding circumstances and the position of the parties, and then to consider whether it should grant specific performance or give damages in lieu thereof. C SREE LAL CHAMARIA *v.* HARIRAM GOENA **737**

Specific Relief Act (I of 1877), s. 13, ill. (a). *See* C. P. C., 1908, O. XXI, R. 89 **693**

——— **s. 15**—*Contract for sale of immoveable property—Vendor only owner of part of property—Specific performance, suit for—Procedure—Damages, purchaser, right of, to recover.*

Defendant agreed to sell to the plaintiff an undivided plot of land owned by himself and a stranger who subsequently declined to join in the sale. Plaintiff brought a suit for specific performance of the contract and in the alternative for damages:

Held, (1) that the case was governed by the provisions of s. 15 of the Specific Relief Act and that plaintiff could be granted a decree for the specific performance of that part of the contract which related to the share of the property owned by the defendant, provided the plaintiff was willing to pay the entire purchase-money and to relinquish all claim to further performance and all right to compensation for the deficiency;

(2) that if the plaintiff was not willing to accept specific performance on these terms, he was entitled to recover damages from the defendant for breach of the contract. L SITA RAM *v.* BALKISHEN, 2 L. C. 9; 6 L. 221; (1925) A. I. R. (L.) 465 **472**

——— **s. 41**—Alienation of minor's property by unauthorised person—Suit by minor to recover property—Refund, whether can be directed—Discretion of Court. *See* MINOR **643**

——— **s. 42.** *See* C. P. C., 1908, s. 92 **1035**

——— **s. 55**—*Co-sharers—Possession of one co-sharer—Injunction to restrain co-sharers from interference, duration of.*

Where the exclusive user of a plot of land by a co-sharer is interfered with by other co-sharers, a perpetual injunction should not be granted against the latter and the duration of injunction should be limited to the period during which the land remains in the lawful possession of the plaintiff. L GAJJA SINGH *v.* NATHA SINGH, (1925) A. I. R. (L.) 333; 1 L. C. 550 **538**

Stamp Act (II of 1899), s. 12—*Stamp on pro-note, cancellation of—Cross-mark, whether operates as effectual cancellation.*

Under s. 12 of the Stamp Act it is not essential that in order to cancel a stamp a person must go the length of either writing his name or his initials thereon. So long as he makes it obviously apparent on the face of the stamp that it has once been used, it appears he has done all that could reasonably be expected of him and all that is in fact required by the section.

Defendant who was illiterate and used a cross-mark as the ordinary method of his acknowledgment executed a pro-note and made a cross-mark on the stamp affixed to the pro-note:

Held, that the cross-mark effectually cancelled the stamp within the meaning of s. 12 of the Stamp Act. R KOLAI SAI *v.* BALAI HAJAM, (1925) A. I. R. (R.) 209; 3 R. 39 **933**

Succession Act (X of 1865), s. 190—Karen *Christians—Applicability of Succession Act.*

Karen Christians being Christians of Asiatic descent. are native Christians, and, therefore, s. 190 of the Succession Act is inapplicable to them. R MA NAN THU *v.* MA SHWE MI, 4 Bur. L. J. 76; (1925) A. I. R. (R.) 233 **609**

Succession Certificate Act (VII of 1889), s. 25 *—Probate and Administration Act (V of 1881), s. 64 —Finding in proceeding to obtain succession certificate, whether conclusive in proceeding to obtain Letters of Administration.*

A finding as to relationship arrived at in proceedings under the Succession Certificate Act does not bar the trial of the same question between the parties in a proceeding for the grant of Letters of Administration under s. 64 of the Probate and Administration Act. O MISRI LAL *v.* ASHARFI BIBI, (1925) A. I. R. (O.) 670 **612**

Suits Valuation Act (VII of 1887), s. 11, *scope of —Objection to valuation, when can be taken—Jurisdiction.*

The general rule relating to jurisdiction is that neither consent nor waiver by a party to a suit can confer jurisdiction upon a Court which has no inherent jurisdiction; jurisdiction over the subject-matter of a suit can be given only by law. Section 11 of the Suits Valuation Act, however, provides an exception to the general rule and lays down that a party who has not taken objection as to the pecuniary jurisdiction of the Court at the time specified in cl. (*a*) of the section cannot be allowed to dispute that jurisdiction afterwards. The object of the Legislature in enacting this provision was to insure that the time and labour spent by a Court in deciding a case should not be wasted if the party concerned has joined issue and gone to trial upon the merits without raising objection to the pecuniary jurisdiction of the Court at the earliest opportunity.

Section 11 of the Suits Valuation Act governs all cases of erroneous valuation irrespective of the question as to whether the value of the suit is determined by rules having the force of law or any other manner. L SARDAR KHAN *v.* AISHA BIBI, (1925) A. I. R. (L.) 290; 6 L. 105 **72**

Surety—Whether a surety can be relieved under the Usurious Loans Act (IX of 1919). *See* USURIOUS LOANS ACT, 1919, s. 2 (3) (*b*) **78**

Tariff Act (VIII of 1894), s. 10—*Tariff (Amendment) Act (IV of 1916), s. 3 (2)—"Duty" and "Tariff value," distinction between—Change in tariff value, whether entitles buyer to claim deduction.*

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Tariff value and its taxation is totally different from duties and their levying. The former is a matter of intelligent anticipation based upon such knowledge of price variations as is available. When the tariff value has been anticipated contracts are made; and when the duty is not changed these contracts take stock of the position with complete accuracy and there is no occasion in reason for any subsequent re-adjustment as between buyer and seller. But duties are in a different position. Their rate remains the subject of Government and administrative action. The parties who make forward contracts are not apprised of such changes, but have to wait for budget announcements. It is in this latter case that s. 10 of the Tariff Act comes in to declare that a change in the duty by decrease, the duty having been imposed between the making of the contract and the delivery of the goods, may be the ground of a claim by the buyer.

A change of duty amounts to a change in the rate of duty and not a change in the total amount of the duty brought about by a change in tariff values. Where there is no change in the rate of duty, the contention that a change in tariff values is constructively a change in the duty is without justification, and does not entitle a buyer to claim a deduction under s. 10 of the Tariff Act. P C PROBHUDAS *v.* GANIDADA, 27 Bom. L. R. 855; (1925) A. I. R. (P. C.) 157; 49 M. L. J. 43; (1925) M. W. N. 477; 41 C. L. J. 618; 52 C. 644; 22 L. W. 250 (P. C.); 30 C. W. N. 73 **337**

Tariff (Amendment Act) (IV of 1916), s. 3 (2). *See* TARIFF ACT, 1894, s. 10 **337**

Transfer of Property Act (IV of 1882), s. 6—*Hindu Law—Reversioner—Relinquishment of reversionary right*—Bona fide *settlement of dispute—Test.*

A reversioner in expectancy can neither validly transfer nor agree to transfer possession of a *spes successionis.*

In considering the question whether a transaction between a reversioner and a widow was really a relinquishment of a *spes successionis* or a *bona fide* compromise of disputed rights, the substance of the transaction ought to be looked at apart altogether from any form which might have been given to it. If in substance the transaction is found to be only a dealing with the *spes successionis*, then it cannot be recognised and cannot form the basis of any binding obligation. But if the substance of the transaction is a *bona fide* settlement between the parties, then, in spite of the fact that the same transaction might be represented in one of its aspects as a dealing with a *spes successionis*, it is nonetheless a real compromise of disputed rights.

Where the effect of a compromise between a Hindu widow and a reversioner suing for declaration of his right and invalidity of alienations by her, is to recognise the right set up on behalf of the widow to part of the property on the ground that it is her absolute property, and hence no part of the property inherited by her from her husband at all, the transaction is not a mere relinquishment by a reversioner of a mere expectancy and must be regarded as a *bona fide* compromise of doubtful disputes and is valid and binding.

The relinquishment of a reversionary right cannot be the consideration for a compromise. But, while a man cannot relinquish his reversionary right in given properties, he can relinquish his right to say that the properties in dispute form part of the estate to which

he is the reversioner; he may for good consideration admit that the properties never formed part of the estate of the person from whom he claims and, therefore, he is not relinquishing his reversionary right to that estate but is merely admitting that the properties with which the dispute is concerned were not properties which formed part of the estate to which he was a reversioner. M VADDADI KARAMASU v. KOCHERLAKOTA VENKATALAKSHMIPATHI, 21 L. W. 711; 49 M. L. J. 296; (1925) A. I. R. (M.) 1043 **982**

——— s. 6—*Madras Hereditary Village Offices Act (III of 1895), s. 5—Contract Act (IX of 1872), ss. 23, 65—Limitation Act (IX of 1908), Sch. I, Art. 62*—Karnam *service* inam—*Agreement to sell, validity of—Contract, whether enforceable—Refund of consideration money—Limitation, commencement of.*

Defendant who was in possession of certain *karnam* service *inams* agreed to sell the *inam* lands to the plaintiffs after they had been enfrenchised. Plaintiffs sued to enforce the contract for sale and in the alternative prayed for a return of the purchase-money paid by them to the defendant:

Held, (1) that at the time when the contract was entered into the defendant had merely an expectation that the lands would be enfranchised in his favour and that the contract, therefore, being one to transfer an expectation offended against the provisions of s. 6 of the Transfer of Property Act and was not enforceable;

(2) that so far as it could be regarded as a contract to transfer *inam* lands it offended against the provisions of s. 5 of the Madras Hereditary Village Offices Act III of 1895 and was, therefore, void under s. 23 of the Contract Act;

(3) that under s. 65 of the Contract Act the plaintiff was entitled to the refund of the money advanced by him and that the limitation for the recovery of the money was three years under Art. 62 of Sch. I to the Limitation Act and began to run from the date of the agreement. M AUMANCHI AURYAPRABHAKARA RAU v. GUMMUDU SANYASI, 48 M. L. J. 598; (1925) M. W. N. 400; (1925) A. I. R. (M.) 885 **557**

——— ss. 8, 59, 70—*"Things attached to the earth", what are—Machinery placed in building, whether attached to building—Equitable mortgage of house, whether includes machinery.*

"Things attached to the earth" within the meaning of s. 8 of the Transfer of Property Act, include not only walls and building imbedded in the earth but also things attached to whatever is imbedded for the permanent beneficial enjoyment of that to which they are attached. Machinery brought into a building for the purpose of carrying on a business therein cannot be said to be attached to the building for the permanent beneficial enjoyment of the building. The important test in such a case is the intention with which an article is placed in the building.

Where an equitable mortgagee of a house claims machinery installed in the house as part of his mortgage security by operation of law by virtue of the provisions of s. 8 of the Transfer of Property Act, the burden is on him to prove all the ingredients necessary to establish his case, for instance, that the machinery is attached to the building and that it is so attached for the permanent beneficial enjoyment of the building.

In the case of an equitable mortgage by deposit of title-deeds the scope of the security is the scope of the title. R A. S. A. VEERAPPA CHETTY v. MA TIN, 4 Bur. L. J. 52; (1925) A. I. R. (R.) 250 **1011**

——— s. 51 **569**

——— s. 52—*Pre-emption suit—Property re-conveyed to vendor*—Lis pendens, *doctrine of, applicability of.*

It is intolerable that a vendee, after a suit for pre-emption has been filed, should be allowed to re-convey the property purchased by him to the vendor and thus to defeat the suit which has been brought by the pre-emptor. In a case of this kind parties who enter into such a transaction are not entitled to the protection of the Court while the plaintiff, on the other hand, ought to have the full benefit of the doctrine of *lis pendens*, as laid down in s. 52 of the Transfer of Property Act. A KEHAR SINGH v. JAHANGIR SINGH, 23 A. L. J. 336; L. R. 6 A. 416 Civ.; (1925) A. I. R. (A.) 487; 47 A. 625 **761**

——— s. 52—*Pre-emption suit—Property re-transferred to vendor during pendency of suit—Pre-emptor, right of, whether affected*—Lis pendens, *doctrine of, applicability of.*

Where during the pendency of a pre-emption suit, the vendee re-transfers the property to the vendor, the transaction cannot affect the result of the suit inasmuch as the doctrine of *lis pendens* applies to such a case. A DURGA PRASAD v. GANGADIN, L. R. 6 A. 320 Civ.; (1925) A. I. R. (A.) 502 **202**

——— s. 55. *See* CONTRACT ACT, 1872, s. 51 **569**

——— s. 55 (2)—*Sale of immoveable property—Title, covenant for presumption—Burden of proof—Time, whether of essence of contract.*

A covenant for title is implied in a sale of immoveable property, and the onus lies on the vendor to prove a contract displacing that presumption. In a contract for the sale of immoveable property, time is not of the essence of the contract. L SRI RAM v. KIDARI PARSHAD-CHEDDI LAL, 6 L. 308; (1925) A. I. R. (L.) 481 **743**

——— s. 59—*Equitable mortgage, creation of—Intention of parties*—Patta *relating to land in* muffassil, *whether document of title.*

What is requisite for the creation of an equitable mortgage is, first, an intention to create a security and, secondly, such intention evidenced by a document which can be described as a document of title.

A *patta* in respect of land situated in the *muffassil* is a document by deposit of which in the City of Madras an equitable mortgage over the property to which the *patta* relates can be validly created. M OFFICIAL ASSIGNEE, MADRAS v. BASUDEVADOSS BADARINARAYANA DOSS, 48 M. L. J. 423; 21 L. W. 538; (1925) M. W. N. 467; (1925) A. I. R. (M.) 723; 48 M. 451 **401**

——— s. 63—*Mortgage—Grove planted by mortgagee, whether accession—Consent of mortgagor, absence of—Redemption—Mortgagor, whether entitled to grove—Compensation, whether payable.*

A grove planted by a mortgagee in possession of the mortgaged land forms an accession to the mortgaged property within the meaning of s. 63 of the Transfer of Property Act. The accession is the grove as it stands and not merely the timber of the trees constituting the grove. The grove as it stands cannot be enjoyed separately from the land, or at least it cannot be so enjoyed without detriment to the land itself. Therefore, unless the grove has been planted with the consent of the mortgagor or was planted for the preservation of the land from destruction, forfeiture or sale, the mortgagor is entitled to the grove on

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redemption of the land without payment of compensation to the mortgagee. **A** NAGESHWAR RAI *v.* NAND LAL, L. R. 6 A. 535 Civ.; 23 A. L. J. 915 **908**

——— **s. 66**—*Mortgage, simple—Lease by mortgagor, whether binding on mortgagee—Possession taken by mortgagee under covenant contained in mortgage—Lessee, whether entitled to compensation from mortgagor.*

Where a simple mortgage contains a term that the mortgagee would be entitled to take possession of the mortgaged property on default in the payment of interest, a lease granted by the mortgagor before any default takes place is binding on the mortgagee who subsequently takes possession of the property under the terms of the mortgage on default of payment of interest. If, however, the lessee voluntarily gives up possession of the mortgaged property to the mortgagee, he is not entitled to claim compensation from the mortgagor on the ground of failure of consideration. **O** CHHOTEY SINGH *v.* BALDEO BUX SINGH, 2 O. W. N. 457; 12 O. L. J. 526; (1925) A. I. R. (O.) 542 **947**

——— **s. 95**—*Mortgage—Lease in favour of mortgagor—Sale of portion of equity of redemption by co-mortgagor—Redemption by purchaser—Suit to eject lessee mortgagor, maintainability of.*

Certain property was mortgaged by two mortgagors and on the same day a lease of the property was granted to one of them. The lease was to run for the same term of years which was fixed in the mortgage-deed for redemption. One of the conditions of the lease was that it would stand cancelled even before the expiry of the period fixed, if the mortgaged property was redeemed during that period. The other mortgagor sold his share in the equity of redemption to the plaintiff who redeemed the entire property and obtained mutation of names in the revenue papers. He then brought a suit to recover possession from the lessee mortgagor:

Held, (1) that the plaintiff having redeemed the entire property and obtained constructive possession of it within the meaning of s. 95 of the Transfer of Property Act had a legal title to remain in possession until he was redeemed by the defendant and that the defendant's action in resisting him from the enjoyment of the full benefit of that right was unlawful;

(2) that the redemption of the property had put an end to the lease and that the defendant had no right to stay any longer on the mortgaged property and that the plaintiff's suit must, therefore, succeed. **O** HAMID ALI BEG *v.* DULAREY LAL, (1925) A. I. R. (O.) 629 **544**

——— **s. 95**—*Mortgage—Redemption by co-mortgagor—Charge on shares of other mortgagors—Interest, whether can be claimed—Notice.*

Under s. 95 of the Transfer of Property Act a redeeming co-mortgagor is only given a charge for his portion of the expenses properly incurred in so redeeming and obtaining possession of the mortgaged property. He is not ordinarily entitled to interest in respect of the amount for which he has a charge on the property unless he gives notice to his co-mortgagors that he would claim interest against them in respect of their share of the mortgage-money paid by him if they wished to redeem their shares. **B** GAFUR IMAM *v.* AMIR ISAB SAUDAGAR, 27 Bom. L. R. 629; 49 B. 591; (1925) A. I. R. (B.) 484 **658**

——— **s. 105.** *See* BOMBAY RENT (WAR RESTRICTIONS) ACT, 1918, s. 2 (1) (b) **316**

Transfer of Property Act—concld.

——— **s. 107**—*Lease—Rent-note, execution of, by tenant—Possession not delivered—Suit to recover possession, whether maintainable.*

The execution of a rent-note by a person in favour of the owner of the land does not constitute a transfer of any interest in the land to the former so as to entitle him to sue for possession of the land. Even if the rent-note is registered and is accepted by the owner of the land, it remains only a contract between the parties which can be enforced by a suit for specific performance. Where, however, possession is delivered under such a rent-note, the tenant would in equity be entitled to retain possession against the owner seeking to eject him. **B** RAMSINGH HARISINGH *v.* BAI DHANBA, 27 Bom. L. R. 626; (1925) A. I. (B.) 512 **648**

——— **ss. 108, 109**—*Lease—Assignment of lease—Privity of estate between lessor and assignee—Assignee, liability of, to pay rents and taxes.*

A lessee does not by assignment of his interest in the lease escape personal liability on the covenants contained in the lease.

An absolute assignment by a lessee of his interest in the lease creates a privity of estate between the lessor and the assignee of the lessee and the assignee is liable to the lessor on all covenants that run with the land including the covenant to pay rents and taxes.

A mortgage by a lessee of his interest in the lease by way of absolute assignment creates a privity of estate between the lessor and the assignee. **B** ARDESHIR COWASJI PATEL *v.* K. D. AND BROS., 27 Bom. L. R. 553; (1925) A. I. R. (B.) 330 **79**

——— **s. 111 (d)**—*Landlord and tenant—Lease—Purchase of tenant's interest by co-sharer landlord, effect of—Merger, when takes place.*

Section 111 (*d*) of the Transfer of Property Act only applies to a case where the interests of the lessee and of the lessor in the whole of the property become vested at the same time in one person in the same right. Where a co-sharer landlord purchases the interest of a tenant then unless the purchase is made on behalf of all the co-sharers the interests of the lessor and the lessee do not become merged in the purchaser. **Pat.** PARMESHWARSINGH *v.* SUREBA KUER, (1925) Pat. 185; (1925) A. I. R. (Pat.) 530; 6 P. L. T. 805 **495**

——— **s. 123**—*Buddhist Law, Burmese—Partition—Property transferred to children of first marriage on second marriage—Transfer, nature of—Registered deed, whether necessary.*

A transfer by a Burmese Buddhist father of a portion of his property, at once to his children by the first wife to satisfy their claims, is not in the nature of a gift but is by way of partition and no registered deed is necessary to carry the transfer into effect.

Equity will not allow the provisions of the Transfer of Property Act to be invoked to enable fraud to be committed. **R** MA HTAY *v.* U THA HLINE, (1925) A. I. R. (R.) 184; 2 R. 649 **66**

Trust—*Charitable endowment—Income, surplus of—Cy-pres, doctrine of, applicability of—High Court, power of, to apply surplus to other purposes.*

Where the income of a charitable trust fund becomes greater than is necessary for the purposes originally named, the High Court has power to apply the surplus to such other purposes as it may deem proper upon the *cy pres* principle. **C** ADVOCATE-GENERAL OF BENGAL *v.* WEBB-JOHNSON, 29 C. W. N. 793; 52 C. 508; (1925) A. I. R. (C.) 797 **890**

Trust—concld.

——— Partition—Property set aside for feeding the poor—Trust, whether created. *See* C. P. C., 1908, s. 92 **375**

U. P. Court of Wards Act (IV of 1912), ss. 9, 17, 20—*Estate taken under superintendence of Court of Wards—Failure to notify claim—"Good and sufficient cause", what amounts to—Attendance under s. 9, whether sufficient.*

The object of the enquiry under s. 9 of the U. P. Court of Wards Act is absolutely different from that of an enquiry under s. 17 of the Act. Under the former section the enquiry is held with a view to determine as to whether the Local Government should or should not place a particular estate under the superintendence of the Court of Wards. On the other hand, an enquiry under s. 17 is intended to invite applications of all persons having claims against the ward or his property in order to settle those. A person who has attended an enquiry under s. 9 of the U. P. Court of Wards Act is not absolved from the further obligation of notifying his claim within six months of the publication of the notice under s. 17 of the Act. His attendance and setting up of a claim under s. 9 does not constitute "good and sufficient cause" within the meaning of the proviso to s. 20 of the Act. O SHEO DAYAL *v.* DEPUTY COMMISSIONER, KHERI, 2 O. W. N. 322; (1925) A. I. R. (O.) 326; 12 O. L. J. 446; 28 O. C. 127 **488**

——— **ss. 9, 17, 20**—*Proof of debt in proceedings under s. 9—Estate taken over by Court of Wards—Failure to notify claim—Sufficient cause.*

Proof of a debt in proceedings under s. 9 of the Court of Wards Act is not a sufficient ground for failure to notify the claim under s. 17 of the Act after the estate has been taken over by the Court of Wards. O BHAGWAN DIN *v.* DEPUTY COMMISSIONER, KHERI, 2 O. W. N. 320; (1925) A. I. R. (O.) 349; 12 O. L. J. 449 **760**

U. P. District Boards Act (X of 1922), ss. 31, 89. *See* CR. P. C., 1898, s. 197 **517**

U. P. Excise Act (IV of 1910), s. 53. *See* PENAL CODE, 1860, s. 448 **725**

——— **ss. 60, 71**—*Possession of implements for manufacture of liquor—Proof, necessary—Possession of liquor—Liquor found in locked room—Key in possession of accused—Burden of proof.*

In order to support a charge under s. 60 (*f*) of the U. P. Excise Act relating to possession of implements for the manufacture of an excisable article, it must be explained to the Court what the implement is and for what purpose, it is supposed, it is in the possession of the accused. The officers of the Excise Department are experts in these matters and Magistrates and other Tribunals are not supposed to be familiar with implements of distillation and require to be instructed in matters which are unconnected with their own work.

Where liquor is discovered from a locked room the key of which was in the possession of the accused, it must be presumed that the accused knew what was inside the room, and the onus is on him of accounting satisfactorily for such possession. A MAHADEO *v.* EMPEROR, 23 A. L. J. 417; (1925) A. I. R. (A.) 388; 47 A. 611; 26 Cr. L. J. 1107 **275**

U. P. Land Revenue Act (III of 1901), s. 233 (k)—*Partition—Khewat recording separate khatas with definite shares and also shamlat khata, construction of—Presumption—Suit to disturb partition, maintainability of.*

Where a partition *khewat* records two separate *khatas* with definite shares and a third *khata* which is described as *shamlat* of the two former the *khewat* will always be construed as meaning, unless the contrary is stated, that the shares of the parties in the *shamlat khata* are in the same proportion as the shares which they hold in severalty. If evidence is admissible at all to rebut this construction very strong evidence would be necessary.

When, however, the partition has once been finally completed and confirmed, such evidence is not admissible and a suit the object of which is to disturb the allotment of the land in the final partition is not maintainable as being obnoxious to the provisions of s. 233 (*k*) of the U. P. Land Revenue Act. O DAN BAHADUR SINGH *v.* SAHEB DAYAL **382**

——— **s. 233 (k)**—*Partition—Title—Compromise regarding allotment of plots—Compromise not given effect to in final allotment—Confirmation of partition—Title based on compromise, whether can be recognised.*

During the course of certain partition proceedings a compromise was arrived at between the parties according to which the plot in dispute was to go to the defendant in place of two other plots which were to go to the plaintiff. At the final allotment of the land in the partition which was subsequently confirmed the plot in dispute was allotted to the plaintiff. Plaintiff sued for possession of the plot allotted to him and defendant resisted the suit on the ground that under the compromise he was entitled to retain possession of the plot:

Held, that the defendant's claim was barred by the provisions of s. 233 (*k*) of the U. P. Land Revenue Act. O FATEH BAHADUR SINGH *v.* SHEO DARSHAN SINGH, (1925) A. I. R. (O.) 664; 2 O. W. N. 400; L. R. 6 A. (O). 83; 12 O. L. J. 494 **567**

U. P. Local Rates Act (I of 1914), s. 14—*Suit for declaration that levy of cess is illegal—Jurisdiction of Civil Courts—Test.*

By virtue of the provision contained in s. 14 of the U. P. Local Rates Act, a Civil Court is debarred from taking cognizance of a suit for a declaration that the levy of a particular cess under the provisions of the N.-W. P. Local Rates Act, on certain property was illegal and invalid

No Civil Court has jurisdiction to grant a declaration that a certain person is entitled to hold certain property for all time as a revenue free and untaxable domain in perpetual succession. A UDAIRAJ SINGH *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, 22 A. L. J. 446; 46 A. 553; (1924) A. I. R. (A.) 652; L. R. 5 A. 361 Rev. **212**

U. P. Municipalities Act (II of 1916), ss. 178, 180, 318, 321—*Notice of intention to erect building—Refusal of sanction—Remedy—Appeal to District Magistrate—Injunction restraining Municipality from interference, suit for, maintainability of.*

A refusal by a Municipality to sanction the erection of a building under s. 180 of the U. P. Municipalities Act cannot be held to be *ultra vires*. The only remedy of a person who feels aggrieved by such refusal is to appeal to the District Magistrate under s. 318 of the Act. If the order of the Municipality is illegal the District Magistrate can be asked to refer the point to the High Court. Where, however,

the District Magistrate confirms the order of the Municipality the order becomes final and cannot be questioned in any other manner or by any other authority by virtue of the provisions contained in s. 321 of the Act.

A suit, therefore, by a person who has been refused permission by a Municipality to erect a building for an injunction restraining the Municipality from interfering with the plaintiff's construction of the building is not maintainable by virtue of the provisions of s. 321 of the U. P. Municipalities Act. A DHUNDE CHAUDHRI v. MUNICIPAL BOARD, L. R. 6 A. 422 Civ. (1925) A. I. R. (A.) 699 **899**

——— **ss. 178, 180, 318, 319, 321**—*Sanction to erect building, refusal to grant—Sanction granted subject to conditions—Order, legality of, whether can be questioned—Appeal—Procedure—Jurisdiction of Civil Courts.*

The scheme of the U. P. Municipalities Act is that even if an order refusing sanction to build or imposing conditions subject to which sanction is granted, passed by a Municipal Board under s. 180 (1) of the Act, is illegal the only remedy of the person aggrieved is to move the District Magistrate under s. 318 of the Act. If the District Magistrate refers the matter to the High Court under s. 319 of the Act, he would abide by its decision. But if no such reference is made and an order is made by the District Magistrate confirming the order of the Municipal Board that order is final and cannot be questioned in any other manner or by any other authority by virtue of the provisions contained in s. 321 of the Act. A Civil Court has, therefore, no jurisdiction to question the legality of an order passed by a Municipal Board under s. 180 (1) of the U. P. Municipalities Act which has been confirmed by the District Magistrate under s. 318 of the Act. A JORHAWAN v. MUNICIPAL BOARD, GORAKHPUR, L. R. 6 A. 460 Civ. **814**

——— **ss. 178, 185, 307**—*Application for sanction to erect building—Building commenced before grant of sanction—Notice to demolish, failure to comply with—Offence—Sanction subsequently granted, effect of.*

Where a person who has made an application under s. 178 of the U. P. Municipalities Act for sanction to erect a building, commences the construction of a building in anticipation of sanction he is guilty of an offence under s. 185 of the Act and it is immaterial that the sanction is subsequently granted by the Municipality.

Similarly, where such a person is required by notice to pull down the construction erected by him without the sanction of the Municipality, and fails to comply with the requirements of the notice he is guilty of an offence under s. 307 of the U. P. Municipalities Act, and the mere fact that the sanction was subsequently granted does not absolve him from liability. A MUNNO DEVI v. MUNICIPAL BOARD, AGRA, 23 A. L. J. 361; L. R. 6 A. 107 Cr.; (1925) A. I. R. (A.) 415; 26 Cr. L. J. 1103 **191**

——— **ss. 185, 307**—*Building erected without sanction—Notice to demolish, failure to comply with—Offence—Notice, proof of—Continuing fine, legality of.*

In a prosecution in respect of an offence under s. 307 of the U. P. Municipalities Act, where the charge against the accused is that he has failed to comply with a notice by the Municipality to demolish a building erected by him without obtaining permission from the Municipality, the mere verbal assertion of the servants of the Municipality that the notice was issued, without producing the notice cannot be regarded as sufficient proof that the notice was so issued.

A sentence imposing a continuing fine in respect of an offence under s. 307 read with s. 185 of the U. P. Municipalities Act is illegal. A RAMZAN v. MUNICIPAL BOARD, BENARES, L. R. 6 A. 112 Cr.; 26 Cr. L. J. 1135 **367**

Usurious Loans Act (X of 1919), s. 2 (3) (b)—*Claim against surety—Interest, whether can be reduced—Interest at 75 per cent. per annum, whether excessive.*

Where a creditor wishes to bind a debtor and recovers from him a sum of money said to be due on a transaction entered into between the parties, the Usurious Loans Act would be applicable irrespective of the fact whether the debtor is liable as a principal debtor or as a surety. Section 2 (3) (*b*) of the Act is wide enough to cover the case of a surety also, and the Act makes no distinction whatsoever between a principal debtor and a surety.

Interest at the rate of 75 per cent. per annum is not only excessive but is extortionately high and it is grossly unjust to allow a claim for such a high rate of interest to succeed in a Court of Law. A BAIJNATH PANDAN v. DISTRICT JUDGE, JHANSI, 23 A. L. J. 438; L. R. 6 A. 391 Civ.; (1925) A. I. R. (A.) 400; 47 A. 645 **78**

Valuation of suit—*Duty of Counsel—Principle, underlying.*

It is the substance of the relief sought, and not the mere form in which the case is preferred in the plaint, that must be looked to in order to determine the proper *forum* for the trial of the action.

It is necessary in the interests of the litigant public that a fair valuation should be put upon every suit. In the High Court fees on the higher scale are usually given and in the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff. If a plaintiff is permitted to place any fanciful figure as the value of the suit, he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his Counsel and also subjects him to a continuing possible liability to pay the plaintiff an amount by way of costs far in excess of the real value of the case. The plaintiff may also embarras himself.

It is as much the duty of a Counsel to protect his client from the liability to pay excessive fees as to protect him from an adverse decree. A UDARAJ SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 22 A. L. J. 446; 46 A. 553; (1924) A. I. R. (A.) 652; L. R. 5 A. 361 Rev. **212**

Vendor and purchaser—*Sale of immoveable property—Conclusion of negotiations—Five days' notice to complete contract, whether unreasonable—Contract Act (IX of 1872), s. 55.*

A contract for the sale of immoveable property contained a clause making the settlement and the payment of the price subject to the condition that time was of the essence of the contract. The investigation into title, however, took nearly six months and at the end of that period when the purchaser had been satisfied as to the vendor's title and a draft conveyance had been prepared and approved by the vendor and had been sent to the agents for the pur-

Vendor and purchaser—concld.

chaser, the vendor gave notice to the purchaser to complete the sale without delay. To this the purchaser replied that he was ready to complete the sale and had the purchase-money lying idle with him. Thereupon the vendor wrote to the purchaser again giving him five days' notice within which to have the sale-deed engrossed and to pay the purchase-money:

Held, (1) that the purchaser having replied to the first letter of the vendor to the effect that the purchase-money was ready, was estopped from contending that five days' notice was too short a period for him to provide the purchase-money;

(2) that in any case having regard to the circumstances of the case the notice given by the vendor to the purchaser was not unreasonable and that the purchaser was bound to complete the sale within the period of the notice. **P C** MOTILAL ITCHPALAL GANDHI, *v.* HAJI MOOSA HAJI MUHAMMAD, (1925) M. W. N. 314; 48 M. L. J. 484; 41 C. L. J. 334; (1925) A. I. R. (P. C.) 124; 3 Pat. L. R. 152; L. R. 6 A. (P. C.) 106; 27 Bom. L. R. 814 (P. C.) **440**

Will, *construction of—Legatees, several—Estate, insufficient—Abatement, proportionate.*

The intention of a testator to give priority to a particular legatee cannot be gathered from a mere use of the words that a particular legacy is to be given immediately or that a particular legacy is to be given first and another legacy in the second place, and after the payment of these legacies, a third legacy is to be given. *Prima facie* all bequests stand on an equal footing and it lies upon those who assert the contrary to prove it. It is not sufficient that the words in the Will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing. In considering whether such was the intention of the testator, words which are merely interlocutory should not by themselves be held to direct any order of payment.

A testator gave a legacy to a particular legatee and then "subject to the aforesaid" directed the payment of other legacies to certain near relatives. His estate turned out to be insufficient to pay all the legacies directed to be given by the Will:

Held, that the words "subject to the aforesaid" did not indicate the intention of the testator that the legacy in favour of the first legatee should be paid first and that, therefore, all the legacies directed to be given by the Will must abate proportionately. **B** JOHN ROBERT BALL *v.* CHARLES WILLIAM BALL, 27 Bom. L. R 561; (1925) A. I. R. (B.) 337 **86**

Words and Phrases:—

Marfatdari receipt. *See* LIMITATION ACT, 1908, SCH. I, ART. 139 **483**

Pagudi. *See* MADRAS ESTATES LAND ACT, 1908, s. 3 (11) **380**

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